

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. ADJ1177048 (SFO 0487779)**

5 **WANDA OGILVIE,**

6 *Applicant,*

7 **vs.**

8 **CITY AND COUNTY OF SAN FRANCISCO,**
9 **Permissibly Self-Insured,**

10 *Defendant(s).*

**OPINION AND
DECISION
AFTER RECONSIDERATION
(EN BANC)**

11 In this en banc decision,¹ we clarify the holdings reached in our en banc decision of
12 February 3, 2009.

13 In our February 3, 2009 decision, we held that: (1) the diminished future earning capacity
14 (DFEC) portion of the current Schedule for Rating Permanent Disabilities (Schedule or 2005
15 Schedule)² is rebuttable; (2) the DFEC portion of the 2005 Schedule ordinarily is *not* rebutted by
16 establishing the percentage to which an injured employee's future earning capacity has been
17 diminished; (3) the DFEC portion of the 2005 Schedule is *not* rebutted by taking two-thirds of the
18 injured employee's estimated diminished future earnings, and then comparing the resulting sum to
19 the permanent disability money chart to approximate a corresponding permanent disability rating;
20 and (4) the DFEC portion of the 2005 Schedule may be rebutted in a manner consistent with Labor
21 Code section 4660 – including section 4660(b)(2) and the RAND data to which section 4660(b)(2)

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23 ¹ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers'
24 compensation judges. (Lab. Code, § 115; Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp.*
25 *Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5] (*Garcia*); *Gee v.*
26 *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).

27 ² The complete Schedule may be found at <http://www.dir.ca.gov/dwc/PDR.pdf>.

1 refers.³ Further, the DFEC rebuttal approach that is consonant with section 4660 and the RAND
2 data to which it refers consists, in essence, of: (1) obtaining two sets of wage data (one for the
3 injured employee and one for similarly situated employees), generally through the Employment
4 Development Department (EDD); (2) doing some simple mathematical calculations with that wage
5 data to determine the injured employee’s individualized proportional earnings loss; (3) dividing
6 the employee’s whole person impairment by the proportional earnings loss to obtain a ratio; and
7 (4) seeing if the ratio falls within certain ranges of ratios in Table A of the 2005 Schedule. If it
8 does, the determination of the employee’s DFEC adjustment factor is simple and relates back to
9 the Schedule. If it does not, then a non-complex formula is used to perform a few additional
10 calculations to determine an individualized DFEC adjustment factor.

11 In this decision, we hold: (1) the language of section 4660(c), which provides that “the
12 schedule ... shall be prima facie evidence of the percentage of permanent disability to be attributed
13 to each injury covered by the schedule,” unambiguously means that a permanent disability rating
14 established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent
15 disability rating rests with the party disputing that rating; and (3) one method of rebutting a
16 scheduled permanent disability rating is to successfully challenge one of the component elements
17 of that rating, such as the injured employee’s DFEC adjustment factor, which may be
18 accomplished by establishing that an individualized adjustment factor most accurately reflects the
19 injured employee’s DFEC. However, any individualized DFEC adjustment factor must be
20 consistent with section 4660(b)(2), the RAND data to which section 4660(b)(2) refers, and the
21 numeric formula adopted by the Administrative Director (AD) in the 2005 Schedule. Any
22 evidence presented to support a proposed individualized DFEC adjustment factor must constitute
23 substantial evidence upon which the Workers’ Compensation Appeals Board (WCAB) may rely.
24 Moreover, even if this rebuttal evidence is legally substantial, the WCAB as the trier-of-fact may
25 still determine that the evidence does not overcome the DFEC adjustment factor component of the
26 scheduled permanent disability rating. Otherwise, we affirm our prior decision.

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³ Unless otherwise noted, all further statutory references are to the Labor Code.

1 **I. BACKGROUND**

2 The factual and procedural history through February 3, 2009 is set forth in our en banc
3 opinion of that date, which we incorporate by reference.

4 On February 19, 2009, applicant filed a petition seeking reconsideration of our February 3,
5 2009 decision. In that petition, applicant contended in substance: (1) our suggestion that the
6 parties ordinarily should “establish the employee’s actual earnings in the three years following his
7 or her injury” is inconsistent with section 4660 and violates the mandate of Article XIV, section 4,
8 of the California Constitution that administration of the workers’ compensation system “shall
9 accomplish substantial justice in all cases expeditiously”; (2) it is improper to compare an injured
10 employee’s individualized rating to proportional earnings loss ratio to the aggregate average rating
11 to proportional earnings loss ratios in Table A of the 2005 Schedule, because the former ratio uses
12 the standard whole person impairment rating assigned by the AMA Guides⁴ while the latter ratios
13 use the standard rating under the 1988 Schedule, which is fundamentally different; (3) it is
14 improper to use the numerical formula adopted by the 2005 Schedule⁵ because that formula is not
15 based on empirical data, as required by section 4660(b)(2), and it has no purpose other than to
16 justify the arbitrary range of 1.1 to 1.4 for the DFEC adjustment factors contained in the Schedule;
17 (4) under section 4660(c), it is the permanent disability rating that is rebuttable, not an individual
18 element of the rating formula, and here applicant’s vocational expert was not challenging the
19 DFEC element of the rating formula, but instead was rebutting the scheduled rating by showing
20 that it was not rationally related to applicant’s true disability and her empirically established
21 diminished future earning capacity; (5) before section 4660 was amended by Senate Bill 899 (SB
22 899),⁶ case law made it clear that an injured employee’s percentage of permanent disability was
23 the same as the percentage of the open labor market from which he or she was precluded;

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25 ⁴ 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).

26 ⁵ That is, $[(1.81/a) \times .1] + 1$, where “a” is the standard permanent disability rating divided by the proportional
27 earnings loss ratio. (See 2005 Schedule, at p. 1-6.)

⁶ Stats. 2004, ch. 34, § 32.

1 therefore, after SB 899, an injured employee's percentage of permanent disability is the same as
2 his or her percentage of diminished future earning capacity; (6) the Schedule is not the exclusive
3 method of calculating permanent disability; therefore, a scheduled permanent disability rating may
4 be rebutted by vocational expert evidence regarding the injured employee's percentage of
5 diminished future earning capacity, which should be deemed to equate to his or her overall
6 percentage of permanent disability; (7) the purpose of the Schedule is to convert the non-empirical
7 AMA Guides whole person impairment (WPI) rating *into* an empirically-based measure of
8 diminished future earning capacity, and not to adjust WPI *for* diminished future earning capacity;
9 (8) the purpose of the Schedule's DFEC adjustment factors is to assure that injured employees
10 with the same diminished future earning capacity will receive the same permanent disability rating
11 regardless of the part of body injured; however, the DFEC rebuttal method adopted by the Appeals
12 Board erroneously results in ratings that vary widely for workers with the same diminished future
13 earning capacity; (9) the language of the Schedule confirms that permanent disability is measured
14 by an injured employee's percentage of diminished future earning capacity; (10) the Appeals
15 Board improperly concluded that an injured employee's percentage of diminished future earning
16 capacity is not tantamount to the employee's percentage of permanent disability; (11) the
17 permanent disability rating calculated by applicant's vocational expert is a more accurate measure
18 of applicant's true disability and, therefore, it rebuts the permanent disability rating assigned by
19 the Schedule; and (12) although the Appeals Board can disallow any DFEC rebuttal evidence that
20 does not comply with the requirements of section 4660, including the specific language of section
21 4660(b)(2), the Appeals Board cannot require that only a single rebuttal methodology – its own –
22 be used, because such a mandate is illegal under *Rea v. Workers' Comp. Appeals Bd. (Milbauer)*
23 (2005) 127 Cal.App.4th 625 [70 Cal.Comp.Cases 312] (*Milbauer*).

24 On March 2, 2009, defendant, the City and County of San Francisco, also filed a petition
25 seeking reconsideration of our February 3, 2009 en banc decision. In that petition, defendant
26 contended in substance: (1) the DFEC component of the 2005 Schedule is defined by statute and
27 that definition cannot be altered by judicial intervention; (2) the Appeals Board usurped the AD's

1 regulatory authority over the 2005 Schedule; (3) the allowance of individualized rebuttal of the
2 Schedule’s DFEC adjustment factors conflicts with the requirement of section 4660(d) that “the
3 schedule *shall* promote consistency, uniformity and objectivity”; (4) the allowance of
4 individualized rebuttal of the Schedule’s DFEC adjustment factors conflicts with the intention of
5 section 49 of SB 899 to reduce workers’ compensation costs; and (4) the cases upon which the
6 Appeals Board relies do not support the holding that permanent disability ratings under the new
7 Schedule are rebuttable.

8 On April 6, 2009, we granted reconsideration.⁷ Concurrently, we invited any interested
9 person or entity to file and serve an amicus curiae brief by May 1. We also gave each party until
10 May 21 to file a single consolidated brief in reply to the amicus briefs.

11 Pursuant to our invitation, we received a number of amicus curiae briefs.⁸ Each party also
12 filed replies to the amicus briefs.⁹

13 **II. DISCUSSION**

14 In part, defendant’s petition for reconsideration challenges *whether* a scheduled permanent
15 disability rating or the DFEC component of it may be rebutted. Therefore, we will address its
16 petition first. Then we will turn to applicant’s contentions, and to some extent contentions by
17 defendant and some amicus curiae, regarding *how* a scheduled permanent disability rating or its
18 DFEC component may be rebutted.

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

20 Beginning when the first mandatory Workers’ Compensation Act was enacted in 1917,

21 ⁷ We concluded that our February 3, 2009 opinion was a “final” order because the question of whether a
22 scheduled permanent disability rating may be rebutted by successfully challenging the DFEC adjustment factor
23 component of that rating is a “threshold” issue that is “fundamental,” “critical,” and “basic” to the issue of permanent
24 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).)

25 ⁸ We have received and considered amicus curiae briefs from: the California Applicants’ Attorneys
26 Association; the California Workers’ Compensation Institute; the International Association of Rehabilitation
Professionals; Morrow & Morrow; the National Federation of Independent Business, Small Business Legal Center;
Steve Poizner, Insurance Commissioner of the State of California; Safeway, Inc.; and The Travelers Companies, Inc.

27 ⁹ Given our disposition, we deny the requests of defendant and various amicus that we stay our February 3,
2009 opinion.

1 through the Act’s first codification in 1937, and on into 2004, section 4660(a) and its predecessors
2 provided: “In determining the percentages of permanent disability, account shall be taken of the
3 nature of the physical injury or disfigurement, the occupation of the injured employee, and his age
4 at the time of such injury, consideration being given to the diminished ability of such injured
5 employee to compete in an open labor market.”¹⁰ From 1937, when section 4660 first mandated
6 the adoption of a permanent disability Schedule, and until 2004, section 4660 set forth no guiding
7 principles regarding the formulation of the Schedule beyond the language of section 4660(a);
8 however, section 4660 consistently provided that “the schedule ... shall be prima facie evidence of
9 the percentage of permanent disability to be attributed to each injury covered by the schedule.”

10 In 2004, SB 899 substantially amended section 4660. These changes included:
11 (1) amending section 4660(a) to read, “In determining the percentages of permanent disability,
12 account shall be taken of the nature of the physical injury or disfigurement, the occupation of the
13 injured employee, and his or her age at the time of the injury, consideration being given to an
14 employee’s diminished future earning capacity” (i.e., the amendment replaced the phrase
15 “consideration being given to the diminished ability of such injured employee to compete in an
16 open labor market,” which had been present since the Workers’ Compensation Act of 1917)¹¹;
17 (2) adding new section 4660(b)(2) to provide, “For purposes of this section, an employee’s
18 diminished future earning capacity shall be a numeric formula based on empirical data and
19 findings that aggregate the average percentage of long-term loss of income resulting from each
20 type of injury for similarly situated employees. The administrative director shall formulate the
21 adjusted rating schedule based on empirical data and findings from the Evaluation of California’s
22 Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND
23 Institute for Civil Justice, and upon data from additional empirical studies.”; and (3) amending

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25 ¹⁰ Stats. 1917, ch. 586, § 9(b)(7), p. 838; Stats. 1919, ch. 471, § 4, p. 915; Stats. 1925, ch. 354, § 1, p. 642;
26 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.

27 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.

1 section 4660(d) to provide, “The schedule shall promote consistency, uniformity, and objectivity.”

2 The amendments to section 4660 also directed that “[o]n or before January 1, 2005, the
3 administrative director shall adopt regulations to implement the changes made to this section by
4 th[is] act” (Lab. Code, § 4660(e).) Accordingly, by regulation, the AD adopted the new
5 Schedule, which became effective on January 1, 2005. (See Cal. Code Regs., tit. 8, § 9805 (AD
6 Rule 9805).)

7 There are four component elements to the new Schedule’s formula for rating an injured
8 employee’s percentage of disability. The first component is the injured employee’s whole person
9 impairment, expressed as a percentage, based on the AMA Guides. (2005 Schedule, at pp. 1-2, 1-3,
10 & 1-4 – 1-5.)¹² The second component involves multiplying this WPI percentage by a factor from
11 1.1 to 1.4 to adjust it for the injured employee’s DFEC. (*Id.*, at pp. 1-2, 1-5 – 1-8, & 2-6 – 2-7.)
12 The third and fourth components further adjust the WPI percentage based, respectively, on the
13 injured employee’s occupation and age at the time of injury, leading to the final percentage
14 permanent disability rating. (*Id.*, at pp. 1-2, 1-8 – 1-9, & 3-1 – 6-5.)

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

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

23 For the reasons that follow, we largely adhere to this prior holding. We modify it only to
24 clarify that it is the permanent disability rating resulting from the application of the Schedule that
25 is rebuttable. Moreover, as discussed later, one way an injured employee or a defendant may rebut

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27 ¹² 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.)

1 a scheduled permanent disability rating is to successfully challenge one or more of the component
2 elements of the rating, such as the DFEC adjustment factor, which may be accomplished by
3 establishing that an alternative adjustment factor most accurately reflects the injured employee's
4 DFEC.

5 The fundamental rule of statutory construction is to effectuate the Legislature's intent.
6 (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289]
7 (*DuBois*); *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56
8 Cal.Comp.Cases 476, 480] (*Nickelsberg*); *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10
9 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657].) The best indicator of legislative intent is the
10 clear, unambiguous, and plain meaning of the statutory language. (*DuBois, supra*, 5 Cal.4th at pp.
11 387-388 [58 Cal.Comp.Cases at p. 289].) When the statutory language is clear and unambiguous,
12 there is no room for interpretation and the WCAB must enforce the statute according to its plain
13 terms. (*DuBois, supra*, 5 Cal.4th at p. 387 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v.*
14 *Workers' Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508].)
15 It is only when statutory language is ambiguous and susceptible of more than one reasonable
16 interpretation that the Appeals Board may look to other maxims of statutory construction, to
17 legislative history, or to other evidence of the Legislature's intent. (*Wells v. One2One Learning*
18 *Foundation* (2006) 39 Cal.4th 1164, 1190; *Benson v. Workers' Comp. Appeals Bd.* (2009) 170
19 Cal.App.4th 1535, 1543 [74 Cal.Comp.Cases 113, 117] (*Benson*).)

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

24 The very nature of "prima facie evidence" is that it is rebuttable: "[P]rima facie evidence is
25 that which suffices for the proof of a particular fact, until contradicted and overcome by other
26 evidence. It may, however, be contradicted, and other evidence is always admissible for that
27 purpose." (*Vaca Valley & Clear Lake Railroad v. Mansfield* (1890) 84 Cal. 560, 566; accord: *In re*

1 *Raymond G.* (1991) 230 Cal.App.3d 964, 972.) This comports with standard legal dictionary
2 definitions of “prima facie evidence.”¹³ It also comports with Evidence Code section 602: “A
3 statute providing that a fact or group of facts is prima facie evidence of another fact establishes a
4 rebuttable presumption.” Therefore, we must apply section 4660(c) according to its plain terms.

5 Moreover, the language of section 4660 that “the schedule ... shall be prima facie evidence
6 of the [injured employee’s] percentage of permanent disability” has long been interpreted to mean
7 that a permanent disability rating based on the Schedule is rebuttable. In some instances, the
8 appellate courts have explicitly pronounced that a scheduled permanent disability rating is
9 rebuttable.¹⁴ In other instances, this conclusion, though not expressly declared, has been an
10 indispensable underpinning of the court’s decision.¹⁵

11 Further, had the Legislature intended that a permanent disability rating established by the
12 Schedule was to be conclusive and un rebuttable, it could have expressly so stated. It did not. To
13 quote our Supreme Court, “As A. P. Herbert so unforgettably quipped: ‘If Parliament does not
14 mean what it says it must say so.’ ” (*Flores v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d

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16 ¹³ See, e.g., Black’s Law Dictionary (6th ed. 1990), at p. 1190, which among other things defines “prima facie
17 evidence” as: (1) “Evidence good and sufficient on its face. Such evidence as ... is sufficient to establish a given fact
18 ... and which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or
19 uncontradicted, is sufficient to sustain a judgment in favor of the issue which supports, but which may be contradicted
20 by other evidence.”; (2) “That quantum of evidence that suffices for proof of a particular fact until the fact is
21 contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the prima facie
22 evidence with all of the other probative evidence presented.”; (3) “An inference or presumption of law, affirmative or
23 negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference.”

24 ¹⁴ See *Glass v. Workers’ Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, 307 [45 Cal.Comp.Cases 441, 449]
25 (*Glass*) (“While the Rating Schedule is prima facie evidence of the proper disability rating, it may be controverted and
26 overcome.”); *Universal Studios, Inc. v. Workers’ Comp. Appeals Bd. (Lewis)* (1979) 99 Cal.App.3d 647, 662-663 [44
27 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.”).

28 ¹⁵ See *Abril v. Workers’ Comp. Appeals Bd.* (1976) 55 Cal.App.3d 480, 486 [40 Cal.Comp.Cases 804, 808]
29 (*Abril*) (a rating must be “rationally related” to the employee’s disability; therefore, although the WCAB properly
30 awarded an employee the scheduled rating for legal blindness of the left eye due to loss of the lens, the employee also
31 should have been rated for work restrictions imposed to avoid the risk of retinal detachment and other eye problems);
32 *Luchini v. Workmen’s Comp. Appeals Bd.* (1970) 7 Cal.App.3d 141, 146 [35 Cal.Comp.Cases 205, 209] (*Luchini*)
33 (WCAB erred in concluding that prophylactic working restrictions are not ratable factors of permanent disability
34 under the Schedule; “the [WCAB] cannot rely on some administrative procedure [(i.e., the Schedule)] to deny to
35 petitioner a disability award commensurate with the disability that he has suffered.”); *Young v. Industrial Acc. Com.*
36 (1940) 38 Cal.App.2d 250, 255 [5 Cal.Comp.Cases 67, 70] (“[i]t is apparent ... from the ... provisions of the Labor
37 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”).

1 171, 177 [39 Cal.Comp.Cases 289, 293].) Certainly, the Legislature knew how to establish a
2 conclusive presumption if that was its intent.¹⁶ Indeed, it has done so many times, including in
3 two instances in SB 899. (See Lab. Code, §§ 4664(b), 5814(c).)¹⁷

4 Our conclusion that the “prima facie evidence” language of section 4660(c) is *not*
5 ambiguous obviates the need to address any of the arguments regarding the construction of
6 ambiguous language.

7 **C. The Provisions of Section 4660(d) and Section 49 of SB 899 Are Not So Clearly**
8 **Repugnant and Utterly Irreconcilable with the “Prima Facie Evidence” Provision of Section**
9 **4660(c) that They Compel the Conclusion that this Provision Was Impliedly Repealed**

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

17 Repeals by implication are not favored. (*Nickelsberg, supra*, 5 Cal.4th at p. 298 [56
18 Cal.Comp.Cases at p. 483]; *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41
19 Cal.Comp.Cases 42, 46].) An implied repeal will be found “only when there is no rational basis
20 for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly
21 repugnant, and so inconsistent that the two cannot have concurrent operation.” (*Schatz v. Allen*
22 *Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573-574 [internal citations and
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24 ¹⁶ Cf. *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1107 (“the Legislature certainly
25 knows how to impose a penalty when it wants to, having established penalties in many Labor Code statutes by using
26 the word ‘penalty.’ ”); *Bryant v. Industrial Acc. Com.* (1951) 37 Cal.2d 215, 223 [16 Cal.Comp.Cases 121, 126] (“If
27 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.”)

¹⁷ See also, e.g., Ins. Code, § 11650; Lab. Code, §§ 3501(a)&(b), 4155, 4662.

1 quotation marks omitted]; see also *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution*
2 *Control Dist.* (1989) 49 Cal.3d 408, 419-420.)

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

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

12 Although section 4660(d) provides that the Schedule “shall promote consistency,
13 uniformity, and objectivity,” this does not necessarily mean that a scheduled permanent disability
14 rating cannot be “prima facie evidence” that may be rebutted. For example, in the context of this
15 case and as we will discuss in greater detail below, these two provisions may be rationally
16 interpreted and harmonized to mean that the scheduled DFEC adjustment factors will be the
17 starting point and, in most cases, will be the ending point of any assessment of the DFEC
18 component of a permanent disability rating. This will “promote” consistency, uniformity, and
19 objectivity in permanent disability ratings. However, consistent with the holding of our February
20 3, 2009 decision, a scheduled DFEC adjustment factor may be challenged in a manner consistent
21 with section 4660, including section 4660(b)(2) and the RAND data to which section 4660(b)(2)
22 refers.

23 **2. The Declared Intention of Section 49 of SB 899, to “Provide Relief to the State from the**
24 **Effects of the Current Workers’ Compensation Crisis,” Does Not Provide Undebatable**
25 **Evidence of a Legislative Intent that the 2005 Schedule and Its Component Elements Cannot**
26 **Be Rebutted**

27 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

1 crisis.” (Stats. 2004, ch. 34, § 49.) As the appellate courts have repeatedly made clear, this
2 statement means that, overall, SB 899 was intended to reduce the costs of the workers’
3 compensation system.¹⁸

4 Nevertheless, while section 49 declared SB 899’s intent to reduce the *overall* costs of
5 workers’ compensation, section 49 does not reflect an intent to reduce the cost of each and every
6 workers’ compensation benefit in each and every possible way. To the contrary, “both workers
7 and employers were to benefit from Senate Bill No. 899 as a whole.” (*Benson, supra*, 170
8 Cal.App.4th at p. 1557 [74 Cal.Comp.Cases at p. 130].) Certainly, some elements of SB 899 were
9 aimed at reducing the cost of permanent disability and the courts have so interpreted these
10 provisions.¹⁹ However, there also was some legislative concern about “diminishing the arguably
11 meager benefits injured workers received in this state.” (*Benson, supra*, 170 Cal.App.4th at p.
12 1557 [74 Cal.Comp.Cases at p. 131] (quoting from Sen. Rules Com., Off. of Sen. Floor Analyses,
13 3d reading analysis of Sen. Bill No. 899 (2003–2004 Reg. Sess.) as amended July 14, 2003, pp. 1–
14 2).) Consistent with this concern, SB 899 *increased* permanent disability benefits for those
15 employees who were the most disabled or who could not return to their work. (Lab. Code, §
16 4658(d)(1) (increasing the number of weeks of benefits for permanently disabled employees with
17 disability from 70% to 99.75%); § 4658(d)(2) (increasing by 15% benefits for permanently
18 disabled employees who were not promptly offered regular, modified or alternative work with the
19 same employer).)

21 ¹⁸ See *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases 565, 578] (SB
22 899 was adopted as “an urgency measure designed to alleviate a perceived crisis in skyrocketing workers’
23 compensation costs”); *Benson, supra*, 170 Cal.App.4th at p. 1555 [74 Cal.Comp.Cases at p. 128] (the legislative
24 history of SB 899 reflects that “the Legislature repeatedly indicated its specific intent to reform apportionment rules to
25 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”).

26 ¹⁹ E.g., *Brodie, supra*, 40 Cal.4th at pp. 1327, 1332 [72 Cal.Comp.Cases at pp. 576, 581] (SB 899’s changes to
27 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”).

1 Therefore, the fact that SB 899 left the “prima facie evidence” provision of section 4660(c)
2 fully intact is not inconsistent with section 49. That is, it appears the Legislature concluded that a
3 system-wide reduction in the total costs of permanent disability benefits could be accomplished by
4 making some changes to section 4660 – as well as making other changes to other statutes affecting
5 permanent disability, such as the apportionment to causation provisions of section 4663 and
6 4664 – without eliminating the right to rebut a scheduled permanent disability rating (or, as
7 discussed below, challenging the DFEC adjustment factor component of a scheduled permanent
8 disability rating) in any particular case.

9 Furthermore, in the context of challenging the DFEC adjustment factor component of a
10 scheduled permanent disability rating (see discussion below), we are not persuaded that the
11 continued existence of the “prima facie evidence” language of section 4660(c), as we have
12 interpreted it, will have any particular effect on the overall costs of permanent disability
13 indemnity. First, nothing in either this opinion or our February 3, 2009 opinion *requires* a party to
14 challenge the DFEC adjustment factor component of a scheduled permanent disability rating or
15 *requires* any WCJ or Appeals Board panel to follow the proposed rebuttal evidence if it is
16 introduced. Second, our interpretation of the “prima facie evidence” language of section 4660(c)
17 allows *either* party to challenge the DFEC adjustment factor component of a scheduled permanent
18 disability rating. Thus, in some cases, an injured employee may succeed in increasing the
19 permanent disability rating, but in other cases a defendant may succeed in decreasing it.

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

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

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

1 Therefore, the “prima facie evidence” provision of section 4660(c) establishes a rebuttable
2 presumption.

3 According to Evidence Code section 601: “Every rebuttable presumption is either (a) a
4 presumption affecting the burden of producing evidence or (b) a presumption affecting the burden
5 of proof.” Per Evidence Code section 603: “A presumption affecting the burden of producing
6 evidence is a presumption established to implement no public policy other than to facilitate the
7 determination of the particular action in which the presumption is applied.” Per Evidence Code
8 section 605: “A presumption affecting the burden of proof is a presumption established to
9 implement some public policy other than to facilitate the determination of the particular action in
10 which the presumption is applied”

11 We conclude that, particularly since section 4660’s amendment by SB 899, the “prima
12 facie evidence” rebuttable presumption established by section 4660(c) is a presumption affecting
13 the burden of proof. By providing that the scheduled permanent disability rating will apply unless
14 contradicted and overcome by other evidence, section 4660(c) helps implement the Legislature’s
15 expressly declared public policy of promoting “consistency, uniformity, and objectivity” in
16 permanent disability ratings (Lab. Code, § 4660(d)). (Cf. *Garcia, supra*, 126 Cal.App.4th at p. 314
17 [70 Cal.Comp.Cases at p. 118] (“ [t]he presumptions of industrial causation found in sections
18 3212 et seq. are rebuttable; and, because they reflect public policy, they are presumptions affecting
19 the burden of proof ” [quoting from *Reeves v. Workers’ Comp. Appeals Bd.* (2000) 80
20 Cal.App.4th 22, 30 [65 Cal.Comp.Cases 359, 365]])²⁰; *Gee v. Workers’ Comp. Appeals Bd.* (2002)
21 96 Cal.App.4th 1418, 1425-1426 [67 Cal.Comp.Cases 236, 240-241] (former section 4062.9,
22 which provided that “the findings of the treating physician are presumed to be correct,” was a
23 presumption affecting the burden of proof “ ‘because it was part of an effort by the Legislature to
24 implement a public policy of reducing medical-legal costs and expediting resolution of medically
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27 ²⁰ 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].)

1 related issues' ")²¹; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Welcher)* (1995) 37
2 Cal.App.4th 675, 682-683 [60 Cal.Comp.Cases 717, 721-722] [section 5402(b), which provides
3 that "[i]f liability is not rejected within 90 days after the date the claim form is filed ..., the injury
4 shall be presumed compensable," is a presumption affecting the burden of proof "because it was
5 created by the Legislature to implement the public policy of expediting workers' compensation
6 claims").)

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

17 **E. One Method of Rebutting a Percentage Permanent Disability Rating Under the 2005**
18 **Schedule Is to Successfully Challenge One of the Component Elements of that Rating, Such**
19 **as the DFEC Adjustment Factor, Which May Be Accomplished by Establishing that an**
20 **Alternative Adjustment Factor Most Accurately Reflects the Injured Employee's DFEC**

21 Section 4660(c) provides that "[the] schedule ... shall be prima facie evidence of the
22 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

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27 ²¹ 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)].

1 Schedule – i.e., the scheduled permanent disability rating – that is rebuttable.²²

2 There are various ways that a permanent disability percentage rating established by the
3 2005 Schedule might be rebutted. This is illustrated by cases under the prior Schedules,²³ when
4 diminished ability to compete in the open labor market was the foundational basis for assessing an
5 injured employee’s permanent disability (see former Lab. Code, § 4660(a)) and when the
6 component elements of the Schedule’s rating formula were the employee’s “disability” as
7 modified by his or her occupation and age at the time of injury. (See 1997 Schedule, at pp. 1-4 &
8 1-6; 1988 Schedule, at p. 1; see *National Kinney v. Workers’ Comp. Appeals Bd. (Casillas)* (1980)
9 113 Cal.App.3d 203, 209 [45 Cal.Comp.Cases 1266, 1270] (*Casillas*).) Under the prior Schedules,
10 the “disability” portion of the rating formula was based either on the employee’s work restrictions
11 or on his or her objective and subjective factors of disability. (See 1997 Schedule, at pp. 1-3 – 1-
12 6.)

13 With the prior Schedules, an injured employee or a defendant could attempt to challenge
14 any one of the individual component elements of the formula in an employee’s particular case.
15 Most commonly, an injured employee or a defendant would attempt to rebut the scheduled rating
16 by successfully challenging the index of “disability” used in the rating formula that, when
17 subsequently adjusted for age and occupation, would result in the scheduled percentage of

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23 ²² See *Lewis, supra*, 99 Cal.App.3d at pp. 657, 662-663 [44 Cal.Comp.Cases at pp. 1138, 1143] (“*The*
24 *percentage of disability* determined by use of the rating schedule is only prima facie evidence of *the percentage of*
25 *permanent disability* to be attributed to each injury. Thus it is not absolute, binding and final. ... It is therefore not to
26 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”).)

27 ²³ 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>.

1 disability. (See, e.g., *Lewis, supra*, 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133];²⁴ *Glass, supra*,
2 105 Cal.App.3d 297 [45 Cal.Comp.Cases 441]²⁵; *Abril, supra*, 55 Cal.App.3d 480 [40
3 Cal.Comp.Cases 804]²⁶; *Luchini, supra*, 7 Cal.App.3d 141 [35 Cal.Comp.Cases 205]²⁷.) Also, a
4 party could rebut the scheduled percentage of disability by successfully challenging the individual
5 component of the rating relating to the injured employee’s occupation at the time of injury. (*Dalen*
6 *v. Workmen’s Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497 [37 Cal.Comp.Cases 393]²⁸; see also
7 *Casillas, supra*, 113 Cal.App.3d 203 [45 Cal.Comp.Cases 1266].)

8 The 2005 Schedule also uses a formula made up of component elements to determine the
9 percentage of permanent disability in any particular case. That is, the percentage rating

10 ²⁴ In *Lewis*, the Court of Appeal held that the WCAB erred in basing the scheduled rating on a semisedentary
11 work restriction, where: the employee had merely sprained her ankle; there were only minimal objective findings; and
12 the AME did not believe the employee’s condition would worsen if she exceeded a semisedentary restriction. The
13 Court stated: “There is no objective evidence ... that Lewis is permanently restricted ... to semisedentary work.
14 [There are no] findings of ... any physical abnormality or any functional disability of Lewis’ left foot. ... [¶] It is no
15 answer to this lack of evidence to say that the rating[] schedule[] ... cannot be questioned. The [cases cited] fully
16 controvert any such ‘hands-off’ attitude toward the schedule or the presumptions used to create the schedule or
17 resulting therefrom. [¶¶] The percentage of disability determined by use of the rating schedule is only prima facie
18 evidence of the percentage of permanent disability to be attributed to each injury. Thus it is not absolute, binding and
19 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.”

20 ²⁵ In *Glass*, the Court of Appeal held that WCAB erred in failing to include a limitation to light work as one of
21 the employee’s factors of disability even though the “Guidelines for Work Capacity” of the Schedule then in effect
22 provided that a limitation to light work applied only to other body parts. The Court said: “The Board may not rely
23 upon alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award which
24 accurately reflects his true disability. ... While the Rating Schedule is prima facie evidence of the proper disability
25 rating, it may be controverted and overcome.”

26 ²⁶ In *Abril*, the Court of Appeal found that the WCAB erred when it awarded the injured employee only the
27 scheduled rating for legal blindness of the left eye due to loss of the lens, without also including work restrictions
28 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 ²⁷ 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 ²⁸ In *Dalen*, the expert opinion of the disability evaluation specialist (rater) was that the injured employee fell
within Occupational Group I, 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.”

1 established by the 2005 Schedule is arrived at by following a formula that takes the injured
2 employee's WPI percentage as determined in accordance with the AMA Guides, multiplies this
3 WPI percentage by a DFEC adjustment factor, and then adjusts the result based on the employee's
4 occupation and age at the time of injury to arrive at the final percentage rating.

5 Therefore, consistent with case law on the prior Schedules, an injured employee or a
6 defendant may rebut the percentage of permanent disability under the 2005 Schedule by
7 successfully challenging any one of the individual component elements of the formula that resulted
8 in the employee's scheduled rating, such as by establishing that an individualized adjustment
9 factor most accurately reflects the injured employee's DFEC. (See *Glass, supra*, 105 Cal.App.3d at
10 p. 307 [45 Cal.Comp.Cases at p. 449] ("The Board may not rely upon alleged limitations in the
11 Rating Schedule to deny the injured worker a permanent disability award which accurately reflects
12 his true disability.").)

13 **F. The Ordinary Progression of a Challenge to the DFEC Adjustment Factor Component of**
14 **a Scheduled Permanent Disability Rating**

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

26 In the ordinary case, a party should be able to anticipate the approximate percentage of
27 permanent disability that would result from utilizing the scheduled DFEC adjustment factor in the

1 Schedule’s rating formula.²⁹ In turn, that party should be able to determine whether it wishes to
2 challenge the scheduled DFEC adjustment factor. If so, the party typically should be able to
3 obtain rebuttal evidence prior to the first MSC involving permanent disability issues. However,
4 although the prudent practitioner should exercise reasonable diligence to obtain rebuttal evidence
5 before the initial MSC relating to permanent disability, there may be instances where post-MSC
6 rebuttal evidence will be allowed.

7 An injured employee’s percentage of permanent disability is a question of fact to be
8 resolved by the WCAB. (Lab. Code, § 5953; *Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d
9 615, 618 [20 I.A.C. 390, 391-392]; *Subsequent Injuries Fund v. Industrial Acc. Com. (Rogers)*
10 (1964) 226 Cal.App.2d 136, 152 [29 Cal.Comp.Cases 59, 69].) Therefore, once all of the evidence
11 relating to permanent disability has been presented, including evidence challenging the injured
12 employee’s DFEC adjustment factor, the WCAB will determine the percentage of permanent
13 disability.

14 Of course, to successfully challenge the DFEC adjustment factor component of a scheduled
15 permanent disability rating, the rebuttal evidence must be legally substantial. (See, generally, Lab.
16 Code, § 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39
17 Cal.Comp.Cases 310, 314] (“any award, order or decision of the board must be supported by
18 substantial evidence”).) Moreover, even if the rebuttal evidence is legally substantial, the WCAB
19 as the trier-of-fact may still determine that the evidence does not “overcome” the DFEC
20 adjustment factor component of the scheduled permanent disability rating. (See *Glass, supra*, 105
21 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449] (“While the Rating Schedule is prima facie
22 evidence of the proper disability rating, it may be controverted and *overcome*.” (emphasis added);
23 see also Black’s Law Dictionary (6th ed. 1990), at p. 1190 (one definition of “prima facie
24 evidence” is “[t]hat quantum of evidence that suffices for proof of a particular fact until the fact is
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26 ²⁹ The scheduled DFEC adjustment factor for any particular body part may be readily obtained from the
27 Schedule. (See Schedule, at p. 1-7 [Tables A and B].) Alternatively, a party may obtain a summary rating,
consultative rating, or informal rating determination from the Disability Evaluation Unit (DEU). (See Cal. Code Regs.,
tit. 8, § 10150 et seq.)

1 contradicted by other evidence; once a trier of fact is faced with conflicting evidence, *it must*
2 *weigh the prima facie evidence with all of the other probative evidence presented.*” (emphasis
3 added.)

4 **G. Any Individualized DFEC Adjustment Factor Must Be Consistent with Section**
5 **4660(b)(1), the RAND Data to which Section 4660(b)(1) Refers, and the Numeric Formula**
6 **Adopted by the Administrative Director in the 2005 Schedule.**

7 Having concluded that a scheduled permanent disability rating may be rebutted by
8 successfully challenging its DFEC adjustment factor component, and having set forth the burden
9 of proof and the ordinary timing of rebuttal evidence, we will now address various issues raised by
10 the parties and amicus curiae regarding the method of rebuttal discussed in our February 3, 2009
11 opinion, i.e., *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 248
12 (Appeals Board en banc) (*Ogilvie I*). We begin by summarizing the relevant elements of that
13 decision.

14 In *Ogilvie I*, we observed that section 4660(b)(2) defined DFEC as “a numeric formula
15 based on empirical data and findings that aggregate the average percentage of long-term loss of
16 income resulting from each type of injury for similarly situated employees.” (*Ogilvie I, supra*, 74
17 Cal.Comp.Cases at pp. 261-262.) We also observed that section 4660(b)(2) stated that “[t]he
18 administrative director shall formulate the adjusted rating schedule based on empirical data and
19 findings from the [2003 RAND Study]³⁰ and upon data from additional empirical studies.” (*Id.*, at
20 p. 262.) Based on this language of section 4660(b)(2), the AD predicated the DFEC adjustment
21 factors of the 2005 Schedule on the empirical data from the 2003 RAND Study and on the 2004
22 RAND Study’s refinement of that empirical data. (*Id.*) Accordingly, we concluded that any valid
23 method of challenging the DFEC component of a scheduled permanent disability rating must be
24 consonant with the language of section 4660(b)(2), the RAND data to which section 4660(b)(2)

25 ³⁰ All references to the “2003 RAND Study” are to Reville, Robert T., et. al., “Evaluation of California’s
26 Permanent Disability Rating Schedule – Interim Report,” RAND Institute for Civil Justice (December 2003). (See
27 http://www.rand.org/pubs/documented_briefings/DB443/DB443.pdf.) All references to the “2004 RAND Study” are
to Seabury, Seth A., et. al., “Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and
Capacity in Compliance with SB 899,” RAND Institute for Civil Justice (December 2004). (See
http://www.rand.org/pubs/working_papers/2004/RAND_WR214.pdf.)

1 refers, and the numeric formula adopted by the AD in the Schedule. (*Ogilvie I, supra*, 74
2 Cal.Comp.Cases at pp. 265-266, 267, 269, 270, 273.)³¹

3 RAND studied 241,685 employees who had sustained industrial injuries over an
4 approximately six-year period. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 262.) RAND obtained
5 permanent disability ratings on these injured employees from the Disability Evaluation Unit
6 (DEU). (*Id.*, at pp. 262-263) RAND also obtained post-injury wage data from EDD both on these
7 injured employees and on control groups of their co-employees who had similar pre-injury
8 earnings. (*Id.*, at p. 263.) RAND concluded that the difference between the post-injury earnings of
9 each injured employee and the post-injury earnings of his or her corresponding control group
10 represented the estimated earnings loss of each injured employee. (*Id.*) RAND then divided each
11 injured employee's estimated earnings loss by the average earnings of that employee's
12 corresponding control group to obtain an estimate of each injured employee's proportional
13 earnings loss. (*Id.*) Next, RAND separated the 241,685 injured employees into 27 groups based on
14 their types of impairments (i.e., injured body parts). (*Id.*) Then RAND took the permanent
15 disability rating for each injured employee within a particular group (e.g., all injured employees
16 having knee impairments) and divided that rating by his or her estimated proportional earnings
17 loss. (*Id.*) RAND aggregated the individual ratings to proportional earnings loss ratios of each
18 injured employee within each impairment group to determine an average permanent disability
19 rating over average proportional earnings loss ratio for that impairment group. (*Id.*) Finally,
20 RAND created a table of average permanent disability rating over average proportional earnings
21 loss ratios for each type of impairment. (*Id.*, at p. 264.)

22 The 2005 Schedule adopted the RAND Studies' average standard ratings to average
23 proportional earnings losses ratios for various impairments. (*Ogilvie I, supra*, 74 Cal.Comp.Cases
24 at p. 264.) The 2005 Schedule then consolidated these average ratings to proportional earnings
25 loss ratios into eight FEC Ranks. (*Id.*) Next, the Schedule established a series of eight DFEC
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27 ³¹ This is one of the main reasons we could not accept the DFEC adjustment factor rebuttal approaches
suggested by the WCJ. (*Id.*, at pp. 258-259, 260.)

1 adjustment factors corresponding to each FEC Rank. (*Id.*) The minimum DFEC adjustment factor
2 is 1.100000 for FEC Rank One and the maximum DFEC adjustment factor is 1.400000 for FEC
3 Rank Eight. (*Id.*) These minimum and maximum DFEC adjustment factors established by the
4 Schedule were calculated by using the numeric formula $([1.81/a] \times .1) + 1$, where “a” corresponds
5 to both the minimum and the maximum average standard ratings to average proportional earnings
6 losses ratios established by RAND. (*Id.*, at pp. 264-265.)

7 Our February 3, 2009 opinion identified a method of challenging the DFEC adjustment
8 factor component of a scheduled permanent disability rating that is consistent with section
9 4660(b)(2), with the RAND data, and with the $([1.81/a] \times .1) + 1$ numerical formula the AD
10 utilized in the Schedule. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at pp. 265-266, 267, 269.)

11 First, the party seeking to rebut the scheduled rating presents evidence on the employee’s
12 actual post-injury earnings using EDD wage data (as did the RAND Studies) or other empirical
13 wage information. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 266.)

14 Second, that party presents evidence of what “similarly situated employees” earned during
15 the same period. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 267.) However, because EDD wage
16 data regarding co-employees is confidential (Unemp. Ins. Code, §§ 1094, 2111) and because there
17 are constitutional limits on when a co-employee may be compelled to disclose his or her wage
18 information to third parties (Cal. Const., art. I, § 1), we concluded that in many cases the earnings
19 of “similarly situated employees” will have to be estimated. (*Id.*, at pp. 267-268.) Normally, this
20 estimated wage information will be obtained from EDD’s Labor Market Information Division
21 website, although it may be obtained from other sources. (*Id.*, at pp. 268-269.)

22 Next, using this data, the injured employee’s estimated earnings loss and proportional
23 earnings loss are calculated. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at pp. 269-270.)

24 Thereafter, the injured employee’s standard WPI rating is divided by his or her estimated
25 proportional earnings loss, to come up with an individualized rating to proportional earnings loss
26 ratio (rating to loss ratio). (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 270.) If the individualized
27 rating to loss ratio falls within the range of ratios of the scheduled FEC Rank for that impairment,

1 then the party challenging the scheduled rating has not shown that an alternative adjustment factor
2 most accurately reflects the injured employee’s DFEC. (*Id.*) If the individualized rating to
3 proportional wage loss ratio falls outside the range of ratios of the scheduled FEC Rank for the
4 injured employee’s particular impairment, but falls within the range of ratios for one of the other
5 seven FEC Ranks, then the challenge has been successful and the scheduled DFEC adjustment
6 factor for that other FEC Rank is used. (*Id.*, at pp. 271-273.) If the individualized rating to
7 proportional wage loss ratio falls outside all of the ranges of ratios for all of the FEC Ranks, then
8 the challenge has been successful and an alternative DFEC adjustment factor is calculated based
9 on the $([1.81/a] \times .1) + 1$ numeric formula of the Schedule, where “a” is the employee’s
10 individualized rating to loss ratio. (*Id.*, at pp. 273-274.)³²

11 Although not expressed, an important principle underlying our February 3, 2009 opinion is
12 that any valid method of challenging the DFEC adjustment factor component of a scheduled
13 permanent disability rating should be consistent with the constitutional mandate that “the
14 administration of [workers’ compensation] legislation shall accomplish substantial justice in all
15 cases expeditiously, inexpensively, and without incumbrance [sic] of any character; all of which
16 matters are expressly declared to be the social public policy of this State, binding upon all
17 departments of the State government.” (Cal. Const., art. XIV, § 4.) This constitutional mandate
18 underlies all of the workers’ compensation provisions of the Labor Code (Lab. Code, § 3201),
19 including section 4660.

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26 ³² As discussed above, however, to successfully challenge the DFEC adjustment factor component of a
27 scheduled permanent disability rating, the rebuttal evidence must be legally substantial. Further, even if the rebuttal
evidence is legally substantial, the WCAB as the trier-of-fact may still determine that the evidence does not
“overcome” the DFEC adjustment factor component of the scheduled permanent disability rating.

1 A central theme of many of the arguments regarding our February 3, 2009 opinion is that
2 the rebuttal method we described is not consistent with the actual language of section 4660(b)(2).³³
3 In essence, these arguments point out that the first sentence of section 4660(b)(2) defines
4 “diminished future earning capacity” as “a numeric formula based on empirical data and findings
5 that aggregate the average percentage of long-term loss of income resulting from each type of
6 injury for similarly situated employees.” They further highlight that the second sentence of section
7 4660(b)(2) indicates that the “empirical data and findings” to which the first sentence refers are
8 those of the 2003 RAND Study “and ... data from additional empirical studies.”³⁴ Based on this
9 statutory language, these arguments suggest among other things that a scheduled DFEC adjustment
10 factor may be challenged only by statistically valid empirical data regarding large numbers of
11 injured employees having different types of injuries that is then used to create new DFEC
12 modifiers based on ratios of ratings over proportional earnings losses for each of the body parts
13 covered by the Schedule, using the RAND methodology endorsed by the Legislature. Some of the
14 arguments further suggest that nothing in the statutory definition of DFEC suggests that it is
15 anything other than a statistical average for each type of injury, i.e., there is nothing
16 claimant-specific in the definition.

17 However, the rebuttal method discussed in our February 3, 2009 opinion is consistent with
18 the language of section 4660(b)(2), the RAND data to which section 4660(b)(2) refers, and the
19 $([1.81/a] \times .1) + 1$ “numeric formula” that the AD adopted in the Schedule. It is also objective,

21 ³³ Defendant also asserts that our February 3, 2009 decision and, presumably, our current decision usurp the
22 Administrative Director’s regulatory authority to create a Schedule. However, the Administrative Director’s authority
23 to create a Schedule does not encompass the authority to determine under section 4660(c) either how a prima facie
24 correct scheduled permanent disability rating may be rebutted or whether such a rating has been rebutted. It is the
WCAB, and not the Administrative Director, 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”).)

25 ³⁴ All references to the “2003 RAND Study” are to Reville, Robert T., et. al., “Evaluation of California’s
26 Permanent Disability Rating Schedule – Interim Report,” RAND Institute for Civil Justice (December 2003). (See
http://www.rand.org/pubs/documented_briefings/DB443/DB443.pdf.) All references to the “2004 RAND Study” are to
27 Seabury, Seth A., et. al., “Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in
Compliance with SB 899,” RAND Institute for Civil Justice (December 2004). (See
http://www.rand.org/pubs/working_papers/2004/RAND_WR214.pdf.)

1 practical, and consistent with our Constitutional mandate to “accomplish substantial justice in all
2 cases expeditiously, inexpensively, and without incumbrance [sic] of any character.” (Cal. Const.,
3 art. XIV, § 4.) That is, the rebuttal method in our February 3, 2009 opinion takes “empirical data”
4 regarding the wages of both the injured employee and “similarly situated employees” to assess the
5 injured employee’s “long-term loss of income.” Moreover, like the RAND Studies, this “empirical
6 data” is generally obtained from EDD and it is used to establish an injured employee’s rating to
7 proportional earnings loss ratio. Further, if an injured employee’s individualized rating to
8 proportional earnings loss ratio falls outside the ranges of ratios for all of the FEC Ranks in the
9 Schedule, then the $([1.81/a] \times .1) + 1$ “numeric formula” of the Schedule is used to determine the
10 injured employee’s individualized DFEC adjustment factor.

11 For the reasons that follow, we rejected any rebuttal method that would require a party to
12 present evidence that aggregates empirical data regarding large numbers of injured employees with
13 multiple types of injuries.

14 As discussed above, the “prima facie evidence” language of section 4660(c)
15 unambiguously establishes that a scheduled permanent disability rating is rebuttable. Further, the
16 case law establishes that one method of rebutting a scheduled rating is to successfully challenge
17 one of its component elements, such as the DFEC adjustment factor. Given that a scheduled
18 permanent disability rating cannot be absolutely conclusive, we were obliged to identify at least
19 one valid method of successfully challenging a DFEC adjustment factor.

20 Yet, to conclude that a scheduled DFEC adjustment factor may be challenged only by
21 statistically valid empirical data regarding large numbers of injured employees with multiple types
22 of injuries that utilizes the RAND methodology, which is then used to create new DFEC
23 adjustment factors for each of the body parts covered by the Schedule, would effectively mean that
24 the resulting permanent disability rating would be conclusive and non-rebuttable, absent a
25 successful challenge to other components of the scheduled rating. This would be inconsistent with
26 the language of section 4660(c) that “the schedule ... shall be *prima facie evidence* of the
27 percentage of permanent disability to be attributed to each injury covered by the schedule.”

1 (Emphasis added.)

2 It would be extraordinarily unlikely, if not virtually impossible, for either party to gather
3 statistically valid empirical data, using the RAND methodology, to create new DFEC adjustment
4 factors and yet do so “expeditiously, inexpensively, and without incumbrance [sic]” as required by
5 Article XIV, section 4, of the California Constitution. This is particularly true in cases where a
6 self-represented injured employee is seeking to challenge the DFEC component of a scheduled
7 permanent disability rating.

8 As discussed in our February 3, 2009 opinion, RAND’s “statistically valid” empirical data
9 was derived from a study of 241,685 injured employees who had sustained industrial injuries over
10 an approximately six-year period. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at pp. 262-263.) In order
11 to perform its study, RAND was given access both to the DEU’s permanent disability ratings on
12 those 241,685 injured employees and to wage data maintained by the EDD on those 241,685
13 injured employees and on many thousands more co-employees at the same workplaces who had
14 similar pre-injury earnings to the injured employees. (*Id.*) RAND used social security numbers to
15 link the injured employees’ DEU ratings with their EDD wage information and to link the injured
16 employees’ EDD wage information with the EDD wage information on their co-workers.³⁵

17 Yet, to gather “statistically valid” empirical data using the RAND methodology, a party
18 seeking to challenge the DFEC adjustment factor component of a scheduled permanent disability
19 rating in a particular case would have to: (1) gather thousands of DEU permanent disability ratings
20 on employees with injuries to particular body parts; (2) correlate those ratings with EDD wage
21 data on those thousands of injured employees; (3) correlate the wage data on those thousands of
22 injured employees with EDD wage data on many more thousands of co-employees in each injured
23 employee’s control group; (4) determine the estimated earnings loss of each of those thousands of
24 injured employees by subtracting that employee’s post-injury earnings from the average
25 post-injury earnings of his or her control group; (5) divide each of those thousands of injured

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27 ³⁵ Reville, Robert T., et. al., “An Evaluation of California’s Permanent Disability Rating
System,” RAND Institute for Civil Justice (2005), at p. 44 (2005 RAND Study). (See
http://www.rand.org/pubs/documented_briefings/DB443/DB443.pdf.)

1 employee's estimated earnings loss by the average earnings of that employee's control group to
2 obtain an estimate of each injured employee's proportional earnings loss; (6) divide each of those
3 thousands of injured employee's ratings by his or her proportional earnings loss to determine a
4 rating to proportional earnings loss ratio for each injured employee; and (7) aggregate the
5 individual ratings to proportional earnings loss ratios of each of those thousands of injured
6 employees within each impairment group to determine an average rating to average proportional
7 earnings loss ratio for that impairment group.

8 No party or amicus explains how this massive task could be achieved. Even if a party
9 obtained thousands of permanent disability ratings on thousands of non-party injured employees
10 through Public Records Act requests to the DEU, that party could not match the DEU ratings to
11 each non-party injured employee's corresponding EDD wage data and could not match each
12 non-party injured employee's EDD wage data to the wage data for non-party co-employees in the
13 corresponding control group. To begin with, the EDD wage data on those thousands of non-party
14 employees is confidential. (Unemp. Ins. Code, §§ 1094, 2111.) Also, even if this particular
15 confidentiality problem did not exist, the only way to reliably correlate various injured employees'
16 EDD wage data with their corresponding DEU ratings would be by matching social security
17 numbers. Yet, various provisions of federal and state law make social security numbers
18 confidential.

19 Therefore, as a practical matter, use of this approach would effectively make the DFEC
20 adjustment factor component of a scheduled permanent disability rating conclusive and
21 non-rebuttable – contrary to the provisions of section 4660(c).

22 Moreover, even if all of these obstacles could be overcome, some person or entity (like
23 RAND) would have to be hired to undertake the seven steps outlined above. Therefore, the entire
24 process, beginning with the data-gathering and continuing through the development of
25 "statistically valid empirical data," would not be expeditious, inexpensive, and without
26 encumbrance as mandated by the California Constitution. (Cal. Const., art. XIV, § 4.)

27 Also, this approach would mean creating an entirely new range of ratings over proportional

1 earnings loss ratios and substituting them for the presumptively correct ratios and corresponding
2 DFEC adjustment factors adopted by the Administrative Director in the 2005 Schedule. This, in
3 essence, would constitute an attempt to entirely invalidate the DFEC portion of the Schedule rather
4 than an attempt to challenge the DFEC adjustment factor component of a scheduled permanent
5 disability rating in an individual case. (See *Boughner v. Comp USA, Inc.* (2008) 73
6 Cal.Comp.Cases 856 (Appeals Board en banc) (*Boughner*);³⁶ *Costa v. Hardy Diagnostic* (2006) 71
7 Cal.Comp.Cases 1797(Appeals Board en banc) (*Costa I.*) Therefore, even if a party hired a
8 statistician or some other qualified expert to re-analyze the existing 2003 and 2004 RAND data
9 (instead of undertaking the extensive data gathering discussed in the paragraphs above), this
10 rebuttal evidence would not be appropriate since it too would be an attempt to entirely invalidate
11 the DFEC portion of the Schedule and not an attempt to successfully challenge the DFEC
12 adjustment factor in a particular case.

13 On the other hand, the method of challenging the DFEC adjustment factor component of a
14 scheduled permanent disability rating set forth in our February 3, 2009 opinion is simple,
15 expeditious, inexpensive, based on reliable data, and applies in the context of rebutting a
16 scheduled permanent disability rating in an individual case, not an attempt to invalidate the entire
17 DFEC portion of the Schedule. At the same time, it is consistent with the language of section
18 4660(b)(2), the RAND methodology to which section 4660(b)(2) refers, and the
19 $([1.81/a] \times .1) + 1$ “numeric formula” that the AD adopted for the Schedule.

20 **H. Our February 3, 2009 Opinion Properly Allows a Party to Present Evidence Regarding**
21 **an Injured Employee’s Individualized DFEC Adjustment Factor**

22 Applicant’s petition states that the DFEC adjustment factors of the Schedule are intended
23 to assure that injured employees with the same DFEC will receive the same permanent disability
24 rating irrespective of what body parts they injure. Applicant argues that allowing parties to
25 challenge the DFEC component of a scheduled permanent disability rating through individualized
26 DFEC adjustment factors will improperly cause widely varying ratings for injured employees with
27

³⁶ Writ den. sub nom. *Boughner v. Workers’ Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 770.

1 the same DFEC.

2 The DFEC adjustment factors of the 2005 Schedule are based in part on data from the 2003
3 RAND Study (which data was later refined by the 2004 RAND Study). The 2003 RAND Study
4 concluded that, under the prior Schedules, injured workers with the same overall permanent
5 disability rating (e.g., 5%) had disparate average proportional earnings losses – and disparate
6 average rating to proportional earnings loss ratios – depending on the body part that was injured.
7 (See 2003 RAND Study, at pp. 24-25, 27, 28-31, 44.)³⁷ Therefore, one of the recommendations of
8 the 2003 RAND Study was that to improve equity in the system any new rating Schedule should
9 contain adjustments to reduce the disparities in compensation for different types of impairments.
10 (*Id.*, at p. 44.) This, of course, is one of the purposes of the DFEC adjustment factors in the 2005
11 Schedule.

12 However, when the 2003 RAND Study reached its conclusions regarding disparate
13 proportional earnings losses – and disparate rating to proportional earnings loss ratios – for
14 different types of impairments, the Study was *averaging* data on 241,685 injured employees.
15 (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 262.) Consequently, in the case of a specific injured
16 employee, that employee might have had a significantly higher or lower proportional earnings
17 loss – and, therefore, a significantly higher or lower rating to proportional earnings loss
18 ratio – than average.

19 The method set forth in our February 3, 2009 opinion allows a party to challenge the DFEC
20 adjustment factor component of a scheduled permanent disability rating in a particular employee’s
21 case. That is, a party may show that an individual employee’s own rating to proportional earnings
22 loss ratio for an impairment is significantly above or below the average rating to average
23 proportional earnings loss ratio for that impairment in the Schedule, thus justifying the use of an
24 individualized DFEC adjustment factor. As discussed above, this method is consistent with the
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26 ³⁷ For example, average proportional earnings losses for knee injuries rating 5% were significantly lower than
27 average proportional earnings losses for back injuries rating 5%, and average proportional earnings losses for shoulder
injuries rating 5% were significantly higher than average proportional earnings losses for back injuries rating 5%. (See
2003 RAND Study, at pp. 24-25.)

1 language of section 4660(b)(2), the methodology of the RAND Study to which section 4660(b)(2)
2 refers, and the numeric formula adopted by the AD in the Schedule. Moreover, in keeping with
3 the rationale that underlies the scheduled DFEC adjustment factors, injured employees with the
4 same individualized DFEC adjustment factor will receive the same ratings for different types of
5 impairments, if those impairments result in the same WPI.

6 Furthermore, if applicant's argument is carried to its logical conclusion, the effective result
7 would be that no party could challenge the DFEC adjustment factor component of a scheduled
8 permanent disability rating, thus effectively making the resulting permanent disability rating
9 conclusive and non-rebuttable, absent a successful challenge to other components of the scheduled
10 rating. This would not comport with the language of section 4660(c) that "the schedule ... shall be
11 *prima facie evidence* of the percentage of permanent disability to be attributed to each injury
12 covered by the schedule." (Emphasis added.)

13 **I. Our February 3, 2009 Opinion Does Not Violate the Mandate of Article XIV, Section 4, of**
14 **the California Constitution**

15 In our February 3, 2009 opinion, we stated: "In determining an individual employee's
16 proportional earnings loss, the first step ordinarily will be to establish the employee's actual
17 earnings in the three years following his or her injury (as did the RAND Studies), using the
18 employee's EDD wage data or other empirical wage information." (*Ogilvie v. City and County of*
19 *San Francisco* (2009) 74 Cal.Comp.Cases 248, 266 (Appeals Board en banc) (*Ogilvie I*).)³⁸
20 Applicant contends that this statement violates the mandate of Article XIV, section 4, of the
21 California Constitution that administration of the workers' compensation system "shall accomplish
22 substantial justice in all cases expeditiously." In essence, applicant claims that because most
23 temporary disability benefits are currently limited to no more than 104 weeks within five years
24 after the date of injury (see Lab. Code, § 4656(c)(1) & (c)(2)), "many workers – including those
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26 ³⁸ As explained in our February 3, 2009 opinion, we focused on an injured employee's actual earnings in the
27 three years following his or her injury because this is the period used by the 2003 and 2004 RAND Studies, which, in
accordance with section 4660(b)(2), are the studies on which the Administrative Director based the DFEC adjustment
factors of the 2005 Schedule. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at pp. 265-266.)

1 who are most seriously injured and who collect temporary disability benefits for the 104 weeks
2 immediately following the injury – will be forced to wait at least one year, and likely longer” for a
3 determination of their individualized proportional earnings loss.

4 There are several flaws in applicant’s argument that employees will have to wait at least
5 three years after their dates of injury for a permanent disability determination.

6 First, nothing in our February 3, 2009 opinion mandates that a party must challenge the
7 DFEC component of a scheduled permanent disability rating. In cases where the scheduled DFEC
8 adjustment factor is used, the injured employee will not have to wait an additional year or more
9 after temporary disability payments cease before his or her permanent disability rating can be
10 established.

11 Second, even if a party elects to challenge the DFEC component of a scheduled permanent
12 disability rating, nothing in our February 3, 2009 opinion requires that the first three years of
13 post-injury earnings be used. Although we stated that this period “ordinarily” would be used
14 (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 266), we went on to state:

15 “Yet, although the 2003 and 2004 RAND Studies used three years of
16 post-injury earnings as the basis for their proportional earnings loss
17 calculations, there is nothing magical about a three-year period. This is
18 because the 2003 and 2004 RAND Studies used three-year proportional
19 earnings losses only ‘because these data provide the best balance between
20 representing long-term outcomes and a sufficient number of observations with
21 which to conduct [an] analysis’ for a large-scale study. (See 2004 RAND
22 Study, at p. 3.) In cases of individual injured employees, however, a longer or
23 shorter period of post-injury earnings may be appropriate.” (*Ogilvie I, supra*,
24 74 Cal.Comp.Cases at p. 266.)

25 Third, we recognize that, by definition, when an employee is receiving temporary disability
26 indemnity he or she is unable to work or is unable to work for full wages. Indeed, “[t]he primary
27 element of temporary disability is wage loss.” (*Granado v. Workers’ Comp. Appeals Bd.* (1968) 69
28 Cal.2d 399, 403 [33 Cal.Comp.Cases 647, 650]; see also *Signature Fruit Co. v. Workers’ Comp.*
29 *Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 801 [71 Cal.Comp.Cases 1044, 1052-1053].)
30 Accordingly, where an injured employee has been off work (or partially off work) and receiving
31 temporary disability indemnity for a period of two years, it may be difficult to assess the

1 employee's actual earning capacity for a three-year period. In such a circumstance, however, the
2 scheduled DFEC adjustment factor may be used to initially rate the employee's permanent
3 disability. Then, if within five years of the date of injury it later becomes clear that the employee's
4 individualized proportional earnings loss is significantly higher or lower than anticipated, a party
5 may seek to reopen the issue of permanent disability by challenging the originally used DFEC
6 adjustment factor. (Lab. Code, §§ 5410, 5803, 5804; see *LeBoeuf v. Workers' Comp. Appeals Bd.*
7 (1983) 34 Cal.3d 234, 242-243 [48 Cal.Comp.Cases 587, 594] (original 60% permanent disability
8 rating reopened and increased to 100% after it was later determined that the injured employee
9 could not be vocationally retrained for suitable gainful employment) (*LeBoeuf*.)

10 **J. Our February 3, 2009 Opinion Properly Used the Whole Person Impairment Rating**
11 **Assigned by the AMA Guides for the Numerator of the Employee's Individualized Rating to**
12 **Proportional Earnings Loss Ratio**

13 In our February 3, 2009 opinion, we stated that the second phase of our method for
14 determining whether the DFEC adjustment factor component of a scheduled permanent disability
15 rating has been successfully challenged "is to take the injured employee's standard WPI rating and
16 then divide this rating by his or her estimated proportional earnings loss, to come up with an
17 individualized rating to proportional earnings loss ratio (rating to loss ratio)." (*Ogilvie I, supra*, 74
18 Cal.Comp.Cases at p. 270.) This particular aspect of the rebuttal method described in our
19 February 3, 2009 opinion was based on the RAND Studies, which took the standard permanent
20 disability rating for each employee within a particular impairment group, divided that rating by his
21 or her estimated proportional earnings loss, and then averaged all of those rating to loss ratios.
22 (*Ogilvie I, supra*, 74 Cal.Comp.Cases at pp. 263-264.) The RAND average standard ratings to
23 average proportional earnings losses ratios for various impairments were then adopted by the
24 Schedule, which used them to establish the FEC Ranks with their corresponding DFEC adjustment
25 factors. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 264.)

26 Applicant contends it is improper to compare an injured employee's individualized rating
27 to proportional earnings loss ratio to the aggregate average rating to proportional earnings loss
ratios in the 2005 Schedule, because the former ratio uses the standard whole person impairment

1 rating assigned by the AMA Guides while the latter ratios use the standard rating under the 1988
2 Schedule, which is fundamentally different.

3 Applicant is correct that the RAND Studies used standard permanent disability ratings
4 under the 1988 Schedule.³⁹ She is also correct that the 2005 Schedule uses the standard whole
5 person impairment rating assigned by the AMA Guides and that this rating is fundamentally
6 different than a standard rating under the 1988 Schedule, which was based on work preclusions
7 and/or objective and subjective factors of disability. (Cf. 1997 Schedule, at pp. 1-3 – 1-4, 1-7 – 1-
8 8.)⁴⁰

9 What applicant disregards, however, is that section 4660(b)(1) now defines the “nature of
10 the physical injury or disfigurement” by reference to the AMA Guides, not the work preclusions
11 and/or objective and subjective factors of disability of the 1988 Schedule. Consistent with section
12 4660(b)(1), the AMA Guides were adopted and incorporated into the 2005 Schedule. (Cal. Code
13 Regs., tit. 8, § 9805.) Because both section 4660(b)(1) and the Schedule now require use of the
14 WPI rating assigned by the AMA Guides, this WPI rating must also be used in determining an
15 injured employee’s individualized rating to proportional earnings loss ratio.

16 Therefore, our February 3, 2009 opinion allows a party to establish an individualized DFEC
17 adjustment factor by a method that is consistent with section 4660(b)(1), with the language of
18 section 4660(b)(2), the methodology used by RAND, and the numeric formula adopted by the AD
19 in the Schedule; however, instead of using the injured employee’s standard rating under the 1988
20 Schedule for the numerator of an individualized rating to proportional earnings loss ratio, it uses
21

22 ³⁹ The RAND Studies assessed 241,685 employees who had sustained industrial injuries between January 1,
23 1991 and April 1, 1997 and who had received formal permanent disability ratings from the DEU. (*Ogilvie I, supra*, 74
24 Cal.Comp.Cases at pp. 262-263; see also 2003 RAND Study, at p. 18.) The period between January 1, 1991 and April
25 1, 1997 appears to have been used partly because, by using April 1, 1997 as the cut-off date, all of the injuries were
rated under the 1988 Schedule, which applied to injuries from July 1, 1988 through March 31, 1997. (See
<http://www.dir.ca.gov/DWC/PDRSpre1997.pdf>.)

26 ⁴⁰ The 1997 Schedule may be viewed at <http://www.dir.ca.gov/DWC/PDR1997.pdf>. Although the 1988 and
27 1997 Schedules largely assessed permanent disability in the same way, there were some differences. For example, the
1997 Schedule made some changes to the work capacity guidelines for pulmonary, heart, abdominal and spinal
disabilities (compare 1988 Schedule, at pp. 1-A, 5-A & 13-A, to 1997 Schedule, at pp. 2-12 – 2-15) and it added work
capacity guidelines for rating lower extremity disabilities (see 1997 Schedule, at p. 2-19).

1 the employee's whole person impairment rating under the AMA Guides.⁴¹

2 **K. Our February 3, 2009 Opinion Properly Concluded That, in Situations Where the**
3 **Injured Employee's Individualized Rating to Proportional Earnings Loss Ratio Does Not**
4 **Fall Within the Range of Ratios for Any of the Eight FEC Ranks of the Schedule, Then the**
5 **Employee's DFEC Adjustment Factor May Be Determined by Applying the Formula of**
6 **$[(1.81/a) \times .1] + 1$, Where "a" is the Employee's Individualized Rating to Loss Ratio**

7 In our February 3, 2009 opinion, we concluded that if an injured employee's individualized
8 rating to loss ratio does not fall within the ranges of ratios for any of the eight FEC Ranks of the
9 Schedule, then the employee's DFEC adjustment factor may be determined by applying the
10 formula of $[(1.81/a) \times .1] + 1$, where "a" is the injured employee's standard WPI divided by his or
11 her proportional earnings loss ratio. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 273.) We
12 concluded that this approach was consistent with section 4660(b)(2)'s requirement that a "numeric
13 formula" be used because the Schedule used this very same numeric formula for determining its
14 minimum and maximum DFEC adjustment factors. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p.

15 Applicant contends that our February 3, 2009 opinion improperly used the
16 $[(1.81/a) \times .1] + 1$ numerical formula adopted by the 2005 Schedule because that formula was not
17 based on empirical data, as required by section 4660(b)(2), and it has no purpose other than to
18 justify the arbitrary range of 1.1 to 1.4 for the DFEC adjustment factors contained in the Schedule.

19 The 2005 Schedule, including the numeric formula used in determining its minimum and
20 maximum DFEC adjustment factors, was adopted by regulation. (Cal. Code Regs., tit. 8, § 9805.)
21 Therefore, in arguing that the $[(1.81/a) \times .1] + 1$ numerical formula adopted by the 2005 Schedule
22 is arbitrary, applicant in essence is challenging the validity of the regulation that adopted the
23 Schedule.

24 As pointed out in our February 3, 2009 opinion, an attempt to rebut a scheduled permanent

25 ⁴¹ Indeed, it would be problematic to do otherwise. For one thing, disabilities under the 1988 Schedule could
26 be rated based on objective and subjective factors of disability or on work preclusions; therefore, it cannot be known
27 whether the standard ratings used in the RAND Studies were based on the objective/subjective factors, the work
preclusions, or both. Moreover, if an employee were required to establish his or her standard rating under the 1988
Schedule in order to rebut the DFEC component of a scheduled permanent disability rating, this could be difficult
because fewer and fewer physicians are versed in how to assess disability under the 1988 Schedule.

1 disability rating in a particular case is entirely different from a challenge to the Schedule itself.
2 (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 280.) Here, at trial, applicant did not assert that the
3 2005 Schedule – or, at least, the formula used to create the DFEC adjustment factor component of
4 it – is invalid. Instead, she sought to rebut the scheduled permanent disability rating. Therefore,
5 she has waived any challenge to the Schedule itself. (*Griffith v. Workers’ Comp. Appeals Bd.*
6 (1989) 209 Cal.App.3d 1260, 1265 [54 Cal.Comp.Cases 145, 148] (issue not raised at trial level is
7 waived); see also *New United Motors Mfg., Inc. v. Workers’ Comp. Appeals Bd. (Gallegos)* (2006)
8 141 Cal.App.4th 1533, 1540 & fn. 4 [71 Cal.Comp.Cases 1037, 1042 & fn. 4].)

9 Moreover, even assuming that applicant has not waived the question of whether the
10 numeric formula portion of the permanent disability schedule regulation is arbitrary or capricious,
11 she has not carried her burden of proving that the regulation was not based on empirical data. In
12 *Boughner* and in *Costa I*, we concluded that the petitioners did not meet their burdens of proving
13 that the 2005 Schedule is not empirically based. In both cases, we emphasized that an agency’s
14 regulation carries a “strong presumption” of validity, that the party challenging the regulation has
15 the burden of demonstrating its invalidity, and that in order to carry this burden the party must
16 demonstrate that the regulation is arbitrary and capricious. (*Boughner, supra*, 73 Cal.Comp.Cases
17 at pp. 859-861; *Costa I, supra*, 71 Cal.Comp.Cases at pp. 1810-1812.) Furthermore, in *Boughner*,
18 we pointed out that any challenge to a regulation must be based solely on the rule-making record.
19 (*Boughner, supra*, 73 Cal.Comp.Cases at pp. 861-862.) Here, too, applicant has not carried her
20 burden of establishing, based on the rule-making record, that the numerical formula of
21 **[(1.81/a) x .1] + 1** adopted by the AD in the 2005 Schedule is arbitrary and capricious because it is
22 not based on empirical data. Accordingly, she has not established that our use of that numerical
23 formula in determining an injured employee’s individualized DFEC adjustment factor was
24 improper.

25 ///

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27 ///

1 **L. Under Section 4660, an Injured Employee’s Percentage of Permanent Disability Does Not**
2 **Equate to His or Her Percentage of Diminished Future Earning Capacity**

3 Much of the balance of applicant’s petition for reconsideration argues, in various ways, that
4 “the percentage of diminished future earning capacity is the permanent disability percentage.”
5 Therefore, she concludes that a permanent disability rating established by the Schedule may be
6 rebutted by vocational expert opinion on the injured employee’s DFEC percentage, where this
7 DFEC percentage results from dividing the amount the expert believes the injured employee likely
8 will earn over his or her remaining expected work life, after the injury, by the amount the expert
9 believes the injured employee likely would have earned over his or her remaining expected work
10 life, absent the injury.

11 However, an injured employee’s percentage of permanent disability does not equate to his
12 or her percentage of diminished future earning capacity.

13 One argument applicant makes is that the Schedule itself confirms that permanent disability
14 is measured by an injured employee’s DFEC percentage. In making this argument, applicant relies
15 on the following statement in the 2005 Schedule:

16 “A permanent disability rating can range from 0% to 100%. Zero
17 percent signifies no reduction of earning capacity, while 100%
18 represents permanent total disability. A rating between 0% and
19 100% represents permanent partial disability. Permanent total
20 disability represents a level of disability at which an employee has
sustained a total loss of earning capacity.” (2005 Schedule, at
pp. 1-2 – 1-3.)

21 As explained by our February 3, 2009 opinion, however, this statement does not mean that an
22 injured employee’s permanent disability percentage is the same as the employee’s DFEC
23 percentage – i.e., it is not true that an estimated 10% loss of pre-injury earning capacity equates to
24 a 10% permanent disability rating, an estimated 20% loss of pre-injury earning capacity equates to
25 a 20% permanent disability rating, etc.

26 For one, the language of section 4660 belies any such conclusion. It provides, “In
27 determining the percentages of permanent disability, account shall be taken of the nature of the

1 physical injury or disfigurement, the occupation of the injured employee, and his or her age at the
2 time of injury, consideration being given to an employee’s diminished future earning capacity.”
3 (Lab. Code, § 4660(a).) Thus, at least ordinarily, an injured employee’s permanent disability
4 rating is a function of a *combination* of factors, i.e., the employee’s WPI, DFEC, age, and
5 occupation; it is not a function of DFEC alone. (*Id.*; see also Lab. Code, § 4660(b)(1) & (b)(2);
6 2005 Schedule, at pp. 1-4 – 1-10.) Accordingly, in the usual case, there is not a one-to-one
7 correlation between DFEC and disability. (See (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 260.)

8 Moreover, section 4660(b)(2) defines “diminished future earning capacity” and does not
9 declare that it is tantamount to the injured employee’s percentage of permanent disability. Instead,
10 section 4660(b)(2) specifically defines “diminished future earning capacity” to mean “a numeric
11 formula based on empirical data and findings that aggregate the average percentage of long-term
12 loss of income resulting from each type of injury for similarly situated employees.”

13 Another of applicant’s arguments begins by pointing out that, prior to SB 899, section
14 4660(a) provided: “In determining the percentages of permanent disability, account shall be taken
15 of the nature of the physical injury or disfigurement, the occupation of the injured employee, and
16 his age at the time of such injury, consideration being given to the diminished ability of such
17 injured employee to compete in an open labor market.” Applicant then points out that, when
18 section 4660(a) was amended by SB 899, the only substantive change was to substitute “an
19 employee’s diminished future earning capacity” for “the diminished ability of such injured
20 employee to compete in an open labor market.” Applicant next goes on to assert that, under
21 former section 4660(a), the California courts equated permanent disability with diminished ability
22 to compete in an open labor market. For example, applicant cites to the Supreme Court’s
23 statement in *LeBoeuf, supra* that “[a] permanent disability rating should reflect as accurately as
24 possible an injured employee’s diminished ability to compete in the open labor market.” (34
25 Cal.3d at pp. 245-246 [48 Cal.Comp.Cases at p. 597].) Therefore, applicant claims that because
26 permanent disability was equated with a diminished ability to compete in the open labor market
27 under former section 4660(a), permanent disability now must be equated with diminished future

1 earning capacity under current section 4660(a).

2 There are several problems with this argument.

3 Like current section 4660(a), former section 4660(a) listed *four* factors to be considered in
4 determining permanent disability, i.e., (1) the nature of the physical injury or disfigurement, (2) the
5 occupation of the injured employee, (3) the employee’s age at the time of the injury, *and* (4) the
6 employee’s diminished ability to compete in the open labor market. As illustrated by the 1997
7 Schedule, *all* of these factors were considered in arriving at a scheduled permanent disability
8 rating. (See 1997 Schedule, at pp. 1-1 – 1-12.) Although diminished ability to compete in the open
9 labor market was the most significant factor in a permanent disability determination under former
10 section 4660(a), and although in some instances the appellate courts would simplify any
11 permanent disability discussion by focusing on that one factor, the reality is that diminished ability
12 to compete in the open labor market was almost never the sole factor in a permanent disability
13 assessment. The exceptions were cases like *LeBoeuf*, in which the injured employee not only
14 could not return to his job as a bus driver, but he also could not be vocationally rehabilitated into
15 any suitable gainful employment. Therefore, the complete inability of such employees to compete
16 in any segment of the open labor market rendered them permanently totally disabled. (Cf. Lab.
17 Code, § 4662.)⁴²

18 Also, until SB 899 section 4660 set forth no guiding principles regarding how percentages
19 of permanent disability were to be determined, beyond the language of former section 4660(a).
20 However, when SB 899 amended section 4660, it not only substituted “diminished future earning
21 capacity” for “diminished ability ... to compete in an open labor market,” but it also defined both

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27 ⁴² As noted in *Ogilvie I*, a complete loss of earning capacity might justify a finding of permanent total disability under section 4662, but that issue is not before us here. (*Ogilvie I, supra*, 74 Cal.Comp.Cases at p. 260, fn. 11.)

1 //“diminished future earning capacity” and “nature of the physical injury or disfigurement.”⁴³
2 Accordingly, the change in the nature and structure of section 4660 now means that permanent
3 disability cannot simply be equated to diminished future earning capacity, even if it could be said
4 that, under former section 4660, permanent disability could be equated to diminished ability to
5 compete in the open labor market.

6 For the reasons outlined above, we also reject applicant’s contention that the purpose of the
7 Schedule is to *convert* a non-empirical AMA Guides whole person impairment rating *into* an
8 empirically-based measure of the injured employee’s diminished future earning capacity, and not
9 to *adjust* the employee’s WPI *for* diminished future earning capacity.

10 Also, for these same reasons, we cannot accept applicant’s view that a scheduled
11 permanent disability rating may be rebutted by a vocational expert’s opinion on the injured
12 employee’s DFEC percentage, which the expert arrives at by dividing the injured employee’s
13 estimated lifetime post-injury earning capacity by the injured employee’s estimated lifetime pre-
14 injury earning capacity. As we said in our February 3, 2009 opinion:

15 “[I]f the Legislature had intended that an injured employee’s permanent
16 disability percentage could be the same as a vocational rehabilitation expert’s
17 opinion of the employee’s DFEC percentage, then why did the Legislature not
18 say so? Indeed, why would the Legislature even require a Schedule at all? A
19 Schedule would not be needed to determine a percentage of permanent
20 disability if that percentage could simply be established by the DFEC opinion
21 of a vocational rehabilitation expert who, in reaching his or her DFEC
22 opinion, took into consideration the employee’s age and occupation and the
23 nature of the employee’s physical injury or disfigurement.” (*Ogilvie, supra*,
24 74 Cal.Comp.Cases at p. 258.)

21 Applicant’s petition claims that the answer to the first question is that “the Legislature *did*
22 say that the permanent disability percentage is the same thing as diminished future earning
23 capacity.” (Applicant’s italics.) Yet, as we have demonstrated above, applicant misconstrues
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25 ⁴³ That is, SB 899 added section 4660(b)(1), which provides, “For purposes of this section, the ‘nature of the
26 physical injury or disfigurement’ shall incorporate the descriptions and measurements of physical impairments in the
27 corresponding percentages of impairments published in the [AMA Guides].” It also added section 4660(b)(2), which
provides, “For purposes of this section, an employee’s diminished future earning capacity shall be a numeric formula
based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from
each type of injury for similarly situated employees.”

1 section 4660 in this regard.

2 Applicant's petition claims that the answer to the second question is that "[t]he Legislature
3 directed adoption of a revised rating schedule because it did not intend to require a vocational
4 expert's input and testimony in every case. A rating schedule provides a cost effective method of
5 assigning ratings that also provides consistency and uniformity of ratings. However, none of those
6 goals are compromised by the fact that permanent disability ratings under the 2005 Schedule
7 should be a measure of the injured worker's diminished future earning capacity, because that is
8 what is required by §4660." We certainly agree with applicant's statements that the Legislature
9 did not intend to require vocational expert testimony in every case and that the rating schedule
10 provides a cost-effective method of assigning ratings. Again, though, applicant is mistaken in
11 believing that an injured employee's permanent disability is simply a measure of his or her
12 diminished future earning capacity.

13 **M. Our February 3, 2009 Opinion Is Not an Invalid "Regulation"**

14 Applicant's final contention is that our February 3, 2009 opinion requires that only one
15 methodology shall be used for challenging the DFEC component of a scheduled permanent
16 disability rating. Applicant asserts that, by issuing an en banc decision which requires the use of a
17 single rebuttal methodology, we have issued a "regulation" that, under *Milbauer, supra*, 127
18 Cal.App.4th 625 [70 Cal.Comp.Cases 312], is invalid because it was not adopted in accordance
19 with the rule-making provisions of the Administrative Procedures Act (APA). (Gov. Code, §
20 11340 et seq.)

21 *Milbauer* was based in large part on the Supreme Court's decision in *Tidewater Marine*
22 *Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (*Tidewater*). *Tidewater* held that any
23 "regulation" not adopted in accordance with the rule-making provisions of the APA is "void."
24 (*Tidewater, supra*, 14 Cal.4th at p. 572.) In reaching this holding *Tidewater* stated, "The APA ...
25 defines 'regulation' very broadly to include 'every rule, regulation, order, or standard of general
26 application ... adopted by any state agency to implement, interpret, or make specific the law
27 enforced or administered by it, or to govern its procedure' " (*Tidewater, supra*, 14 Cal.4th at

1 p. 571 [quoting from former Gov. Code, § 11342(g) (now, § 11342.600)].) *Tidewater* then said:
2 “A regulation subject to the APA thus has two principal identifying characteristics. First, the
3 agency must intend its rule to apply generally, rather than in a specific case. The rule need not,
4 however, apply universally; a rule applies generally so long as it declares how a certain class of
5 cases will be decided. Second, the rule must ‘implement, interpret, or make specific the law
6 enforced or administered by [the agency], or ... govern [the agency’s] procedure.’ ” (*Tidewater*,
7 *supra*, 14 Cal.4th at p. 571 [internal citations omitted].)

8 *Milbauer* held that the principles articulated in *Tidewater* apply to the Appeals Board.
9 (*Milbauer, supra*, 127 Cal.App.4th at p. 646 [70 Cal.Comp.Cases at p. 329].) While the Board’s
10 rule-making powers are largely governed by the Labor Code (Lab. Code, §§ 5307, 5307.4; see also
11 §§ 133, 5309, 5708), the Board is also subject to the APA to some extent (Gov. Code, § 11351),
12 including its definition of a “regulation.” (Gov. Code, § 11342.600.)

13 Yet, in asserting that our February 3, 2009 en banc decision constitutes an invalid
14 regulation, applicant disregards the further holding of *Tidewater*, which states: “Of course,
15 *interpretations that arise in the course of case-specific adjudication are not regulations*, though
16 they may be persuasive as precedents in similar subsequent cases.” (*Tidewater, supra*, 14 Cal.4th
17 at p. 571 (emphasis added).)

18 Also, applicant disregards Government Code section 11425.60(b), which became effective
19 after *Tidewater* (*Milbauer, supra*, 127 Cal.App.4th at p. 647 [70 Cal.Comp.Cases at p. 331]) and
20 which “is applicable to the WCAB.” (*Id.*, 127 Cal.App.4th at p. 646 [70 Cal.Comp.Cases at p.
21 330].) Section 11425.60(b) specifically states:

22 “An agency may designate as a precedent decision a decision or part of a
23 decision that contains a significant legal or policy determination of general
24 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*

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1 *under Chapter 3.5 (commencing with Section 11340) [i.e., rule-making*
2 *provisions of the APA].” (Gov. Code, § 11425.60(b) (emphasis added).)*⁴⁴

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

4 *“The first sentence of subdivision (b) recognizes the need of agencies to be*
5 *able to make law and policy through adjudication as well as through*
6 *rulemaking. ... Under the second sentence of subdivision (b), this section*
7 *applies notwithstanding Section 11340.5 (‘underground regulations’).”*
8 *(Emphasis added.)*

9 Therefore, section 11425.60(b) expressly allows the Appeals Board to issue a “precedent” decision
10 that addresses a significant legal or policy issue of general application that is likely to recur.
11 Furthermore, section 11425.60(b) expressly provides that such a precedent decision “is not
12 rulemaking” and need not be issued in accordance with the rule-making provisions of the
13 APA – i.e., a precedent decision is not an illegal “underground regulation.” (See *Plumbers &*
14 *Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1095 (citing to section
15 11425.60(b) and stating, “The department designated [its] decision in this case as precedential,
16 thereby exercising its ability to make law and policy through adjudication.”).)

17 Finally, applicant disregards the express provisions of Labor Code section 115, which
18 specifically allows “the appeals board as a whole” to issue en banc decisions “*in order to achieve*
19 *uniformity of decision, or in cases presenting novel issues.*” (Lab. Code, § 115 (emphasis added).)
20 The Appeals Board’s statutory authority to issue en banc decisions “in order to achieve uniformity
21 of decision” is consistent with the fact that the Board is vested with “*judicial powers.*” (Lab. Code,
22 § 111(a) (emphasis added).) In accordance with its judicial status and the authority granted it by
23 section 115, the Appeals Board periodically issues en banc decisions that “are binding on [all]
24 panels of the Appeals Board and workers’ compensation judges as legal precedent under the

25 ⁴⁴ Section 11425.60(b) falls within the administrative adjudication provisions of the APA. (Gov. Code, § 11400
26 et seq.) These APA administrative adjudication provisions apply to all state “agencies” (see Gov. Code, § 11500),
27 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*.)

1 principle of *stare decisis*.” (Cal. Code Regs., tit. 8, § 10341.)⁴⁵ In the context of proceedings
2 before the WCAB, en banc decisions of the Appeals Board have the same effect as published
3 appellate opinions. (*Signature Fruit Co. v. Workers’ Comp. Appeals Bd. (Ochoa)* (2006) 142
4 Cal.App.4th 790, 796, fn. 2 [71 Cal.Comp.Cases 1044, 1047, fn. 2] (“An en banc decision of the
5 WCAB binds future WCAB panels and WCJ’s as legal precedent in the same manner as a
6 published appellate opinion.”); accord: *Garcia, supra*, 126 Cal.App.4th at p. 313, fn. 5 [70
7 Cal.Comp.Cases at p. 120, fn. 5].)

8 Therefore, our February 3, 2009 en banc decision is not a regulation because it was issued
9 both under the authority of section 115 “in order to achieve uniformity of decision” and under the
10 authority of section 11425.60(b) to designate as precedent a “decision that contains a significant
11 legal or policy determination of general application that is likely to recur” without having to
12 undertake rulemaking. Our February 3, 2009 decision also accords with the holding of *Tidewater*
13 that “interpretations that arise in the course of case-specific adjudication *are not regulations*,
14 though they may be persuasive as precedents in similar subsequent cases.” (*Tidewater, supra*, 14
15 Cal.4th at p. 571 (emphasis added).)

16 We recognize that, in *Milbauer*, the Court concluded that the Appeals Board’s power to
17 issue en banc decisions in lieu of regulations is not unlimited. (*Milbauer, supra*, 127 Cal.App.4th
18 at pp. 647-649 [70 Cal.Comp.Cases at pp. 329-332].) In *Milbauer*, the Court was reviewing an en
19 banc decision of the Appeals Board which had determined that the Uninsured Employers Fund
20 (UEF) could be ordered to provisionally appear at a hearing to assist an employee of an illegally
21 uninsured employer in determining the employer’s correct legal identity; then, when the illegally
22 uninsured employer had been properly named and served with an application and special notice of
23 lawsuit, UEF could be formally joined as a party defendant and its statutory liability for benefits
24 would attach. The Court concluded that the procedures set forth in the Board’s en banc decision
25 violated the APA and *Tidewater*. However, the Court reached this conclusion because the Board’s
26 en banc decision had “adopted and announced a whole body of entirely new procedures” relating

27 ⁴⁵ WCAB Rule 10341 was adopted through the rule-making provisions of Labor Code section 5306.

1 to the joinder and the responsibilities of UEF and because these “new procedures [were] much
2 more extensive than general legal conclusions or policies produced after interpretation of
3 applicable statutes or law in the context of a specific case.” (*Milbauer, supra*, 127 Cal.App.4th at
4 p. 648 [70 Cal.Comp.Cases at p. 331].)

5 Our February 3, 2009 en banc decision is readily distinguishable because it did not impose
6 a whole series of new procedural requirements. To the contrary, our decision simply interpreted
7 the “prima facie evidence” language of section 4660(c) to mean that a permanent disability rating
8 established by the Schedule is rebuttable – including by rebutting a component element of that
9 rating, e.g., the DFEC adjustment factor. Moreover, our decision further held that, if a party seeks
10 to challenge a scheduled DFEC adjustment factor, any rebuttal evidence must be consonant with
11 the provisions of section 4660(b)(2) and the RAND data to which section 4660(b)(2) refers. We
12 then identified steps for challenging a scheduled DFEC adjustment factor that would be consonant
13 with section 4660(b)(2) and the RAND data. Our decision, however, did *not* mandate that any
14 party must challenge a scheduled DFEC adjustment factor; it did *not* mandate that if any such
15 attempt is made it must be done in any particular manner (other than it must be consistent with
16 section 4660(b)(2) and the RAND data to which section 4660(b)(2) refers); and it did *not* mandate
17 that a WCJ or Appeals Board panel must admit or follow any rebuttal evidence presented.

18 Moreover, in keeping with *Tidewater*’s holding that “interpretations that arise in the course
19 of case-specific adjudication are not regulations” (*Tidewater, supra*, 14 Cal.4th at p. 571), we
20 reached our holdings in the context of a specific case in which the injured employee was
21 presenting evidence in rebuttal to the permanent disability rating called for by the 2005 Schedule.
22 If the *Milbauer* case were interpreted to apply in this context, this would effectively eradicate both
23 the Appeals Board’s power to issue en banc decisions “in order to achieve uniformity of decision”
24 (Lab. Code, § 115) and its power to “designate as a precedent decision ... a decision that contains
25 a significant legal or policy determination of general application that is likely to recur [and that] is
26 not rulemaking” (Gov. Code, § 11425.60(b)).

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1 **III. CONCLUSION**

2 For the reasons above, we clarify our February 3, 2009 en banc decision by holding that:
3 (1) the language of section 4660(c), which provides that “the schedule ... shall be prima facie
4 evidence of the percentage of permanent disability to be attributed to each injury covered by the
5 schedule,” unambiguously means that a permanent disability rating established by the Schedule is
6 rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party
7 disputing that rating; and (3) one method of rebutting a scheduled permanent disability rating is to
8 successfully challenge one of the component elements of that rating, such as the injured
9 employee’s DFEC adjustment factor, which may be accomplished by establishing that an
10 alternative adjustment factor most accurately reflects the injured employee’s DFEC. However,
11 any individualized DFEC adjustment factor must be consistent with section 4660(b)(1), the RAND
12 data to which section 4660(b)(1) refers, and the numeric formula adopted by the Administrative
13 Director in the 2005 Schedule. Otherwise, we affirm our prior decision.

14 For the foregoing reasons,

15 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers’ Compensation

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1 Appeals Board (en banc), that the joint en banc decision issued on February 3, 2009 is
2 **AFFIRMED.**

3 **WORKERS' COMPENSATION APPEALS BOARD**

4 /s/ Joseph M. Miller

5 **JOSEPH M. MILLER, Chairman**

6 /s/ James C. Cuneo

7 **JAMES C. CUNEO, Commissioner**

8 /s/ Frank M. Brass

9 **FRANK M. BRASS, Commissioner**

10 /s/ Alfonso J. Moresi

11 **ALFONSO J. MORESI, Commissioner**

12 /s/ Deidra .E. Lowe

13 **DEIDRA E. LOWE, Commissioner**

14 /s/ Gregory G. Aghazarian

15 **GREGORY G. AGHAZARIAN, Commissioner**

16 **I DISSENT**

17 **(See attached Dissenting Opinion)**

18 /s/ Ronnie G. Caplane

19 **RONNIE G. CAPLANE, Commissioner**

20
21 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

22 **9/3/09**

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

25 **Wanda Ogilvie**

26 **Law Office of Joseph C. Waxman, 114 Sansome Street, Ste. 1205, San Francisco, CA 94104**

27 **Office of the City Attorney, Fox Plaza, 1390 Market Street, 7th Floor, San Francisco, CA**

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**DISSENTING OPINION OF
COMMISSIONER CAPLANE**

For the reasons set forth in my February 3, 2009 dissenting opinion, which I adopt and incorporate by reference, and for the following reasons, I again dissent. Although I concur with the majority’s holding that the percentage of permanent disability established by the Schedule is rebuttable, I still disagree with the majority’s restrictions on the nature and scope of the evidence a party may offer in rebuttal.

Section 4660 is a permanent disability *schedule* statute, not a *permanent disability* statute. That is, section 4660 sets forth the criteria that the Administrative Director must use in preparing and amending the Schedule, but section 4660 does not limit the evidence a party may present to rebut a prima facie correct permanent disability rating established by the Schedule.

In this regard, the Court of Appeal recently confirmed my view that, even after the amendments to it by SB 899, section 4660 does not define “permanent disability.” (*Benson v. Workers’ Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1544 [74 Cal.Comp.Cases 113, 118] (*Benson*) (“The Labor Code does not define ‘permanent disability.’ ”).) Moreover, in its decision in *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565] (*Brodie*), which addressed permanent disability in the post-SB 899 context, the Supreme Court described what permanent disability is and what purpose permanent disability indemnity serves:

“ [P]ermanent disability is understood as “the irreversible residual of an injury.” ’ (*Kopping v. Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1111 [71 Cal.Comp.Cases 1229], quoting 1 Cal. Workers’ Compensation Practice (Cont.Ed.Bar 4th ed. 2005) § 5.1, p. 276, italics omitted.) ‘A permanent disability is one “... which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market.” ’ (*State Compensation Ins. Fund v. Industrial Acc. Com.* [(*Hutchinson*)] (1963) 59 Cal.2d 45, 52 [28 Cal.Comp.Cases 20].) Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity. (Lab. Code, § 4660, subd. (a); *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753 [57 Cal.Comp.Cases 355].)” (*Brodie*, 40 Cal.4th at p. 1320 [72 Cal.Comp.Cases at p. 571] (footnote omitted; Cal.Comp.Cases citations substituted for other parallel citations); accord: *Benson, supra*, 170 Cal.App.4th at p. 1544 [74 Cal.Comp.Cases at p. 118].)

1 Because section 4660 does not define “permanent disability,” then the language of section
2 4660(b)(2) cannot limit the nature and scope of the evidence a party may offer in rebuttal to a
3 scheduled permanent disability rating. Also, because *Brodie* establishes, even after SB 899, that
4 permanent disability means an impairment of earning capacity, an impairment of the normal use of
5 a member, or a competitive handicap in the open labor market – and that permanent disability
6 payments are intended to compensate workers for both physical loss and the loss of some or all of
7 their future earning capacity – then it is entirely appropriate for a party to present expert evidence
8 on the effect of an injury on the employee’s earning capacity as rebuttal to a scheduled permanent
9 disability rating. Moreover, if this expert evidence is credible and legally substantial, the WCAB
10 may accept the percentage of lost future earning capacity as establishing the injured employee’s
11 percentage of permanent disability.

12 The right to present rebuttal evidence through expert opinion is not limited by section
13 4660. On the contrary, it is guaranteed by other provisions of law. Section 5704 expressly
14 provides that “an opportunity shall be given to produce evidence in ... rebuttal.” It has been held
15 that “improper restrictions on the right to present evidence in rebuttal is [sic] a deprivation of the
16 constitutional guaranty of due process of law.” (*Pence v. Industrial Acc. Com.* (1965) 63 Cal.2d
17 48, 50-51 [30 Cal.Comp.Cases 207, 208-209] (internal citations omitted); accord: *Hegglin v.*
18 *Workmen’s Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 175 [36 Cal.Comp.Cases 93, 102].)
19 Therefore, an injured employee or a defendant may have an absolute right to expert opinion – or,
20 indeed, any other probative evidence – to rebut a scheduled percentage of permanent disability
21 rating.

22 Finally, section 4660(a) provides: “In determining the percentages of permanent disability,
23 account shall be taken of the nature of the physical injury or disfigurement, the occupation of the
24 injured employee, and his or her age at the time of injury, consideration being given to an
25 employee’s diminished future earning capacity.” Here, applicant’s expert estimated that her
26 diminished future earning capacity was 51% and defendant’s expert estimated that her diminished
27 future earning capacity ranged from 51.31% to 53.77%. In reaching these DFEC opinions, the

1 experts divided the amount that applicant likely will earn over her remaining expected work life
2 after the injury by the amount she likely would have earned over her remaining expected work life
3 absent the injury.⁴⁶ They arrived at these pre-injury and post-injury earnings estimates by
4 considering the nature of applicant's physical injury (i.e., the medical evidence regarding
5 applicant's impairments and work restrictions), her occupation at the time of injury, and her age at
6 the time of injury. Thus, the experts took into account all of the factors set forth in section
7 4660(a). Therefore, these experts' opinions constituted proper rebuttal to the scheduled permanent
8 disability rating.

9 Accordingly, I dissent.

10
11 /s/ Ronnie G. Caplane
12 **RONNIE G. CAPLANE, Commissioner**

13
14
15 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

16 **9/3/09**

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24 **NPS/jr**

25 ⁴⁶ Defendant's expert estimated that, absent her industrial injury, applicant likely would have earned
26 \$335,680.80 during the remaining 6.09 years of her expected work life. He also estimated that, after sustaining her
27 industrial injury, applicant could likely earn either \$169,391.25 or \$177,654.88 during her remaining expected work
life.

Applicant's expert estimated that, but for her injury, applicant likely would have earned \$364,482.24 during
the 6.26 years of her expected work life. He also estimated that, following the injury, applicant's earning capacity
over the same time period would be \$178,562.88