WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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

The Appeals Board granted reconsideration in each of these matters. Because these cases present common issues of law, and for judicial efficiency, they have been consolidated for the limited purpose of issuing a joint Opinion and Decision After Reconsideration. (Cal. Code Regs., tit. 8, § 10589.)

Because of the important legal issue as to whether and how the AMA Guides[1] portion of the 2005 Schedule for Rating Permanent Disabilities (2005 Schedule or Schedule)[2] may be rebutted, and to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a

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1 In general, 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). However, in some instances (which should be clear from the context, especially when we cite to out-of-state opinions issued before 2001), references to the "AMA Guides" or the "Guides" may be to earlier editions of that publication.

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

majority vote of its members, assigned these cases to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)[3]

For the reasons below, we hold in summary that: (1) the AMA Guides portion of the 2005 Schedule is rebuttable; (2) the AMA Guides portion of the 2005 Schedule is rebutted by showing that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability; and (3) when an impairment rating based on the AMA Guides has been rebutted, the WCAB may make an impairment determination that considers medical opinions that are not based or are only partially based on the AMA Guides.

In the cases before us, however, we explicitly emphasize that we are not determining whether the standards for rebutting the AMA Guides portion of the 2005 Schedule have been or may be met. Instead, in each case, we are remanding to the assigned workers' compensation administrative law judge (WCJ) to decide these questions in the first instance.

Further, we expressly proclaim that our holding does *not* open the door to impairment ratings directly or indirectly based upon any Schedule in effect prior to 2005, regardless of how "fair" such a rating might seem to a physician, litigant, or trier-of-fact.

I. BACKGROUND

A. The *Almaraz* Case

Applicant, Mario Almaraz, sustained an admitted industrial injury to his back on November 5, 2004, while employed as a truck driver by Environmental Recovery Services (a.k.a. Enviroserve), insured by defendant, State Compensation Insurance Fund.

Applicant did not testify at trial, but the medical evidence indicates he injured himself when, while manually pulling a large tarp on to the top of the trailer of his truck, he felt a pop in his low back. He experienced low back pain extending into his right leg.

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[3] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation judges. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Gov. Code, § 11425.60(b).)

On December 29, 2004, applicant had a laminectomy and discectomy at L4-5.

After a period of temporary disability, applicant began working as an instructor at a truck driving school. The parties stipulated that, following his injury, applicant's employer did not offer him modified work as a truck driver.

Applicant was evaluated by Bruce E. Fishman, M.D., as an agreed medical evaluator (AME). In his initial report dated November 22, 2006, Dr. Fishman declared applicant to be permanent and stationary. He concluded that applicant has 12% whole person impairment (WPI) under the AMA Guides, based on a DRE lumbar category III. He also noted, however, that applicant is permanently limited to light duty work and permanently precluded from prolonged sitting activities. Dr. Fishman found that 20% of applicant's current lumbosacral disability was non-industrial – i.e., it was caused by the natural progression of prior non-occupational injuries, by his diffuse underlying degenerative lumbar disc disease, and by pre-existing spondylosis. Dr. Fishman stated that he had no job analysis for applicant, but reported that applicant had described his job as involving: (1) lifting up to 100 pounds; (2) pushing and pulling drums weighing up to 1500 pounds; (3) bending, stooping, twisting, climbing, squatting, kneeling, and reaching overhead; (4) using a pallet jack, a forklift, and dollies; and (5) working 8 to 12 hour shifts, with 80% of the time spent sitting and the remaining 20% spent standing or walking. In the absence of a formal job analysis, Dr. Fishman indicated he could not determine whether applicant could return to his job duty as a truck driver. Nevertheless, Dr. Fishman stated that applicant "clearly would be unable" to move 1500 pound drums.

Dr. Fishman issued a supplemental AME report dated October 16, 2007. In that report, he reiterated that applicant is limited to light duty work and is precluded from prolonged sitting. He stated that these restrictions are both actual and prophylactic.

Applicant's claim went to trial, primarily on the issues of permanent disability and apportionment. Applicant argued that the WCAB has the discretion to award permanent disability based on his work restrictions, instead of by multiplying his AMA Guides impairment by the appropriate diminished future earning capacity (DFEC) adjustment factor per the 2005 Schedule.

The parties stipulated that, before apportionment, applicant's injury would rate 17% under the 2005 Schedule and 58% under the 1997 Schedule.

On April 23, 2008, WCJ found that applicant's November 4, 2004 back injury caused 14% permanent disability, after apportionment. In making this permanent disability determination, the WCJ utilized the rating methodology established by the 2005 Schedule, including its provision that the extent of an injured employee's permanent impairment is determined by use of the AMA Guides. The WCJ concluded he was not free to make a permanent disability finding based on the work preclusions set forth by Dr. Fishman. The WCJ said that, in enacting Labor Code section 4660,[4] the Legislature "mandated the use of the AMA Guide[s]." Specifically, he cited to section 4660(b)(1), which provides: "For purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides]." The WCJ further stated, "it is within the purview of the Legislature to establish the system for rating permanent disability." Because "the Legislature has established what that system is," the WCAB "is not at liberty to deviate from th[ose] criteria." Accordingly, pursuant to the parties' stipulation to 17% permanent disability under the 2005 Schedule, before apportionment, the WCJ found that applicant's permanent disability is 14% – after apportionment of 20% of his disability to non-industrial causation.

Applicant filed a timely petition for reconsideration, contending in substance that: (1) section 4660 merely requires that "account shall be taken" of the AMA Guides; therefore, the Guides is not conclusive and unrebuttable; (2) the AMA Guides need not be blindly followed where the Guides does not completely and fairly describe and measure the injured employee's impairment; and (3) where the AMA Guides does not fairly and accurately reflect the injured employee's impairment, other measures of disability should be used.

No answer to the petition was received.

On July 7, 2008, we granted reconsideration.

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

B. The *Guzman* Case

Applicant, Joyce Guzman, sustained an admitted industrial injury to her bilateral upper extremities during a cumulative period ending on April 11, 2005, while employed as a secretary by defendant, the Milpitas Unified School District (adjusted by Keenan & Associates).

Applicant was evaluated by Steven D. Feinberg, M.D., as an AME. In his initial report, Dr. Feinberg diagnosed bilateral carpal tunnel syndrome, which was not yet permanent and stationary.

In his December 2, 2005 report, Dr. Feinberg declared applicant to be permanent and stationary. He opined that applicant's bilateral upper extremity injury caused "a 25% loss of her … preinjury capacity for pushing, pulling, grasping, gripping, keyboarding [and] fine manipulation." He further stated that applicant "could not go back to [her] former occupation," because it would "caus[e] a gradual worsening of her condition."

On July 13, 2007, Dr. Feinberg issued a supplemental AME report that analyzed applicant's permanent disability utilizing the AMA Guides. He concluded that applicant's injury caused 3% whole person impairment for each upper extremity, based upon applicant's symptoms and her reported functional difficulties secondary to her symptoms.

In a March 21, 2008 report, Dr. Feinberg reiterated that applicant's bilateral upper extremity injury caused WPI under the AMA Guides of 3% for each side and also that her injury caused a 25% loss of her pre-injury capacity for pushing, pulling, grasping, gripping, keyboarding and fine manipulation.

In his final report of April 30, 2008, however, Dr. Feinberg stated that applicant's bilateral upper extremity injury precludes her from "very forceful, prolonged repetitive and forceful repetitive work activities." He further stated:

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

At trial, the parties stipulated that the 2005 Schedule should be applied to applicant's cumulative bilateral upper extremity injury. The main issues raised were permanent disability and apportionment.

Following the trial, the WCJ instructed the Disability Evaluation Unit (DEU) to prepare a recommended rating based on the factors of disability set forth in Dr. Feinberg's March 21, 2008 report. However, the instructions further directed the DEU to consider the above-quoted language from Dr. Feinberg's April 30, 2008 report and to use this language in rating applicant's impairment, if that language was ratable and if the resulting rating was higher than any other method.

In her recommended permanent disability rating, the disability evaluation specialist (rater) found 12% permanent disability, which was the adjusted rating for applicant's bilateral upper extremities based upon 3% WPI for each upper extremity in accordance with Dr. Feinberg's March 21, 2008 report.

On October 3, 2008, the rater was cross-examined. She testified that in issuing her recommended 12% permanent disability rating she did not consider the language in Dr. Feinberg's April 30, 2008 report that – based on applicant's activities of daily living (ADL) losses – each upper extremity would have a 15% WPI. Although the transcript of the rater's testimony is somewhat confusing, it appears the rater essentially believed it would be inappropriate to assign a 15% WPI to each upper extremity because: (1) in determining WPI, she is required to use the AMA Guides; (2) Dr. Feinberg indicated that his 15% WPI finding for each upper extremity was based on applicant's ADL losses; however, the ADL tables of the AMA Guides (i.e., Table 1-2 & Table 1-3 at pp. 4 & 6-7) do not specify any particular WPI impairments for any particular ADL loss; (3) Dr. Feinberg acknowledged that assigning a 15% WPI to each upper extremity based on applicant's ADL losses "is not a method that is sanctioned by the AMA Guides"; and (4) page 495 of the Guides specifies how to determine WPI for carpal tunnel syndrome injuries. The rater testified, however, that if she were allowed to consider the 15% WPI for each upper extremity, then applicant's final permanent disability rating would be 39%, after adjustment for age and

occupation.

On October 7, 2008, the WCJ issued an Amended Findings and Award which found that applicant's cumulative injury to her bilateral upper extremities caused 12% permanent disability, after adjustment for age and occupation.[5] In reaching this 12% permanent disability finding, the WCJ stated: "While the exact quantum of evidence required to rebut the [Schedule] has yet to be established by case law, I feel certain that a single paragraph in an AME report does not suffice. In particular, Dr. Feinberg provides no data or clinical observations in support of his opinion; his opinion seems to be, rather, that the guides generally underrate this impairment. He may be correct; he is certainly a highly respected and qualified physician: but without a significant amount of objective data I am unwilling to accept his opinion, standing alone, against that of the Legislature."

Applicant filed a timely petition for reconsideration, essentially arguing that the AMA Guides support the opinion of Dr. Feinberg, the AME; therefore, she has a 15% WPI per upper extremity based upon her loss of ADLs. In her petition, applicant quoted extensively from the AMA Guides, including but not limited to the following passages: (1) the AMA Guides defines impairment as "a loss, loss of use, or derangement of any body part, organ system, or organ function" (AMA Guides, § 1.2a, at p. 2); (2) the impairment ratings of the AMA Guides estimate functional limitations "*excluding work*" (*id*., § 1.2a, at p. 4 [Guide's italics]); (3) "[t]he ADLs listed in [Table 1-2 of the Guides] correspond to the activities that physicians should consider when establishing an impairment rating" and "[a] physician can often assess a person's ability to perform ADLs based on knowledge of the patient's medical condition and clinical judgment" (*id*., § 1.2a, at p. 5); (4) "[p]hysicians have the education and training to evaluate a person's health

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5 The WCJ's original Findings and Award of August 27, 2008 was rescinded on September 8, 2008 pursuant to WCAB Rule 10859 (Cal. Code Regs., tit. 8, § 10859) because applicant had filed a motion to cross-examine the rater. After the cross-examination, the WCJ issued the October 7, 2008 Amended Findings and Award. For reasons that are not clear, however, the WCJ re-issued the Amended Findings and Award on October 22, 2008. Because the October 22, 2008 is a duplicate of the October 7, 2008 decision, from which applicant timely sought reconsideration, the October 22, 2008 decision has no effect on the proceedings on reconsideration. (*Nestle Ice Cream Co., LLC v. Workers' Comp. Appeals Bd.* (*Ryerson*) (2007) 146 Cal.App.4th 1104 [72 Cal.Comp.Cases 13].)

The WCJ's October 7, 2008 decision also involved Case No. ADJ2705099 (SJO 0244266), which is not pending before us.

status and determine the presence or absence of impairment" and "[i]f the physician has the expertise and is well acquainted with the individual's activities and needs, the physician may also express an opinion about the presence or absence of a specific disability" (*id*., § 1.2b, at p. 8); (5) "[t]he physician's role in performing an impairment evaluation is to provide an independent, unbiased assessment of the individual's medical condition, including … identify[ing] abilities and limitations to performing activities of daily living as listed in Table 1-2" and "[p]erforming an impairment evaluation requires considerable expertise and judgment" (*id*., § 2.3, at p. 18); and (6) the AMA Guides chapter on upper extremities (i.e., Chapter 16) states that "[i]f the total combined whole person impairment does not seem to adequately reflect the actual extent of alteration in the individual's ability to perform activities of daily living, this should be noted (*id*., § 16.1b, at p. 435). Applicant's petition then argued that the AMA Guides consistently states it is but a guide, which requires the evaluating physician to exercise clinical judgment, and that ultimately the AMA Guides always defers to the evaluator's clinical judgment. Accordingly, applicant asserted that because a 15% WPI per upper extremity was found to be appropriate by the AME through the exercise of his clinical judgment, then applicant should be found to have 39% permanent disability, after adjustment for age and occupation, in accordance with the rater's statement at her cross-examination.

Defendant filed an answer to applicant's petition. Moreover, the WCJ prepared a report recommending that his decision be affirmed. The WCJ stated that applicant "has produced a great many quotes" from the AMA Guides suggesting that "the Guides permit[s] a physician to bypass the diagnosis and measurement portions of the [G]uides, form an independent judgment as to the loss of ADL's, and arrive at a rating based on that judgment." The WCJ characterized these quotations as "advocacy, not evidence, albeit skillful advocacy." The WCJ said, however, that the rater offered her expert opinion that the AMA Guides does not sanction Dr. Feinberg's alternative method of rating impairment. Accordingly, the WCJ concluded it would be an abuse of discretion not to follow the rater's expert opinion evidence.

On December 12, 2008, we granted reconsideration.

II. DISCUSSION

One of the benefits available to an injured employee is compensation for permanent disability. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565, 571] (*Brodie*).) An injured employee's right to permanent disability compensation, if any, arises when his or her condition becomes permanent and stationary. (*Dept. of Rehabilitation v. Workers' Comp. Appeals Bd.* (*Lauher*) (2003) 30 Cal.4th 1281, 1292 [68 Cal.Comp.Cases 831, 837] (*Lauher*).) A disability is considered permanent if the employee has reached maximum medical improvement or his or her condition has been stationary for a reasonable period of time. (*Id*.; see also Cal. Code Regs., tit. 8, § 10152.)

In its recent decision in *Brodie*, the Supreme Court discussed 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).)[6]

Keeping these principles in mind, we turn to the provisions of section 4660.

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[6] See also, e.g., *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 479] ("Permanent disability indemnity has a dual function: to compensate both for actual incapacity to work and for physical impairment of the worker's body, which may or may not be incapacitating"); *Kopitske v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 623, 632 [64 Cal.Comp.Cases 972, 977] ("PD compensates for residual handicap and/or impairment of function after maximum recovery has been attained and also serves 'to assist the injured worker in his adjustment in returning to the labor market.' ").)

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A. A Brief History Of Labor Code Section 4660.

Beginning when the first mandatory Workers' Compensation Act was enacted in 1917, through the Act's first codification in 1937, and on until 2004, section 4660(a) and its predecessors provided: "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market."[7] From 1937, when section 4660 first mandated the adoption of a Permanent Disability Schedule, and until 2004, section 4660 set forth no guiding principles regarding the formulation of the Schedule beyond the language of section 4660(a); however, section 4660 consistently provided that the Schedule constituted "prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule."

In 2004, Senate Bill 899 (SB 899) substantially amended section 4660.[8] Section 4660(a) now provides, "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity." Moreover, as pertinent here, new section 4660(b)(1) provides, "For purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measures of physical impairments in the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)." Further, amended section 4660(d) provides, "The schedule shall promote consistency, uniformity, and objectivity." However, SB 899 did *not* amend the language of section 4660 which provides that the Schedule "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." (Lab. Code,

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7 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.

8 Stats. 2004, ch. 34, § 32.

§ 4660(c) [formerly, § 4660(b)].)

The amendments to section 4660 directed that "[o]n or before January 1, 2005, the administrative director [(AD)] shall adopt regulations to implement the changes made to this section by th[is] act … ." (Lab. Code, § 4660(e).) Accordingly, by regulation, the AD adopted the new Schedule, which became effective on January 1, 2005. (See Cal. Code Regs., tit. 8, § 9805.) The AD's Schedule adopted and incorporated the AMA Guides by reference. (*Id*.; see also 2005 Schedule, at pp. 1-3–1-5, 1-11–1-12.)

B. The 2005 Schedule Is Rebuttable.

As discussed in our en banc decisions in *Costa I* (71 Cal.Comp.Cases at p. 1817) and *Costa II* (72 Cal.Comp.Cases at p. 1496),[9] while SB 899 made "sweeping changes" to section 4660, one of the few aspects of section 4660 that SB 899 did not change is that the new Schedule is "prima facie evidence of the percentage of permanent disability." (Lab. Code, § 4660(c).) This provision has been part of section 4660 since it was first codified in 1937. (Stats. 1937, ch. 90, p. 283; see *Liberty Mutual Ins. Co. v. Industrial Acc. Com*. (*Serafin*) (1948) 33 Cal.2d 89, 93 [13 Cal.Comp.Cases 267, 270] (*Serafin*).) Because the new Schedule is prima facie evidence of an injured employee's percentage of permanent disability, the Schedule may be rebutted. (*Costa I*, 71 Cal.Comp.Cases at pp. 1817-1819; *Costa II*, 72 Cal.Comp.Cases at pp. 1496-1497.)

This principle is reflected in a number of cases.

For example, in *Universal Studios, Inc. v. Workers' Comp. Appeals Bd*. (*Lewis*) (1979) 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133] (*Lewis*), the Court of Appeal stated, in relevant part:

> "It is no answer … to say that the ratings schedules … cannot be questioned. The [cases cited] fully controvert any such 'hands-off' attitude toward the schedule or the presumptions used to create the schedule … [¶¶] … [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." (*Lewis*, at pp. 657, 662-663 [44 Cal.Comp.Cases at pp. 1138, 1143].)

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[9] All references to "*Costa I*" are to *Costa v. Hardy Diagnostics* (2006) 71 Cal.Comp.Cases 1797 (Appeals Board en banc). All references to "*Costa II*" are to *Costa v. Hardy Diagnostics* (2007) 72 Cal.Comp.Cases 1492 (Appeals Board en banc).

Similarly, in *Glass v. Workers' Comp. Appeals Bd*. (1980) 105 Cal.App.3d 297, 307 [45 Cal.Comp.Cases 441, 449] (*Glass*), the Court of Appeal said: "The Board may not rely upon alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award which accurately reflects his true disability. … While the Rating Schedule is prima facie evidence of the proper disability rating, it may be controverted and overcome." (*Glass*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449]; see also *Luchini v. Workmen's Comp. Appeals Bd.* (1970) 7 Cal.App.3d 141, 146 [35 Cal.Comp.Cases 205, 209] (*Luchini*) ("the board cannot rely on some administrative procedure [(i.e., the Schedule)] to deny to petitioner a disability award commensurate with the disability that he has suffered"); *Young v. Industrial Acc. Com*. (1940) 38 Cal.App.2d 250, 255 [5 Cal.Comp.Cases 67, 70] ("[i]t is apparent … from the … provisions of the Labor Code and the schedule itself, that it was not intended that it should be applied in a case … where it did not even approximately cover the disability involved").)

Therefore, although the 2005 Schedule is prima facie correct in the absence of contrary evidence, a party may present evidence to overcome it. (See Lab. Code, §§ 3202.5, 5705.) In this regard, our Supreme Court said long ago, "prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. It may, however, be contradicted, and other evidence is always admissible for that purpose." (*Vaca Valley & Clear Lake Railroad v. Mansfield* (1890) 84 Cal. 560, 566 (*Mansfield*); accord: *In re Raymond G.* (1991) 230 Cal.App.3d 964, 972 (*Raymond G.*); see also, Evid. Code, § 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.").)

C. The AMA Guides Portion Of The 2005 Schedule Is Rebuttable.

In accordance with the discussion above, we specifically conclude that the AMA Guides portion of the 2005 Schedule is rebuttable. Nothing in section 4660 suggests otherwise.

Once again, section 4660(c) still provides that the Schedule is "prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." Because section 4660(c) still provides that the Schedule is rebuttable, then no portion of it –

including the AMA Guides portion – is conclusive. Any contrary interpretation would nullify, at least in part, the language of section 4660(c). Moreover, had the Legislature intended that the AMA Guides portion of the Schedule be unrebuttable, it could have expressly so stated. It did not.

Further, although section 4660(b)(1) states that "[f]or purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of [the AMA Guides]," section 4660(a) also states that "[i]n determining the percentages of permanent disability, *account shall be taken* of the nature of the physical injury or disfigurement … ." (Emphasis added.) Therefore, section 4660(a) requires *consideration* of the AMA Guides. It does not make the AMA Guides determinative in assessing an injured employee's impairment.

We are aware that when SB 899 amended section 4660, the Legislature provided that "[t]he schedule shall promote consistency, uniformity, and objectivity." (Lab. Code, § 4660(d).) Nevertheless, we do not believe that in enacting this provision the Legislature intended to preclude an injured employee – or an employer – from rebutting the AMA Guides portion of the 2005 Schedule. When the Legislature enacts or amends a statute, it is presumed it is "aware of judicial decisions already in existence, and to have enacted or amended [the] statute in light thereof." (*People v. Giordano* (2007) 42 Cal.4th 644, 659 [internal citations and quotation marks omitted]; see also *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42, 45] (*Fuentes*).) Similarly, when the Legislature enacts or amends a statute, it is presumed that the Legislature does not intend to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied. (*Brodie*, 40 Cal.4th at p. 1325 [72 Cal.Comp.Cases at p. 574]; *Fuentes*, 16 Cal.3d at p. 7 [41 Cal.Comp.Cases at p. 45].) Therefore, when the Legislature amended section 4660 to provide that the Schedule "shall promote consistency, uniformity, and objectivity" (Lab. Code, § 4660(d)), but at the same time did *not* alter the provision first enacted in 1939 that the Schedule is "prima facie evidence" (Lab. Code, § 4660(c)), we must assume the Legislature was aware of the long-established case law that an injured employee can rebut the Schedule by showing that his or her disability is actually higher than what the Schedule would provide (e.g., *Glass*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449]) and, conversely,

that an employer can rebut the Schedule by showing that the employee's disability is actually lower (e.g., *Lewis*, 99 Cal.App.3d at pp. 657, 658-659, 662-663 [44 Cal.Comp.Cases at pp. 1138, 1139-1140, 1143]).

Accordingly, we conclude that the AMA Guides portion of the 2005 Schedule is rebuttable and not conclusive.

As will be seen, this conclusion is consistent with the language of the AMA Guides itself. It is also consistent with the decisional law of other states regarding the AMA Guides.

1. The AMA Guides Itself Recognizes Its Limitations, Indicates That It Should Not Necessarily Be The Sole Determinant Of Work Impairment, And Allows Other Factors To Be Considered.

The AMA Guides explicitly recognizes it has inherent limitations in assessing occupational impairment. Accordingly, the language of the AMA Guides establishes that, at least in some cases, it cannot be the only or ultimate determinant of industrially-caused impairment.

a. The AMA Guides Does Not Measure *Work* Impairment.

The AMA Guides expressly acknowledges that its whole person impairment ratings estimate the impact of an injury or condition on the individual's overall ability to perform activities of daily living, *excluding work*. Specifically, the AMA Guides states:

> "Impairment percentages or ratings … reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The whole person impairment percentages listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work*, as listed in Table 1-2." (AMA Guides, § 1.2a, at p. 4 (italics in original).)

And:

> "The *Guides* is not intended to be used for direct estimates of work disability. Impairment percentages derived according to the *Guides* criteria do not measure work disability. Therefore, it is inappropriate to use the *Guides'* criteria or ratings to make direct estimates of work disability." (AMA Guides, § 1.2b, at p. 9.)

And:

> "Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work." (AMA Guides, § 1.8, at p. 13.)

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

Because the "whole person impairment percentages listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding* work" (AMA Guides' emphasis), and because many of the ADLs addressed by the AMA Guides have limited or no bearing on work activities, the AMA Guides itself recognizes that, at least in some cases, it is appropriate to depart from an industrial impairment rating based strictly upon the Guides.

b. The AMA Guides Recognizes That It Is Merely A First Step For Measuring Work Impairment; Therefore, Factors Outside The Guides May Be Considered, Including The Impact Of The Injury On The Employee's Ability To Perform Work Activities.

Because the AMA Guides does not actually measure work impairment, the AMA Guides also indicates it is but a component or tool for assessing such impairment. Accordingly, the

Guides provides that when making a work impairment assessment, it is appropriate in some cases for a physician to consider factors outside the Guides, including the injured employee's ability to perform work and his or her need for work restrictions or accommodations.

Preliminarily, the AMA Guides states:

> "As previously stated, the *Guides* is not to be used for direct financial awards nor as the sole measure of disability. The Guides provides a standard medical assessment for impairment determination and may be used as a *component* in disability assessment." (AMA Guides, § 1.7, at p. 12 (emphasis added).)

Further, the AMA Guides states:

> "The *Guides* is a tool for evaluation of permanent impairment. [¶] Impairment percentages derived from the *Guides* criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary *first step* for determining disability." (*Id*., § 1.8, at p. 13 (italics in original).)

In addition to recognizing that it is but a first step in any occupational disability determination, the AMA Guides also makes it clear that a physician may consider factors outside the four corners of the Guides. That is, the AMA Guides recites:

> "[I]mpairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment." (*Id*., § 1.2a, at p. 5.)

And:

> "The impairment evaluation … is only one aspect of disability determination. A disability determination also includes information about the individual's skills, education, job history, adaptability, age, and environment requirements and modifications. Assessing these factors can provide a more realistic picture of the effects of the impairment on the ability to perform complex work … activities." (*Id*., § 1.2b, at p. 8.)

And:

> "Physicians with the appropriate skills, training, and knowledge may address some of the implications of the medical impairment toward work disability and future employment. … [¶] [In some] cases … the physician is requested to make a broad judgment regarding an individual's ability to return to any job in his or her field. A decision of this scope usually requires input from medical and nonmedical experts, such as vocational specialists … ." (*Id*., § 1.9, at pp. 13-14.)

And:

> "A complete impairment evaluation provides valuable information beyond an impairment percentage … . Combining the medical and nonmedical information, and including detailed information about essential work activities if requested, is a basis for improved understanding of the degree to which the impairment may affect the individual's work ability." (*Id*., § 1.12, at p. 15.)

And:

> "In some cases, physicians may be asked to assess the medical impairment's impact on the individual's ability to work. In the [such a] case, physicians need to understand the essential functions of the occupation and specific job, as well as how the medical condition interacts with the occupational demands. In many cases, the physician may need to obtain additional expertise to define functional abilities and limitations, as well as vocational demands." (*Id*., § 2.2, at p. 18.)

Finally, the AMA Guides states that when a physician's report discusses his or her "impairment rating criteria," the physician should:

> "Describe the residual function and the impact of the medical impairment(s) on the ability to perform activities of daily living *and, if requested, complex activities such as work*. … [¶] *If requested, the physician may need to analyze different job tasks to determine if an individual has the residual function to perform that complex activity. The physician should also identify any medical consequence of performing a complex activity such as work.* [¶] *Explain* any conclusion about the need for restrictions or accommodations for standard activities of daily living *or complex activities such as work*." (*Id*., §§ 2.6a.8, 2.6a.9, at p. 22 (italics in original).)

Thus, the AMA Guides recognizes that an injured employee's impairment assessment is not necessarily limited to an evaluation of an injured employee's "anatomic loss" (damage to an organ

system or body structure) or "functional loss" (a change in function for an organ system or body structure) (see AMA Guides, § 1.2a, at p. 4) via the framework of the Guides' various chapters. Instead, a physician may assess how the industrial injury will affect the employee's ability to return to his or her job. Further, with respect to the broader job market, other evidence may be appropriate – specifically including the expert opinion of "vocational specialists." (*Id*., § 1.9, at p. 14; see also § 2.6a.4, at p. 21 ("pertinent diagnostic studies … may include rehabilitation evaluations …").)

c. The AMA Guides Allow An Evaluating Physician, Through The Exercise Of His Or Her Judgment, To Modify An Impairment Rating.

The AMA Guides highlights that the role of an evaluating physician is not simply to take a few objective measurements and then mechanically and uncritically assign a whole person impairment rating. Instead, the AMA Guides calls for the evaluating physician to draw on his or her judgment and experience in reaching a determination regarding impairment. For example, the AMA Guides state:

> "A physician can often assess a person's ability to perform ADLs based on knowledge of the patient's medical condition and clinical judgment." (AMA Guides, § 1.2a, at p. 5.)

And:

> "An individual can have a disability in performing a specific work activity but not have a disability in any other social role. Physicians have the education and training to evaluate a person's health status and determine the presence or absence of an impairment. If the physician has the expertise and is well acquainted with the individual's activities and needs, the physician may also express an opinion about the presence or absence of a specific disability. For example, an occupational medicine physician who understands the job requirements in a particular workplace can provide insights on how the impairment could contribute to a workplace disability." (*Id*., § 1.2b, at p. 8.)

And:

> "The physician's role in performing an impairment evaluation is to provide an independent, unbiased assessment of the individual's medical condition, including its effect on function, and identify

> abilities and limitations to performing activities of daily living … . Performing an impairment evaluation requires considerable medical expertise and judgment." (*Id*., § 2.3, at p. 18.)

And:

> "The physician must use the entire range of clinical skill and judgment when assessing whether or not the measurements or tests results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the physician may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing." (*Id*., § 2.5c, at p.19.)

And:

> "In situations where impairment ratings are not provided, the *Guides* suggests that physicians use clinical judgment, comparing measurable impairment resulting from the unlisted condition to measureable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living. [¶] The physician's judgment, based upon experience, training, skill, thoroughness in clinical evaluation, and ability to apply the *Guides* criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment." (*Id*., § 1.5, at p. 11.)

d. The AMA Guides Acknowledges Its Inherent Limitations.

The AMA Guides recognizes that it is not all-encompassing. The Guides specifically acknowledges that it "cannot provide an impairment rating for all impairments" and that "some medical syndromes are poorly understood." (AMA Guides, § 1.5, at p. 11.) Further, while the AMA Guides takes subjective complaints into consideration to some extent, such complaints generally are not given separate impairment ratings, even though "[t]he *Guides* does not deny the existence or importance of these subjective complaints to the individual or their functional impact." (*Id*.)[10] Also, the AMA Guides states that its impairment ratings are merely "consensus-

[10] In *Sutton v. Quality Furniture Co*. (1989) 191 Ga.App. 279 [381 S.E.2d 389], the Georgia Court of Appeal concluded that, under former Georgia Code section 34-9-1(5), an injured employee with pain-causing chronic tendinitis was entitled to a permanent disability award even though there was no ratable disability under the AMA Guides. At trial, the employee submitted in evidence a letter from the AMA's Director explaining that the "[G]uides' near silence on pain is not due to failure to recogniz[e] pain as a potentially chronically impairing condition, but due to our inabilities to agree upon methods of evaluating or measuring pain." (191 Ga.App. at p. 280.)

derived estimates" (*id*., § 1.2a, p. 4) and that "there are limited data to support some of the … impairment percentages." (*Id*., § 1.2a, p. 5; see also § 1.5, at p. 10 ("[t]he *Guides* uses objective and scientifically based data when available ... . When objective data have not been identified, estimates of the degree of impairment are used, based on clinical experience and consensus.").) Finally, although the AMA Guides states that future research will be used "to improve the *Guides*' reliability and validity," the Guides concedes that "[r]esearch is limited on the reproducibility and validity of the *Guides*." (*Id*., § 1.5, at p. 10.)

Accordingly, for all the reasons outlined in Section C-1 above, the AMA Guides cannot always be the ultimate determinant of industrially-caused impairment.

2. The Case Law Of Other Jurisdictions Recognizes That The AMA Guides Need Not Always Be Followed.

Because the application of the AMA Guides to industrial injuries is new in California, we will consider the law of other jurisdictions that have used the Guides for some time. While not binding authority, the case law of other states can be persuasive and instructive. (*Lebrilla v. Farmers Group, Inc*. (2004) 119 Cal.App.4th 1070, 1077.) Indeed, where there is no California case law directly on point, the opinions of other jurisdictions involving similar statutes and similar factual situations "are of great value." (*Martinez v. Enterprise Rent-A-Car Co*. (2004) 119 Cal.App.4th 46, 55.) California appellate courts will consider the case law of other jurisdictions, including when construing workers' compensation laws. (E.g., *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 352 [54 Cal. Comp. Cases 80, 87].)

Our conclusion that the AMA Guides cannot always be the only basis for arriving at an impairment rating is consistent with the decisional law of other states that both: (1) utilize or formerly utilized a version of the AMA Guides for rating permanent impairments, as mandated by either statute or regulation; *and* (2) have a significant body of appellate court opinions that suggest circumstances under which the AMA Guides may be departed from, at least to some extent.[11]

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[11] As of the 2001 publication date of its Fifth edition, the AMA Guides said that approximately 40 states were using it in some manner to rate occupationally-caused permanent disability. (AMA Guides, § 1.7, at p. 12.) However, some states strictly adhere to the AMA Guides and do not allow them to be rebutted under any circumstances. Because

a. Arizona AMA Guides Cases.

Arizona has been using the AMA Guides for over three decades. Currently, its law provides that a "physician should rate the percentage of impairment using the standards for the evaluation of permanent impairment as published by the most recent edition of the [AMA Guides], if applicable." (Ariz. Admin. Code R20-5-113(B)(1) [formerly known as R4-13-113(D) or "Rule 13(d)"].) After issuing a series of opinions regarding the AMA Guides (see *Adams v. Industrial Commission* (Ariz. 1976) 113 Ariz. 294 [552 P.2d 764] (*Adams*); *Smith v. Industrial Commission* (Ariz. 1976) 113 Ariz. 304 [552 P.2d 1198] (*Smith*); *Gomez v. Industrial Commission* (Ariz. 1985) 148 Ariz. 575 [716 P.2d 32] (*Gomez*); *W.A. Krueger Co. v. Industrial Commission* (*Puma*) (Ariz. 1986) 150 Ariz. 66 [722 P.2d 234] (*Puma*)), the Arizona Supreme Court summed up its approach to the Guides in *Slover Masonry, Inc. v. Industrial Commission* (*Williamson*) (1988) 158 Ariz. 131 [761 P.2d 1035] (*Williamson*), where it stated, in relevant part:

> "… Although the AMA Guides are important in the disability rating, they are not the philosopher's stone:
>
> > 'When they are applicable and "truly reflect the claimant's loss", [the AMA Guides] may be used as the sole indicator or factor to be considered in fixing the percentage of impaired function. *Adams ...,* 113 Ariz. at 295 … . Where the ALJ finds that the Guides do not provide a fair, accurate measure of the degree of impairment, he or she *must* turn to other factors. *Id. Any relevant factors ... may be considered.* Effect on job performance is one such factor. ... Evidence regarding such factors may come from experts, from the literature, lay witnesses or any other competent source that would assist the ALJ in determining the actual percentage of partial loss of use. Use of these factors fulfills the statutory mandate [to accurately determine the percentage of loss of use].'

California law provides that its permanent disability schedule may be rebutted, the case law of those states is not useful to our discussion. Moreover, other states have little or no published case law addressing when or how it may be appropriate to depart from or go beyond the AMA Guides. Accordingly, the law of these states will not be directly discussed.

> *Gomez,* 148 Ariz. at 569 … (emphasis added) [Court's emphasis].
>
> "Indeed, non-medical factors may be vital when assessing a disability, despite the AMA Guides. [Citation omitted.] In fact, sometimes the AMA Guides do not apply. [Citations omitted.] Therefore, when other evidence requires a different result, a medical expert cannot bind the ALJ to unreasoning adherence to the AMA Guides.
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> ***
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> "Here, the court of appeals' opinion implies that the ALJ must follow the AMA Guides unless a medical expert determines that they are inadequate. [Citation omitted.] We disagree. The ALJ must consider all competent and relevant evidence in establishing an accurate rating of functional impairment, even if a medical expert asserts that the AMA Guides are perfectly adequate to measure loss ...
>
> "The AMA Guides are only a tool adopted by administrative regulation to assist in ascertaining an injured worker's percentage of disability. Thus, when the AMA Guides do not truly reflect a claimant's loss, the ALJ must use his discretion to hear additional evidence and, from the whole record, establish a rating independent of the AMA recommendations. … If an injury has resulted in a functional impairment not adequately reflected by clinical measurement under the AMA Guides, then an ALJ must consider impact on job performance ..." (*Williamson*, 158 Ariz. at pp. 135-137.)

Thus, in *Williamson*, the Arizona Supreme Court vacated the opinion of the Court of Appeals and reinstated the award of an administrative law judge (ALJ) of the Arizona Industrial Commission. The ALJ had found that a hod carrier's fractured tibial condyle of the right knee caused a 70% impairment, even though the AMA Guides called for a 50% impairment. This increased impairment rating was predicated on the facts that: (1) the applicant testified he could not perform seventy-eight percent of his job; (2) the evaluating physician "made it clear that the AMA Guides did not actually measure ability to perform a specific job or occupation," he agreed with the applicant's assessment of which job functions he could no longer perform, and he concluded that "the working disability the applicant suffers is not totally covered by the Guides"; and (3) a labor

market consultant confirmed that employee's injury disabled him from performing sixty-five percent of a hod carrier's job.[12]

Arizona's lower appellate courts have similarly recognized that the AMA Guides, in effect, are rebuttable, i.e., that the Guides do *not* foreclose any other evidence of – or means for assessing – permanent impairment.

For example, in *Hunter v. Industrial Commission* (Ariz.App. 1981) 130 Ariz. 59 [633 P.2d 1052] (*Hunter*), a meat wrapper developed bronchial hypersensitivity (meat wrapper's asthma) as a result of exposure to polyvinyl chloride (PVC) fumes from plastic used to wrap the meat. The two reporting physicians agreed that her bronchial hypersensitivity was not ratable under the AMA Guides; however, they also agreed that her pulmonary condition permanently precluded her from any employment that would expose her to PVC or other lung irritants. Citing to the Arizona Supreme Court's opinions in *Adams* and *Smith*, the Court of Appeals stated, "[T]he AMA guides apply only to the extent that they cover the specific impairment and the percentage thereof. [Cites.] Since both doctors testified that petitioner's industrially-caused hypersensitivity permanently precludes her for returning to work as a meat wrapper, we find that petitioner has met her burden of proving a permanent functional impairment causally related to her employment. Accordingly, she is entitled to proceed to a hearing to determine whether her impairment has caused a loss of earning capacity. … [¶¶] … [T]he award finding no permanent impairment was in error."

Later, in *Cassey v. Industrial Commission* (Ariz.App. 1987) 152 Ariz. 280 [731 P.2d 645] (*Cassey*), a delivery truck driver suffered a chronic thoracolumbar sprain as the result of a lifting incident. One physician concluded that the employee could not return to work because of his chronic muscular pain. This physician stated, however, that the AMA Guides does not cover a

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12 The Arizona Supreme Court, however, has emphasized that factors other than the AMA Guides – such as the effect of an injury on a worker's ability to perform his or her job – should be considered only when the AMA Guides does *not* provide a fair and accurate measure of the degree of an injured employee's impairment. (*Gomez*, 148 Ariz. 565.) In *Gomez*, the employee suffered a left knee injury that ultimately required two surgeries. All of the evaluating physicians agreed he could not return to his work as a truck driver, which required him to lift heavy weights and to extensively climb and bend. Nevertheless, because all of the doctors also agreed that a 30% impairment rating under the AMA Guides provided an accurate measure of the degree of the employee's impairment, the Court accepted the ALJ's 30% finding and rejected the employee's claim of 100% impairment.

chronic sprain. He further stated that since the employee has no evidence of neurological impairment and has full range of motion, the AMA Guides then in effect was inapplicable. Another physician agreed. In rejecting the ALJ's finding of no permanent impairment, the Arizona Court of Appeals began by citing to the principles set forth in earlier Arizona Supreme Court decisions that the AMA Guides is "not to be blindly applied regardless of a claimant's actual physical condition;" that the AMA Guides is "only a valid guideline where the stated percentage [of impairment] 'truly reflects the claimant's loss' "; that where the AMA Guides is inapplicable, the ALJ "must use other factors to determine the degree of impairment"; and that when the AMA Guides does "not accurately assess a claimant's impairment because no objective observations are available, 'sound clinical judgment' must be substituted in evaluating permanent impairment." (*Cassey*, 152 Ariz. at pp. 281-282.) The Arizona Court of Appeals then said:

> "The assessment of the effects of a permanent impairment on earning capacity is accomplished through a bifurcated procedure. First, claimant must establish the existence and degree of a permanent impairment; second, claimant must establish that the impairment diminishes his earning capacity. [Citation.] Normally, the degree of the impairment can be assessed independently of its resulting loss of earning capacity. Impairment is usually a question of medical fact, while loss of earning capacity is a question of law. [Citation.] In some cases, however, the claimant must establish the disabling effect of the industrial injury in order to establish a permanent impairment. … During the first stage, the claimant meets his burden of proof … if he shows that [there is impairment] caused by his industrial injury and [that] results in his permanent inability to return to his former work. [Citation.] Once this initial burden has been met, claimant is then entitled to go through the second stage, during which he must show that the [impairment] resulted in lost earning capacity. The claimant cannot be barred from proceeding to this second stage by his failure to provide [an AMA Guides] rating of impairment when none is applicable.
>
> "In this case, claimant met his burden of showing a permanent impairment. [A]lthough] [b]oth medical experts testified that the impairment was not ratable under the Guides … [t]he judge found that the claimant had a permanent industrial related condition that prevents him from returning to work. Having found the foregoing to be true, it was error for the judge to conclude that claimant had suffered no permanent impairment." (*Cassey*, 152 Ariz. at p. 283.)

A similar result was reached in *Benafield v. Industrial Commission* (Ariz.App. 1998) 193 Ariz. 531 [975 P.2d 121], where a secretary suffered bilateral carpal tunnel syndrome resulting in surgery on both wrists. Although it was undisputed that, after the surgeries, the employee had no permanent impairment under the AMA Guides, the treating orthopedic surgeon observed that she had residual pain and opined that she had "permanent work restrictions which include no lifting of more than 20 lbs. and no repetitive use of her hands." The physician also concluded that these restrictions would preclude the employee from returning to her secretarial job, stating "I do not believe that she is going to be able to sit at a keyboard and do data entry or typing." Nevertheless, the ALJ did not allow the treating orthopedic surgeon's testimony regarding the employee's work limitations because the parties agreed he would state there was no ratable impairment under the AMA Guides. The Arizona Court of Appeals reversed, citing to principles established in *Cassey* and other cases.

The Arizona appellate courts, however, have concluded not only that the AMA Guides need not be followed in cases where to do so would result in an inequitably low impairment rating, but also where the resulting rating would be inequitably high. In *Puma*, the employee sustained an industrial neck injury and, eventually, had a discectomy to decompress the left C-7 nerve. This surgery constituted ratable impairment under the AMA Guides then in effect. Nevertheless, all post-surgical objective tests were normal. Further, surveillance films showed the employee performing a variety of physical activities without any apparent difficulty – even though, when evaluated following the surgery, he complained of severe neck pain and, during his examination, "he would barely move his head in any direction at all; just minimal movement to the right and to the left." After viewing the films, two surgeons found 0% impairment, notwithstanding the AMA Guides. In affirming the ALJ's 0% permanent disability finding, the Arizona Supreme Court said:

> "The AMA Guides are not to be blindly applied regardless of a claimant's actual physical condition. Rather, their purpose is to serve as a *guideline* in rating an impairment and are valid when the stated percentage 'truly reflects the claimant's loss.' Where however, the evidence establishes that the Guides do not 'truly

> reflect the claimant's loss' or where the medical evidence is in conflict, the ALJ may use his discretion and make findings independent of the Guides' recommendations." (*Puma*, 150 Ariz. at pp. 67-68 [Court's emphasis; internal citations omitted].)

b. Florida AMA Guides Cases.

Florida no longer uses the AMA Guides per se.[13] Prior to 1990, however, Florida law provided, in relevant part:

> "In order to reduce litigation and establish more certainty and uniformity in the rating of permanent impairment, the [Division of Workers' Compensation (DWC)] shall establish and use a schedule for determining the existence and degree of permanent impairment based upon medically or scientifically demonstrable findings. The schedule shall be based on generally accepted medical standards for determining impairment and may incorporate all or part of any one or more generally accepted schedules used for such purpose, such as the [AMA Guides]. … [P]ending the [DWC's] adoption, by rule, of a permanent schedule, [the AMA Guides] shall be the temporary schedule and shall be used for purposes hereof." (Fla. Stats. 1979, ch. 79-312, § 8 [repealed Fla. Stats. 1990, ch. 90-201, § 20, eff. July 1, 1990.)

For the most part, early Florida appellate court decisions interpreted this statutory language to mean that, until the DWC adopted a permanent version of a permanent disability schedule, the AMA Guides "shall be used" as the sole and exclusive determinant of permanent impairment. (E.g., *Decor Painting v. Rohn* (Fla.App. 1981) 401 So.2d 899; *Mathis v. Kelly Const. Co*. (Fla.App. 1982) 417 So.2d 740; *Racz v. Chennault, Inc*. (Fla.App. 1982) 418 So.2d 413; *Morrison & Knudsen/American Bridge Div. v. Scott* (Fla.App. 1982) 423 So.2d 463; *Paradise Fruit Co. v. Floyd* (Fla.App. 1982) 425 So.2d 9.) Nevertheless, as time went by, and the DWC failed to adopt a permanent schedule, the Florida appellate courts became more and more frustrated both with that failure and with inherent limitations in the AMA Guides.

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13 In 1990, the Florida Legislature amended its permanent disability law to require the establishment of a permanent disability schedule that, although it may be based on "systems and criteria set forth in the [AMA] Guides …," it nevertheless "shall expand the areas already addressed and address additional areas not currently contained in the guides." (Fla. Stats., § 440.15(3)(b); see generally *Injured Workers Ass'n of Florida v. Dept. of Labor and Employment Security* (Fla.App. 1994) 630 So.2d 1189, 1190 -1191.)

Thus, for example, Florida's Court of Appeal, First District, issued an en banc opinion – signed by twelve Justices – in *Trindade v. Abbey Road Beef 'N Booze* (Fla.App. 1983) 443 So.2d 1007 (*Trindade*). In *Trindade*, the employee's knee injury was rated based on the "American Academy of Orthopedic Surgery Guides" [sic], i.e., *not* the AMA Guides.[14] This was because the AMA Guides dealt only with loss of range of motion and, here, the knee instability was due to excessive range of motion. In affirming this departure from the AMA Guides, the en banc Court of Appeal stated that it was "reced[ing]" from its prior three-Justice opinions which had held that the AMA Guides must be the exclusive measure of impairment. (*Trindade*, 443 So.2d at p. 1012.) In reaching this conclusion, the en banc Court said, in relevant part:

> "More than four years have now passed since the legislature imposed upon the Division the duty of establishing such a comprehensive guide, and mandated the use of the AMA *Guides* as a temporary schedule. In the meantime, it has become increasingly difficult (as attested by the opinions of this court reflecting the actual experience of the litigants, their counsel, and the deputy commissioners) to reconcile the limited scope and coverage of the *Guides* with the broader command of Chapter 440 itself, which has as its fundamental purpose the compensation (as well as rehabilitation) of injured workers. [Footnote omitted.]
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> ***
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> "If our former approach as indicated in *Mathis* and other cases was justified by the 'temporary' status given to the *Guides* by the legislative enactment, it no longer is …
>
> "It may be observed that our experience in trying to formulate a standard based on the 'covered' or 'not covered' dichotomy for determining when the *Guides* permit a finding of permanent impairment, and when they do not, offers little hope for a workable solution. One fundamental reason for this is that the *Guides* apparently were never intended to be used in this manner. Thus, it is unrealistic for us to find that certain types of 'injuries' are 'not covered' by the *Guides* (and therefore other medical standards can be used) when, in actuality, the *Guides* (Chapter I particularly) do not generally speak in terms of 'injuries,' to the body and its

14 The *Manual for Orthopaedic Surgeons in Evaluating Permanent Physical Impairment* (1st Ed. 1965) of the American Academy of Orthopaedic Surgeons is no longer in print. However, the laws of some states still refer to it. (E.g., Alaska Admin. Code, tit. 8, § 45.122(b); Haw. Admin. Rules 10-12-21(a).)

> extremities but speak primarily in terms of the consequences or results of injury. …
>
> ***
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> "… [A]s a practical matter, over four years of experience have shown the futility of attempting to view the *Guides* as a comprehensive, all-inclusive schedule of permanent impairments. This valuable treatise, viewed by the Division as the 'best available,' is nevertheless – according to much credible medical testimony reflected in the cases coming before us – incomplete and unsuited to the determination of permanent impairment resulting from certain types of injuries. … The Division apparently agrees with this assessment. Its brief labels it 'an absurdity' to require the use of the *Guides* where the injury is not covered by the *Guides,* and urges also that 'coverage' must not be governed by whether the *Guides* cover 'a particular area of the body,' [footnote omitted] but whether the *Guides* cover conditions created by the injury itself.
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> ***
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> "Finally, but not least importantly, to interpret and apply the statute so as to find one employee – with permanent impairment manifested by restrictions in the range of motion of his body or extremities – eligible for compensation for his loss of earning ability, but to deny such eligibility to another employee – whose non-range of motion permanent impairment has no less effect on his earning ability – would … [not] bear any reasonable relationship to permissible legislative objectives … .
>
> "We therefore hold that … the existence and degree of permanent impairment resulting from injury shall be determined pursuant to the *Guides,* unless such permanent impairment cannot reasonably be determined under the criteria utilized in the *Guides,* in which event such permanent impairment may be established under other generally accepted medical criteria for determining impairment.
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> ***
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> "… The *Guides,* where applicable, shall be used as the primary rating schedule, but shall not be used to deny benefits simply because the *Guides* do not make provision for the conditions causing the impairment." (*Trindade*, 443 So.2d at pp. 1008-1013.)

Subsequently, in *OBS Co., Inc. v. Freeney* (Fla.App. 1985) 475 So.2d 947 (*Freeney*), a journeyman plasterer developed contact dermatitis from exposure to wet cement. The evaluating

physician found that the employee was permanently precluded from contact with wet cement and, therefore, cannot work as a plasterer. Nevertheless, because the employee's condition did not affect his "activities of daily living" within the meaning of the AMA Guides, there was no ratable AMA Guides impairment. Yet, before the injury, the employee made more than minimum wage. After the injury, he only could find jobs paying minimum wage. Notwithstanding the non-ratable impairment under the AMA Guides, the deputy commissioner found permanent impairment and awarded benefits. The First District Court of Appeal affirmed, stating:

> "Claimant clearly suffers from permanent impairment which has resulted in his 'incapacity because of the injury to *earn in the same* or any other employment the wages which the employee was receiving at the time of the injury.' (emphasis added) [Court's emphasis]. Section 440.02(9), Florida Statutes. Due to his skin condition, claimant cannot work in his chosen occupation, where he earned a relatively high salary, and, in all likelihood, is unable to earn an equal wage in other employment without further training. … Under the terms of the Guides, there is no impairment if the injury does not affect the employee's daily living. In the case sub judice, claimant's skin condition does *not* affect his daily living as long as he does not work in his job. Essentially, as long as claimant does nothing, there is no impairment.
>
> "In *Trindade v. Abbey Road Beef 'n Booze,* 443 So.2d 1007, 1011 (Fla. 1st DCA 1983), this court held:
>
> > 'We have the obligation of interpreting a statute in a manner consistent with the legislative intent, to the extent it is ascertainable and can lawfully be implemented … .'
>
> "Accordingly, although the Guides do not award the permanent impairment to claimant's skin condition, we affirm and agree with the deputy that, under the particular factual circumstances at bar, the Guides are not exclusively controlling because the Guides do not address claimant's evident economic loss … . *Trindade* at 1012." (*Freeney*, 475 So.2d at pp. 950-951.)

About two years later, the Florida Supreme Court issued an opinion in *Dayron Corp. v. Morehead* (Fla. 1987) 509 So.2d 930 (*Morehead*). In *Morehead*, a machinist could not continue at his job because he developed contact dermatitis from a new oil-based coolant for his metal-cutting

machinery. A physician testified, however, that the employee would have no impairment if not exposed to the coolant. Nevertheless, the employee testified he could find only limited alternative work, despite his best efforts. In affirming the DWC's award of permanent disability benefits, the Florida Supreme Court began by noting that "the AMA Guides anticipate the possible confusion of the terms 'impairment' and 'disability' which indeed has occurred in this case" and that "[e]ven in their preface, the AMA Guides note that 'impairment' should not be confused with 'disability,' the former being a medical assessment and the latter a legal issue." (*Morehead*, 509 So.2d at p. 931.) The Supreme Court then stated, in relevant part:

> "When an injury is not covered by the AMA Guides, it is permissible to rely upon medical testimony of permanent impairment based upon other generally accepted medical standards. [Citation.] Here, [the employee's] condition is addressed in the AMA Guides, but it is evaluated only in terms of medical impairment without regard to the wage loss which may result from disability. …
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> ***
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> "Economic loss is an indispensable requisite of the wage-loss concept. Therefore, the AMA Guides are inapplicable when, as here, they preclude a finding of permanent impairment where the claimant suffered a disability due to an occupational disease which permanently impairs his ability to work and results in economic loss but does not affect his activities of daily living. ..." (*Morehead*, 509 So.2d at pp. 931-932.)

c. New Hampshire AMA Guides Cases.

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

In *Appeal of Rainville* (N.H. 1999) 143 N.H. 624 [732 A.2d 406] (*Rainville*), a jackhammer operator had been diagnosed with multifocal myofascial pain syndrome after he began experiencing upper body pain, neck pain, tremors, diaphoresis, headaches, anxiety, hoarse voice, and numbness in his arms. The treating physician explained that the nature of the employee's

medical condition rendered his impairment incapable of measurement under the AMA Guides, so he resorted to an alternative method to calculate the employee's impairment. After a hearing, however, the Department of Labor (DOL) hearing officer denied a permanent impairment award. In reversing this denial, the New Hampshire Supreme Court said:

> "[Section] 281-A:32 … mandates that the *AMA Guides* be used to calculate the percent of whole person impair[ment] … [I]t is the statute that governs whether a permanent impairment exists; the *AMA Guides* applies only to the determination of appropriate compensation for a permanent impairment. …
>
> "We note that the *AMA Guides* expressly acknowledges it 'does not and cannot provide answers about every type and degree of impairment' because of the 'infinite variety of human disease,' the constantly evolving field of medicine, and the complex process of human functioning. *See AMA Guides* § 1.3, at 3. Accordingly, the *AMA Guides* advises that a 'physician's judgment and his or her experience, training, skill and thoroughness in examining the patient and applying the findings to *Guides* criteria will be factors in estimating the degree of the patient's impairment.' *Id.* While this estimate 'should be based on current findings and evidence,' *id.* § 2.2, at 8, '[i]f in spite of an observation or test result the medical evidence appears not to be of sufficient weight to verify that an impairment of a certain magnitude exists, the physician should modify the impairment estimate accordingly, describing the modification and explaining the reason for it in writing.' *Id.* The *AMA Guides* expressly allows a physician to deviate from the guidelines if the physician finds it necessary to produce an impairment rating more accurate than the recommended formula can achieve.
>
> "This decision to use alternative methodology must, however, be grounded in adequate clinical information about the patient's medical condition. *See id.* § 1.2, at 3. Additionally, in order to allow a third party to compare reports properly, physicians must use a standard protocol in evaluating and reporting impairment. *See id.* ch. 2 Preface at 7. 'A clear, accurate, and complete report is essential to support a rating of permanent impairment.' *Id.* § 2.4, at 10. Within the report, an evaluating physician is expected to provide a full medical evaluation, analysis of the medical findings with respect to the patient's life activities, and comparison of the results of analysis with the impairment criteria. *See id.*
>
> "Hence, in view of the *AMA Guides*'s own instructions and our liberal construction of [the permanent impairment statute] … , we

> hold that if a physician, exercising competent professional skill and judgment, finds that the recommended procedures in the *AMA Guides* are inapplicable to estimate impairment, the physician may use other methods not otherwise prohibited by the *AMA Guides.* … The reasons for such a deviation must be fully explained and the alternative methodology set forth in sufficient detail so as to allow a proper evaluation of its soundness and accuracy.
>
> "We caution that our decision does not permit physicians or claimants to deviate from procedures simply to achieve a more desirable result. To satisfy the statutory requirements of [section] 281-A:32, IX, a deviation must be justified by competent medical evidence and be consistent with the specific dictates and general purpose of the *AMA Guides*. Whether and to what extent an alternative method is proper, credible, or permissible under the *AMA Guides* are questions of fact to be decided by the board. See *Vaughn*, 824 P.2d at 827 (as trier of fact, agency entitled to rely on expert testimony supporting deviation from *AMA Guides*). We hold only that the board may not disregard a physician's impairment evaluation solely because it deviates from the express recommended methodology of the *AMA Guides.*
>
> ***
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> "On remand, the claimant may present evidence substantiating the calculation of his impairment rating and setting forth the reasons for deviating from the *AMA Guides*." (*Rainville,* 143 N.H. at pp. 631-633.)

Subsequently, in *Appeal of Wal-Mart Stores* (*Hargreaves*) (N.H. 2000) 145 N.H. 635 [765 A.2d 168] (*Hargreaves*), the New Hampshire Supreme Court again addressed a question regarding the application of the AMA Guides. In *Hargreaves*, an employee injured his left shoulder lifting and separating snow blowers. The neurosurgeon who operated on the employee determined that he suffered a 28% permanent impairment. An independent physician retained by the insurance carrier calculated his impairment at 15%. A DOL hearing officer awarded the lesser permanent impairment, and the Compensation Appeals Board reversed. Wal-Mart then appealed, and the Supreme Court said:

> "We reject Wal-Mart's argument that the twenty-eight percent permanent impairment evaluation accepted by the board deviated from the applicable *AMA Guides* and, therefore, should have been rejected. …

> " 'The *AMA Guides* expressly allows a physician to deviate from the guidelines if the physician finds it necessary to produce an impairment rating more accurate than the recommended formula can achieve.' [*Rainville*] at 631-32, … . In this case, there is record evidence to show that deviation from the guidelines was necessary to evaluate accurately the impairment suffered by the respondent." (*Hargreaves,* 145 N.H. at p. 639.)

d. Hawaii AMA Guides Cases.

Hawaii law allows impairment ratings to be based on "guides issued by the American Medical Association, American Academy of Orthopedic Surgeons, and any other such guides which the director deems appropriate and proper … ." (Haw. Admin. Rules, § 12-10-21(a).)

In *Cabatbat v. County of Hawai'i, Dept. of Water Supply* (Haw. 2003) 103 Haw. 1 [78 P.3d 756] (*Cabatbat*), the Hawaii Supreme Court addressed an employee's temporomandibular joint (TMJ) injury. Although it was undisputed that the TMJ injury resulted in 8% impairment under the AMA Guides, the treating dentist and the parties' respective evaluating dentists all found between 18% and 23% impairment using methods other than the AMA Guides, including the Recommended Guide of the American Academy of Head, Neck, Facial Pain and TMJ Orthopedics (now, the American Academy of Craniofacial Pain). Nevertheless, the Labor and Industrial Relations Appeals Board awarded 8% permanent disability, construing Rule 12-10-21 to require the use of the AMA Guides.[15] In reversing the Board's decision, the Hawaii Supreme Court pointed out that the Rule, by its own terms, permits reliance on the AMA Guides, but does not mandate their use to the exclusion of other appropriate guides. It further observed that a restrictive interpretation of the Rule runs afoul of Hawaii's liberal construction mandate. Then, the Court went on to state:

> "The Board also erred in relying solely on the AMA Guides because the AMA Guides themselves instruct that they should not be the only factor considered in assessing impairments. The AMA Guides state that
>
> > [i]t should be understood that the Guides do[] not and cannot provide answers about every type and

15 Although the Fifth Edition of the AMA Guides had been published at the time of the Court's decision, only the Fourth Edition was available to the dentists and the Board.

> degree of impairment.... *The physician's judgment and his or her experience, training, skill, and thoroughness in examining the patient* and applying the findings to *Guides*' criteria *will be factors* in estimating the degree of the patient's impairment.

AMA Guides at 3 (emphases added [Court's emphasis]). Thus, the AMA Guides direct that the physician's judgment is a factor to be considered when determining an impairment rating. ... All three dentists judged the AMA Guides to be inadequate in evaluating TMJ impairments; yet, the Board failed to consider their judgments as factors in determining [claimant's] PPD rating.

"The AMA Guides further emphasize that 'impairment percentages derived according to *Guides* criteria should not be used to make direct financial awards or direct estimates of disabilities.' AMA Guides at 5. [Footnote omitted.] The AMA Guides caution that disability determinations should not be based solely on the Guides; however, the Board relied exclusively upon an impairment rating 'derived according to the Guides criteria,' despite this limiting language. *Id.*

"In [*Hargreaves*], 145 N.H. 635 …, the Supreme Court of New Hampshire held that the compensation appeals board properly deviated from the AMA Guides to accurately evaluate the respondent's impairment. *Id.* at 172. In that case, the court observed that New Hampshire's workers' compensation statute specified that the AMA Guides were to be used in determining permanent impairment. *Id.* However, the court explained that '[t]he *AMA Guides* expressly allow[] a physician to deviate from the guidelines if the physician finds it necessary to produce an impairment rating more accurate than the recommended formula can achieve.' *Id.* (quoting [*Rainville*], 143 N.H. 624 … ('[the AMA Guides] do[] not and cannot provide answers about every type and degree of impairment because of the infinite variety of human disease, and the constantly evolving field of medicine, and the complex process of human functioning' (quoting the AMA Guides, Fourth Edition (1993), at 3)).

"Similarly, in [*Williamson*], 158 Ariz. 131 …, the Arizona Supreme Court held that an administrative law judge (ALJ) is not bound to follow the AMA Guides as the sole measure of impairment. [Citation omitted.] The court reasoned that the "ALJ must consider *all competent and relevant evidence* in establishing an accurate rating of functional impairment, even if a medical expert asserts that the AMA Guides are perfectly adequate to measure loss of motion." [Citation omitted.] (emphasis added [Court's emphasis]). The court acknowledged that

> [t]he AMA Guides are only a tool adopted by administrative regulation to assist in ascertaining an injured worker's percentage of disability. Thus, *where the AMA Guides do not truly reflect a claimant's loss, the ALJ must use his discretion to hear additional evidence and, from the whole record, establish a rating independent of the AMA recommendations. Id.* (emphasis added).

> "According to the AMA Guides and [the three reporting physicians], the Board should not have relied solely upon the AMA Guides to evaluate [the employee's] TMJ injury. Under the circumstances, the AMA Guides would 'not truly reflect' [his] TMJ impairment. *Id.* (*Cabatbat*, 103 Haw. at pp. 8-9.)

In *Duque v. Hilton Hawaiian Village* (Haw. 2004) 105 Haw. 433 [98 P.3d 640] (*Duque*), the issue before the Hawaii Supreme Court was whether the Fifth Edition of the AMA Guides must be used to evaluate impairment, or whether an earlier edition of the AMA Guides could be used instead. On this issue, the Court said:

> "While the most recent edition incorporates the latest scientific knowledge, physicians are not necessarily limited to reliance on the most current edition of the Guides. The Guides itself states that it is not 'the sole measure of disability,' but 'a component in disability assessment.' Guides (5th ed. 2001) … Therefore, in conjunction with the Guides, physicians must be allowed to draw on their medical expertise and judgment to evaluate the numerous factors relating to an individual's impairment rating and to determine which Guides would be most appropriate to apply." (*Duque*, 105 Haw. at pp. 434-435.)

In addition, the Court said:

> "[T]he AMA also recognizes that the Guides are only 'a tool for evaluation of permanent impairment' used by the physician, id. at 13, and 'may be used as a *component in disability assessment*[,]' id. at 12 (emphasis added [Court's emphasis]). It is cautioned that 'the Guides is not to be used for direct financial awards nor as the sole measure of disability.' Id. Rather, 'the impairment evaluation … is only one aspect of disability determination. A disability determination also includes information about the individual's skills, education, job history, adaptability, age, and environment requirements and modifications.' Id. at 8. Accordingly, the AMA recognizes that 'assessing these factors can provide *a more realistic picture of the effects of the impairment* on the ability to

> perform complex work and social activities.' Id. (emphasis added [Court's emphasis]). Hence, in applying the Guides the impairment rating is one factor in a sum of considerations employed in arriving at a disability decision. As emphasized by the Fifth Edition, 'impairment percentages derived from the Guides criteria should not be used as direct estimates of disability.' Id. at 13." (*Duque*, 105 Haw. at p. 439.)

e. New Mexico AMA Guides Cases.

New Mexico law provides that permanent impairment is to be based upon the most recent edition of the AMA Guides or comparable AMA publications. (N.M. Stats., § 52-1-24(A).)

In *Madrid v. St. Joseph Hosp*. (N.M. 1996) 122 N.M. 524 [928 P.2d 250] (*Madrid*), the New Mexico Supreme Court rejected a constitutional challenge to the use of the AMA Guides. In upholding the use of the Guides, the Court relied in part on the fact that, under section 52-1-24(A), "other comparable AMA publications may be utilized to evaluate impairment when the AMA Guide is insufficient." (*Madrid*, 122 N.M. at p. 534 (see also, 122 N.M. at p. 532 ("the statute explicitly allows for reference to other AMA publications").) Moreover, the Court pointed out that "other jurisdictions allow workers' compensation judges to consider generally-accepted standards in awarding workers' compensation benefits when the injury at issue is not covered by the AMA Guide." (122 N.M. at p. 534 [citing to *Morehead* (Fla. 1987) 509 So.2d 930 and *Williamson* (Ariz. 1988) 158 Ariz. 131].) The Court then said:

> "Further, the AMA Guide explicitly provides that it 'does not and cannot provide answers about every type and degree of impairment.' AMA Guide, *supra,* § 1.3. It is a 'guideline to be used in conjunction with the expertise of the medical profession.' *Id.* While the Legislature intended to preclude arbitrary determinations, it did not intend to exclude determinations by medical professionals in situations not covered by the Guide." (*Madrid*, 122 N.M. at p. 534.)

f. South Dakota AMA Guides Cases.

South Dakota law provides, "impairment shall be determined … using the [AMA Guides], fourth edition, June 1993." (S.D. Codified Laws, § 62-1-1.2.)

In *Cantalope v. Veterans of Foreign Wars Club* (S.D. 2004) 674 N.W.2d 329 (*Cantalope*), the South Dakota Supreme Court considered the permanent disability claim of an employee who

had sustained industrial subcutaneous pneumomediastinum, which is a condition in which air ruptures into body tissues. It was undisputed that this condition was not covered by the AMA Guides. In affirming a finding of 10 to 15 percent impairment, the Supreme Court stated:

> "In order to compute the statutory compensation allowed, a claimant must be evaluated and given an impairment rating. Such rating shall be 'expressed as a percentage to the affected body part, using the [AMA] Guides … .['] SDCL 62-1-1.2. There is a disclaimer in the Guides explaining that not all questions can be directly answered because of the variables involved in medical practice. Guides at 3. Furthermore, 'the AMA Guides are not intended to establish a rigid formula, though where use of the AMA Guides is required by statute, a deviation must be justified by competent medical evidence and be consistent with the specific dictates and general purpose of the Guides.' AMJUR Workers 406. Here, [the employee's] physician admitted the Guides do not address her specific injury. However, the Guides offer a means to assess impairment.
>
> "… SDCL 62-1-1.2 mandates that the AMA Guides be used to calculate the percent of the impairment to the whole person. Other states also statutorily specify the use of the AMA Guides for impairment assessment. [Footnote omitted.] As this Court has not reviewed this statute under the circumstances presented here, we will consider how other states have dealt with the Guides. In New Hampshire, the court 'held that if a physician, exercising competent professional skill and judgment, finds that the recommended procedures in the *AMA Guides* are inapplicable to estimate impairment, the physician may use other methods not otherwise prohibited by the *AMA Guides.*' [Footnote omitted.] ... *Rainville* … 143 N.H. 624, 632 (1999). Similarly, in New Mexico, the court noted, '[t]he AMA Guide is a general framework, requiring flexibility in its application.['] *Madrid* … 122 N.M. 524, 532, (1996). ['']While the AMA Guide was intended to help standardize the evaluation of a worker's impairment, it was not intended to establish a rigid formula to be followed in determining the percentage of a worker's impairment.' *Id.*
>
> "Here, the physician used the Guides, [the employee's] medical history, and his professional experience to determine [she] had a 10-15% impairment rating. And while the Guides do not contain ratings on [her] specific injury, they do contain methods for evaluating respiratory injuries. The physician further explained that while under one of the Guides' rating tests [the employee] would show no impairment, she nevertheless has a permanent

> injury to her lung, greatly increasing her risk to redevelop the condition and increasing her susceptibility to pneumomediastinum or pneumothorax. Consequently, at trial, the physician testified that [she] had a 10 to 15 percent whole person impairment under that portion of the Guides that allow independent physician assessment when the specific injury is not covered. … [T]he trial court ultimately found that a 10 to 15 percent impairment did exist. 'Whether and to what extent an alternative method is proper, credible, or permissible under the *AMA Guides* are questions of fact to be decided by the board.' *Rainville,* … 143 N.H. at 632 (citing *City of Aurora v. Vaughn,* 824 P.2d 825, 827 (Colo.Ct.App.1991) ('as trier of fact, agency entitled to rely on expert testimony supporting deviation from *AMA Guides*')). Here, this matter was tried before the circuit court, and that trier of fact found the physician's alternative methodology credible. Considering the totality of the evidence, we do not conclude that the trial court's finding was clearly erroneous.
>
> "Where the legislature has expressly incorporated a private organizations standards into our statutes and where those standards expressly allow for professional discretion in reaching a determination, such discretion, if supported by competent medical evidence and if consistent with the general purpose of the AMA Guides, satisfies the statutory requirements of SDCL 62-1-1.2." (*Cantalope*, 674 N.W.2d at pp. 336-337.)

Accordingly, the appellate decisions from the various jurisdictions discussed above support our conclusion that an impairment rating under the AMA Guides may be rebutted.

D. Determining Whether An AMA Guides Impairment Rating Has Been Rebutted.

Although we have concluded that an impairment rating under the AMA Guides may be rebutted, the questions remain of: (1) what standards should be used in determining whether the AMA Guides impairment rating has been rebutted; (2) what evidence may be presented to establish whether those standards have been met; and (3) if the standards have been met, how is impairment determined. We initially resolve the first question.

We conclude that an impairment rating strictly based on the AMA Guides is rebutted by showing that such an impairment rating would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability. This conclusion finds support both in California cases addressing injuries under the

former Schedule and in out-of-state cases addressing circumstances under which the AMA Guides need not be strictly followed.

We turn first to the California cases, which all involved older versions of the Schedule, when an employee's permanent disability was largely predicated on his or her diminished capacity to compete in the open labor market. (See former Lab. Code, § 4660(a).)

In *Luchini*, 7 Cal.App.3d 141 [35 Cal.Comp.Cases 205], the injured employee had suffered a compound fracture of his leg. All of the medical experts agreed that he should have various permanent work restrictions on a prophylactic basis. The WCAB, however, did not rate the employee's disability using these work restrictions, concluding that "prophylactic working restrictions are not rateable factors of permanent disability" under the Schedule. In reversing and remanding to the WCAB to rate the employee's disability based on his prophylactic restrictions, the Court of Appeal stated, among other things: "the board 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*." (*Luchini*, 7 Cal.App.3d at p. 146 [35 Cal.Comp.Cases at p. 209] (emphasis added); accord: *Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 508 [37 Cal.Comp.Cases 393, 401].)

In *Nielsen v. Workmen's Comp. Appeals Bd*. (1974) 36 Cal.App.3d 756 [39 Cal.Comp.Cases 83] (*Nielsen*), the injured employee was a bank teller who developed sensitivity to nickel and copper. The WCJ awarded 13% permanent disability, which was the customary rating for skin sensitivity cases. This rating was premised on the assumption that, within a year, the employee would be able to rehabilitate herself and find employment that did not expose her to the substances to which she was sensitive. The Court rejected this 13% rating, stating:

> "While the customary rating may be reasonable with respect to many sensitivity cases, *it is not rationally related to Applicant's disability in this case*. … Applicant here is totally disabled from engaging in any employment in which she comes into contact with nickel or copper, and there are few, if any, occupations on the open

> labor market which do not involve contact with these metals.[16] There is no evidence that Applicant will be able to rehabilitate herself within one year and find employment on the open labor market which does not involve contact with nickel or copper. [¶] Thus the 13 percent permanent disability rating *is not rationally related* to Applicant's diminished ability to compete on the open labor market as is required by Labor Code section 4660, subdivision (a). *It is, therefore, arbitrary, unreasonable and not supported by the evidence in light of the entire record*." (*Nielsen*, 36 Cal.App.3d at p. 758 [39 Cal.Comp.Cases at p. 84] (emphasis added; fn. omitted).)[17]

In *Abril v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 480 [40 Cal.Comp.Cases 804] (*Abril*), the employee sustained an injury causing legal blindness of his left eye. A physician recommended that the employee be precluded from various activities "[t]o avoid the risk of further retinal detachment." The WCAB found 25% standard disability, which was the scheduled rating for the complete loss of vision of one eye. A further 3% was added in anticipation of any disability that might result from further surgery. The WCAB, however, did not rate the work preclusions because they were intended to reduce the risk of retinal detachment; therefore, the WCAB concluded that the restrictions added nothing to the already existing rating for complete vision loss of the left eye. The Court of Appeal, however, annulled the WCAB's decision and remanded the matter to re-rate the employee's disability. The Court stated:

> "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 as is required by Labor Code section 4660, subdivision (a). 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] (emphasis

16 The Court did not expound on the facts of the case but, apparently, the evidence was that workplace exposure to nickel and copper was not limited to occupations involving the handling of coins, but that nickel and copper also were found in many everyday items having any metal components (e.g., tools, keys, paper clips, doorknobs, jewelry, clothing, etc.).

17 *Nielsen* is not absolutely on point because it involved an "unscheduled" disability. Before *Nielsen*, the customary practice of assigning a 13% rating for "change of occupation" cases derived (1) from the fact that, at one time, such a rating entitled the injured employee to 52 weeks of permanent disability indemnity and (2) it was assumed it would take the injured employee approximately one year to find other work within his or her limitations. (See *Hyatt Regency Hotel v. Workers' Comp. Appeals Bd.* (*Foote*) (2008) 73 Cal.Comp.Cases 524 (writ den.) [and cases cited therein].)

> added) (quoting from *Nielsen*, 36 Cal.App.3d at p. 758 [39 Cal.Comp.Cases at p. 84]).)

In *Lewis*, the employee was injured when she jumped over a puddle in her employer's parking lot and sprained her ankle. The AME opined that the employee should "have a semisedentary work restriction for her industrial injury," even though she had minimal objective findings and even though the AME did not believe her condition would worsen if she exceeded the restriction; instead, he merely believed that her minimal to slight pain at rest would be exacerbated to a more than moderate level with prolonged walking or standing. The WCAB found 61% permanent disability, which is what a semisedentary work restriction rated under the Schedule then in effect, after adjustment for age and occupation. In rejecting the scheduled rating based on the semisedentary work restriction as being too high, the Court stated:

> "[T]he only evidence which supports the theory that the employee should be confined to semisedentary work … is the evidence of the employee's own subjective complaints and the [AME's] acceptance of that subjective complaint. There is no objective evidence … that Lewis is permanently restricted … to semisedentary work. [There are no] findings of … any physical abnormality or any functional disability of Lewis' left foot.
>
> "It is no answer to this lack of evidence to say that the ratings schedules … cannot be questioned. The [cases cited] fully controvert any such 'hands-off' attitude toward the schedule or the presumptions used to create the schedule or resulting therefrom.
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> ***
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> "… [A] court of review must… examine other facts which … may well be relevant and important when the result is examined for fairness, reasonableness and proportionality in the overall scheme of the law and the purposes sought to be accomplished by that law. … … The basic disproportion of the award at bench to any proven disability, is so clear as to compel our intervention. … [*W]hen we discern an inequitable result, it is our duty to require reexamination. … [W]e conclude here that the award is so disproportionate to the disability and the objectives of reasonably compensating an injured worker as to be fundamentally unfair. … [It is] not just and fair compensation.*
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> ***
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> "The percentage of disability determined by use of the rating schedule is only prima facie evidence of the percentage of

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

In *Duke*, 204 Cal.App.3d 455 [53 Cal.Comp.Cases 385], the employee experienced migraine headaches and vision blackouts from mixing chemicals and solvents at work. Two weeks after leaving work, the symptoms cleared; therefore, the examining physician found no permanent disability. The Court concluded, however, that the employee had ratable permanent disability because the physician also had found that the employee must avoid exposure to chemicals or solvents; otherwise, the migraine headaches and vision blackouts would return. The Court quoted with approval the statements in *Nielsen* that where a "rating is *not rationally related* to [the] Applicant's diminished ability to compete on the open labor market," then the rating is "*arbitrary, unreasonable and not supported by the evidence in light of the entire record*." (*Duke*, 204 Cal.App.3d at p. 460 [53 Cal.Comp.Cases at p. 388] (emphasis added).) The Court then returned the matter to the WCAB to consider "how much of the labor market is closed to the worker because of his preclusion from exposure to chemicals." (*Id*., 204 Cal.App.3d at p. 461, fn. 3 [53 Cal.Comp.Cases at p. 389, fn. 3].)

Therefore, the California cases interpreting the former Schedule suggest, by analogy, that the AMA Guides portion of the 2005 Schedule is rebutted: if it is established that the AMA Guides impairment rating does not "accurately reflect[] [the employee's] true disability" (*Glass*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449]); if the AMA Guides impairment rating is "inequitable," "is so disproportionate to the disability and the objectives of reasonably compensating an injured worker as to be fundamentally unfair," and it does not provide "just and fair compensation" (*Lewis*, 99 Cal.App.3d at p. 659 [44 Cal.Comp.Cases at p. 1140]); if the AMA Guides impairment rating "is not rationally related" to the employee's permanent disability (*Duke*,

204 Cal.App.3d at p. 461, fn. 3 [53 Cal.Comp.Cases at p. 389, fn. 3]; *Glass*, 105 Cal.App.3d at p. 306 [45 Cal.Comp.Cases at p. 448]; *Abril*, 55 Cal.App.3d at p. 486 [40 Cal.Comp.Cases at p. 808]; *Nielsen*, 36 Cal.App.3d at p. 758 [39 Cal.Comp.Cases at p. 84]); or if the AMA Guides impairment rating is not "commensurate with the disability that [the employee] has suffered" (*Luchini*, 7 Cal.App.3d at p. 146 [35 Cal.Comp.Cases at p. 209]).

The out-of-state AMA Guides cases support this interpretation. For example, the Arizona Supreme Court has repeatedly held that the AMA Guides should not be followed if its impairment rating does not "truly reflect the claimant's loss" and "do[es] not provide a fair, accurate measure of the degree of impairment." (*Williamson*, 158 Ariz. at p. 135; *Puma*, 150 Ariz. at pp. 67-68; *Gomez*, 148 Ariz. at p. 152; *Adams*, 113 Ariz. at p. 295.) The Hawaii Supreme Court has specifically agreed with the Arizona Supreme Court that the AMA Guides need not be relied upon "where [the Guides] do[es] not truly reflect the claimant's loss." (*Cabatbat*, 103 Haw. at p. 9.) Similarly, the Florida Supreme Court has held that the AMA Guides should not be followed where "the Guides do[es] not address claimant's evident economic loss." (*Morehead*, 509 So.2d at p. 932.) Further, in a 12-Justice en banc opinion, the Florida Court of Appeal held that departures from the AMA Guides are appropriate where the impairment rating under the Guides "bears no reasonable relationship to [the employee's] economic loss" (*Trindade*, 443 So.2d at p. 1012) or where the employee's "permanent impairment cannot reasonably be determined under the criteria utilized in the Guides" (*id*.).

Of course, as is true in many areas of law, there is no bright line test for determining whether these standards have been met. Instead, the trier-of-fact must make a determination based on the facts and circumstances of each particular case, as did the appellate courts in the California and out-of-state cases discussed above.

It appears likely, for example, that an AMA Guides rating will be deemed to have been rebutted where the employee's injury has no permanent effect on his or her "activities of daily living" or it is simply not covered by the Guides – thereby resulting in *no* ratable AMA Guides

impairment – but the injury seriously impacts the employee's ability to perform his or her usual occupation and, therefore, significantly affects his or her future earning capacity. Such a conclusion would be consistent with: (1) what permanent disability is and what purpose permanent disability payments serve (*Brodie*, 40 Cal.4th at p. 1320 [72 Cal.Comp.Cases at p. 571] ("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. … 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." (internal quotations omitted)); (2) pre-AMA Guides California case law (see, e.g., *Duke*, 204 Cal.App.3d 455 [53 Cal.Comp.Cases 385] (employee who was permanently required to avoid exposure to chemicals or solvents was entitled to a rating for his disability, even though no rating was called for by the former Schedule)); and (3) the AMA Guides

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case law of other jurisdictions, as discussed above.[18] We emphasize, however, that our references to these cases are merely illustrative. We do not mean to suggest that all chemical and skin sensitivity cases necessarily will result in no impairment under the AMA Guides. To the contrary, some such conditions may cause a ratable impairment under the respiratory system, skin, or other

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[18] See *Cantalope* (S.D. 2004) 674 N.W.2d 329 (employee entitled to rating for subcutaneous pneumomediastinum, even though not ratable under the AMA Guides); *Rainville* (N.H. 1999) 509 143 N.H. 624 (jackhammer operator entitled to rating for myofascial pain syndrome, even though not ratable under the AMA Guides); *Benafield* (Ariz.App. 1998) 193 Ariz. 531 (secretary entitled to rating for post-surgical bilateral carpal syndrome, even though not ratable under the AMA Guides, where she could no longer perform keyboarding due to permanent preclusions from repetitive use of her hands); *Morehead* (Fla. 1987) 509 So.2d 930 (machinist entitled to rating for permanent sensitivity to oil-based machine coolant, even though not ratable under the AMA Guides); *Cassey* (Ariz.App. 1987) 152 Ariz. 280 (truck driver entitled to rating for chronic back strain, even though not ratable under the AMA Guides, where he could not return to work because of chronic pain); *Freeney* (Fla.App. 1985) 475 So.2d 947 (journeyman plasterer entitled to rating for permanent preclusion from contact with wet cement, even though not ratable under the AMA Guides); *Trindade* (Fla.App. 1983 [en banc]) 443 So.2d 1007 (employee entitled to rating for knee instability due to *excessive* range of motion, even though the AMA Guides covered only *loss* of range of motion); *Hunter* (Ariz.App. 1981) 130 Ariz. 59 (meat wrapper entitled to rating for bronchial hypersensitivity, it even though not ratable impairment under the AMA Guides, where her permanent limitations from exposure to PVC or other lung irritants precluded her from returning to work as a meat wrapper)).

chapters of the Guides. Nevertheless, we reiterate that the AMA Guides focuses on activities of daily living *excluding* work. (See AMA Guides, §§ 1.2a, 1.2b, 1.8 at pp. 4-5, 9, 13.) Therefore, some conditions may result in little or no AMA Guides impairment, but only if the employee does not engage in his or her normal work.

Beyond that, however, we also agree with the 12-Justice en banc decision of the Florida Court of Appeal in *Trindade*, that the question of whether the AMA Guides have been rebutted should not be resolved "based on the 'covered' or 'not covered' dichotomy." (443 So.2d at p. 1010.) Indeed, many of the cases discussed above allowed departures from the AMA Guides even where the Guides covered the employee's condition to some extent and, therefore, provided for some impairment rating. (E.g., *Cabatbat* (2003) 103 Haw. 1 (Hawaii Supreme Court rejected Board's finding of 8% impairment under the AMA Guides for a TMJ injury, where all three reporting dentists found between 18% and 23% impairment using methods other than the AMA Guides); *Williamson* (1988) 158 Ariz. 131 (Arizona Supreme Court upheld 70% impairment finding for hod carrier's fractured tibial condyle, even though the AMA Guides called for a 50% impairment).) Such a view is consistent with the California pre-AMA Guides case law regarding injuries that were covered, but not adequately covered, by the former Schedule. (See, e.g., *LeBoeuf v. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 234, 242-243 [48 Cal.Comp.Cases 587, 594] (*LeBoeuf*) (a rating called for by the former Schedule could be rebutted by vocational expert opinion that the injured employee's permanent disability was in fact greater because of his or her inability or limited ability to be vocationally retrained for suitable gainful employment); *Abril*, 55 Cal.App.3d 480 [40 Cal.Comp.Cases 804] (employee rated under the former Schedule for legal blindness of the left eye was also entitled to be rated for work restrictions imposed to avoid the risk of further retinal detachment); cf. *Nielsen*, 36 Cal.App.3d 756 [39 Cal.Comp.Cases 83] (bank teller who developed sensitivity to nickel and copper not limited to customary 13% standard rating for skin sensitivity cases, which had been based on the assumption that the employee could be rehabilitated to gainful employment within one year).)

But, as indicated above, a defendant also can show that an AMA Guides rating should not be followed where it is inequitably high. (*Puma*, 150 Ariz. 66 (Arizona Supreme Court affirmed 0% rating for employee who had a cervical discectomy, where all post-surgical objective tests were normal and where surveillance films showed him performing a variety of physical activities without any apparent difficulty, in sharp contrast to his complaints of severe pain and minimal ability to move his head during his post-surgical evaluation by physicians).) Once again, this is consistent with pre-AMA Guides California case law. (E.g., *LeBoeuf*, 34 Cal.3d at pp. 242-243 [48 Cal.Comp.Cases at p. 594] (a rating called for by the former Schedule could be rebutted by vocational expert opinion that the injured employee's permanent disability was in fact less because his or her completion of vocational rehabilitation increased the employee's ability to compete in the open labor market); *Lewis*, 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133] (Court rejected 61% permanent disability rating based on semisedentary work restriction for employee who sprained her ankle while jumping over a puddle, where there were minimal objective findings and where her subjective pain complaints were minimal to slight at rest, increasing to more than moderate with prolonged walking or standing).)

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E. Evidence That May Be Presented To Demonstrate That The Standards For Rebutting The AMA Guides Impairment Rating Have Been Met.

Once again, a party may rebut a scheduled impairment rating based on the AMA Guides by showing that this impairment rating would result in a permanent disability award that would be inequitable and not commensurate with the disability the employee has suffered. Ordinarily, this showing will be accomplished through the opinions of treating or evaluating physicians who, using methodology in addition to and/or independent of the AMA Guides, conclude that the injured employee's impairment is greater than – or lesser than – the impairment rating called for by the Guides.

In arriving at an impairment opinion that differs from the impairment rating called for by the AMA Guides, a physician may invoke his or her judgment based upon his or her experience,

training, and skill. (See AMA Guides, §§ 1.2a, 1.2b, 1.5, 2.3, 2.5c, at pp. 5, 8, 11, 18, 19; see also *Duque* (Haw. 2004) 105 Haw. at pp. 434-435 ("[t]he AMA Guides caution that disability determinations should not be based solely on the Guides" and "physicians must be allowed to draw on their medical expertise and judgment to evaluate the numerous factors relating to an individual's impairment rating"); *Cabatbat* (Haw. 2003) 103 Haw. 1 ("the AMA Guides direct that the physician's judgment is a factor to be considered when determining an impairment rating"); *Rainville* (N.H. 1999) 143 N.H. at pp. 631-633 ("if a physician, exercising competent professional skill and judgment, finds that the recommended procedures in the *AMA Guides* are inapplicable to estimate impairment, the physician may use other methods not otherwise prohibited by the *AMA Guides*"); *Cassey* (Ariz.App. 1987) 152 Ariz. at pp. 281-282 (a physician may use his or her "sound clinical judgment" in arriving at an impairment rating different from the Guides).) Thus, a physician is not required to blindly and unthinkingly adhere to the Guides.

Therefore, a physician may depart from the specific recommendations of the AMA Guides and draw analogies to the Guides' other chapters, tables, or methods of assessing impairment. This is consistent with the long-established principle in California that non-scheduled ratings may be arrived at by making comparisons and drawing analogies to scheduled ratings. (*Glass*, 105 Cal.App.3d at pp. 306-307 [45 Cal.Comp.Cases at p. 448]; *Dept. of Motor Vehicles v. Workers' Comp. Appeals Bd*. (*Payne*) (1971) 20 Cal.App.3d 1039, 1044-1045 [36 Cal.Comp.Cases 692, 696].)

Also, in evaluating impairment in a manner outside of or in addition to that prescribed by the AMA Guides, the physician may consider other generally accepted medical literature or criteria. Such additional or alternative literature could include, but would not necessarily be limited to, other AMA publications or the publications of other established medical organizations.[19] (See, generally, *Cantalope* (S.D. 2004) 674 N.W.2d at pp. 336-337 (an "alternative methodology"

[19] We observe that Florida, Illinois, Minnesota, New York, North Carolina, and Wisconsin all use their own impairment guidelines. Indeed, Florida uses the Florida Impairment Rating Guide (aka Florida Impairment Rating Schedule) for some injuries and the Minnesota Department of Labor and Industry Disability Schedule for others. (Fla. Stats., § 440.15(3)(b); Fla. Admin. Code, § 69L-7.604.) However, we do not now decide if impairment guidelines of other States may be a "relevant factor" which a physician may consider.

may be used to rate impairment "if supported by competent medical evidence"); *Cabatbat* (Haw. 2003) 103 Haw. at p. 9 ("According to the AMA Guides and [the three reporting physicians], the Board should not have relied solely upon the AMA Guides to evaluate [the employee's] injury"); *Williamson* (Ariz. 1988) 158 Ariz. at pp. 135-137 ("[a]ny relevant factors" and "all competent and relevant evidence" may be used to establish an accurate rating of functional impairment); *Morehead* (Fla. 1987) 509 So.2d at pp. 931-932 (impairment determination may be "based upon other generally accepted medical standards"); *Trindade* (Fla.App. 1983 [en banc]) 443 So.2d at pp. 1008-1013 (if "permanent impairment cannot reasonably be determined under the criteria utilized in the *Guides,* … such permanent impairment may be established under other generally accepted medical criteria for determining impairment").)[20]

Moreover, in reaching an impairment opinion that is not based on a strict application of the AMA Guides, a physician may consider a wide variety of medical and non-medical information. For example, the AMA Guides analyzes whether an injured employee's injury impairs his or her ability to perform activities of daily living, *excluding work*. (AMA Guides, §§ 1.2a, 1.2b, 1.8, at pp. 4, 9, 13.) Therefore, when a physician believes that an impairment rating based on the AMA Guides would not provide a fair and accurate measure of the injured employee's degree of impairment, then the physician may assess how the permanent effects of the employee's injury impair his or her ability to perform *work* activities, as well as assess the medical consequences of performing certain work activities. (*Id*., §§ 1.2a, 1.9, 1.12, 2.3, 2.6a.2, 2.6a.8, 2.6a.9, at pp. 5, 13-14, 15, 18, 21, 22; see also *Williamson* (Ariz. 1988) 158 Ariz. at pp. 135-137 ("Where the ALJ finds that the Guides do not provide a fair, accurate measure of the degree of impairment, he or she *must* turn to other factors. *Any relevant factors … may be considered.* Effect on job performance is one such factor. [¶¶] … If an injury has resulted in a functional impairment not adequately reflected by clinical measurement under the AMA Guides, then an ALJ must consider impact on

[20] See also former Ga. Code, § 34-9-1(5) ("ratings shall be based upon [the AMA Guides] or any other recognized medical books or guides"); Haw. Admin. Rules, § 12-10-21(a) (ratings may be based on "guides issued by the American Medical Association, American Academy of Orthopedic Surgeons, and any other such guides which the director deems appropriate and proper"); N.M. Stats., § 52-1-24(A) (ratings may be "based upon the most recent edition of the [AMA Guides] or comparable publications of the American medical association").

job performance." (Court's emphasis; citations omitted).) In addition, a physician may take into account pertinent diagnostic studies, such as functional capacity and rehabilitation evaluations. (AMA Guides, § 2.6a.4, at p. 21.) Finally, if the employee has been evaluated by a vocational rehabilitation expert, the physician may review and consider the vocational specialist's opinion regarding what jobs the employee might be able to perform and what effect the injury may have on his or her ability to earn. (*Id*., § 1.9, at p. 14.)

We emphasize, however, our agreement with the New Hampshire Supreme Court that: (1) "our decision does not permit physicians … to deviate from [the AMA Guides] simply to achieve a more desirable result"; (2) "[t]he reasons for such a deviation must be fully explained and the alternative methodology set forth in sufficient detail so as to allow a proper evaluation of its soundness and accuracy"; and (3) therefore, "[w]ithin the report, an evaluating physician is expected to provide a full medical evaluation, analysis of the medical findings with respect to the patient's life activities, and comparison of the results of analysis with the impairment criteria." (*Rainville* (N.H. 1999) 143 N.H. at pp. 631-633.) As stated by the AMA Guides, "[a] clear, accurate, and complete report is essential to support a rating of permanent impairment" and the report should "explain" its impairment conclusions. (AMA Guides, § 2.6, at pp. 21-22.) In other words, if a physician finds an impairment in a manner at variance, in whole or in part, with the AMA Guides, then the physician's report must constitute substantial evidence upon which the WCAB may properly rely.

F. Determining Impairment Once The AMA Guides Portion Of The 2005 Schedule Has Been Rebutted.

We have now reached the last stage of our analysis: how to determine the employee's permanent impairment once it has been shown that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability.

In Section II-E, above, we described the factors that a physician may consider when assessing impairment outside the four corners of the AMA Guides. Based on these factors, the

physician should state his or her best opinion regarding the employee's percentage of impairment and explain how and why this impairment percentage was determined. (See *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Of course, it is the WCAB, and not any particular physician, which is the ultimate trier-of-fact. (See, *Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54 Cal.Comp.Cases 251, 252] ("the WCJ, not the physician, is the trier of fact"); *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792-793 [52 Cal.Comp.Cases 419, 425] ("the Board and not the physician is the trier of fact"); *Johns-Manville Products Corp. v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740, 753 [43 Cal.Comp.Cases 1372, 1379] ("While the appeals board must utilize expert medical opinion on many issues, it and not the physician is the trier of fact" [internal citation omitted]).) Moreover, the WCAB may make any finding that is supported by substantial evidence when the record is viewed as a whole. (Lab. Code, § 5952(d); *Lamb*, 11 Cal.3d at p. 281 [39 Cal.Comp.Cases at p. 314]; *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (*Cugini*) (2008) 159 Cal.App.4th 483, 490, 495 [73 Cal.Comp.Cases 81, 82, 90].) Therefore, the WCAB may accept the opinion of a single physician or it may make a finding within the range of the medical evidence presented. (*Serafin*, 33 Cal.2d at p. 94 [13 Cal.Comp.Cases at p. 270] (the WCAB "may make a determination within the range of the evidence as to the degree of disability," it need "not adopt exactly the view of any expert witness," and it "may accept the evidence of any one expert or choose a figure between them based on all of the evidence"); *U.S. Auto Stores v. Workers Comp. Appeals Bd.* (*Brenner*) (1971) 4 Cal.3d 469, 474-475 [36 Cal.Comp.Cases 173, 176] (a "decision is supported by substantial evidence if the degree of disability found by the [WCAB] is within the *range* of evidence in the record. It is not necessary that there be evidence of the exact degree of disability." (Court's italics).)

Medicine, though, is not a precise science. To the contrary, a physician's "[c]linical judgment" regarding impairment "combin[es] both the 'art' and the 'science' of medicine." (AMA Guides, at § 1.5, p. 11.) And, as our Supreme Court has observed, "Arriving at a decision on the exact degree of disability is a difficult task under the most favorable circumstances. It necessarily

involves some measure of conjecture and compromise … .” (*Serafin*, 33 Cal.2d at p. 93 [13 Cal.Comp.Cases at p. 270]; see also *Foremost Dairies, Inc. v. Industrial Acc. Com.* (*McDannald*) (1965) 237 Cal.App.2d 560, 572 [30 Cal.Comp.Cases 320, 329] (“Of necessity every medical opinion must be in a sense speculative [but] this does not destroy the probative value of such an opinion.”).) Therefore, a physician’s estimate of the percentage of the employee’s impairment may be accepted even though this estimate is not exact, provided that the physician’s opinion is adequately explained and is based on the factors set forth in Section II-E, above – including the physician’s judgment, experience, training, and skill. Such a conclusion is consistent with recent appellate case law regarding estimates of what percentage of an injured employee’s permanent disability should be apportioned to non-industrial causation. (See *Anderson v. Workers’ Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1382 [72 Cal.Comp.Cases 389, 398] (the fact that an apportionment determination is “not precise and require[s] some intuition and medical judgment ... does not mean [the] conclusions are speculative [where the physician] stated the factual bases for his determinations based on his medical expertise”); *E.L. Yeager Construction v. Workers’ Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687, 1693] (a physician’s apportionment opinion “cannot be disregarded as being speculative when it was based on his expertise in evaluating the significance of the[] facts”).)

Once the WCAB has made its percentage impairment determination, then that percentage impairment figure is plugged into the rating formula of the 2005 Schedule, in place of the AMA Guides percentage impairment, but otherwise the calculation of the ultimate permanent disability rating remains the same. That is, the impairment percentage is adjusted by the appropriate DFEC adjustment factor and then is adjusted for occupation and age.[21]

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21 Section 2 of the 2005 Schedule is used to determine an impairment number and a future earning capacity (FEC) rank for each body part. (See 2005 Schedule, at pp. 2-1 – 2-5.) Many of these impairment numbers and FEC ranks correspond to specific impairments addressed by the AMA Guides. The Schedule provides, however: “If the impairment is not addressed by the AMA Guides, choose the closest applicable impairment number, and replace the last pair of digits with the number 99.” Accordingly, even when an impairment is outside of the AMA Guides, the impairment will still be ratable using the formula of the Schedule.

We very strongly emphasize, however, that the method for evaluating impairment described above does *not* mean that an impairment rating can be directly or indirectly based on what the employee's work preclusions would have rated under the old Schedule, had it been applicable. The Legislature saw fit to establish a new method for rating permanent disability; therefore, the old Schedule cannot be revived through surreptitious or underhanded methods merely because the trier-of-fact considers the old Schedule rating to be "fair."

We do not suggest that this approach to evaluating impairment is perfect. The reality is that, at present, there is no simple method by which evidence regarding an employee's medical condition can be combined with other evidence to calculate the percentage to which an injured employee is occupationally impaired. As observed by the AMA Guides:

> "Unfortunately, there is no validated formula that assigns accurate weights to determine how a medical condition can be combined with other factors … to calculate the effect of the medical impairment on future employment. Therefore, each commissioner or hearing official bases a decision on the assessment of the available medical and nonmedical information. The *Guides* may help resolve such a situation, but it cannot provide complete and definitive answers. Each administrative or legal system that bases disability ratings on permanent impairment [must] define[] its own process of converting impairment ratings into a disability rating …" (AMA Guides, § 1.8, at p. 13.)

Nevertheless, just because there is no easy solution does not mean that when a rating called for by the AMA Guides does not provide a fair and accurate measure of the injured employee's impairment and does not truly and accurately reflect his or her loss, we may turn a blind eye to this fact and deny the employee his or her just compensation.

III. CONCLUSION

In sum, we conclude that the AMA Guides portion of the 2005 Schedule may be rebutted by a showing that an impairment based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the injured employee's permanent disability. Moreover, when the AMA Guides portion of the 2005 Schedule has been rebutted, the WCAB may make an impairment determination that considers

medical opinions regarding impairment that are not based or are only partially based on the AMA Guides. We believe this conclusion is consistent with the language of section 4660, particularly its provision that the Schedule is merely "prima facie evidence of the percentage of permanent disability." (Lab. Code, § 4660(c).) It also is consistent with the nature of prima facie evidence, i.e., "prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." (*Mansfield*, 84 Cal. at p. 566; *Raymond G.*, 230 Cal.App.3d at p. 972.) Further, our conclusion is consistent with the language of the AMA Guides itself and with relevant out-of-state cases interpreting the Guides. Finally, our conclusion is consistent with the language of the Supreme Court's recent decision in *Brodie*, in which it describes permanent disability as causing "impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market" and in which it states that "permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity." (*Brodie*, 40 Cal.4th at p. 1320 [72 Cal.Comp.Cases at p. 571] (internal quotation marks omitted).)

In light of the above, we will rescind the permanent disability-related findings (including attorney's fees) in both the *Almaraz* and *Guzman* cases.

In *Almaraz*, the WCJ incorrectly concluded that, by enacting section 4660(b)(1) regarding the use of the AMA Guides, the Legislature was mandating that the AMA Guides must always be used for rating permanent impairment and, therefore, the WCAB cannot deviate from them. In *Guzman*, the WCJ incorrectly concluded that a physician cannot use his or her independent judgment to arrive at an impairment rating not specifically called for by the AMA Guides. Because of these errors, we will remand both matters to their respective assigned WCJs for further proceedings (including possible development of the record), if deemed appropriate by the assigned WCJ, and for new decisions on the permanent disability-related issues, including attorney's fees.

In remanding these cases, we expressly do not mean to suggest or imply an opinion that either applicant has rebutted the AMA Guides portion of the 2005 Schedule. In each case, this question will be for the assigned WCJ to determine in the first instance.

For the foregoing reasons,

IT IS ORDERED that *Almaraz v. Environmental Recovery Services*, Case No. ADJ1078163 (BAK 0145426), and *Guzman v. Milpitas Unified School District*, Case No. ADJ3341185 (SJO 0254688), are **CONSOLIDATED** for the limited purpose of issuing a joint opinion.

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

FINDINGS OF FACT

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3. The issue of permanent disability is deferred, with jurisdiction reserved.

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

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7. The issue of reasonable attorney's fees is deferred, with jurisdiction reserved.

AWARD

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

(a) Temporary disability indemnity in accordance with Finding of Fact No. 2, less credit to defendant for any amounts previously paid therefor;
(b) All further medical treatment reasonably required to cure or relieve the effects of the injury; and

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

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (en banc) in *Guzman v. Milpitas Unified School District*, Case No.

ADJ3341185 (SJO 0254688), that the Amended Findings and Award issued on October 7, 2008 (and re-issued on October 22, 2008) is **AMENDED** such that Findings of Fact Nos. 3 and 4 and the Award in its entirety are **STRICKEN** therefrom and the following are **SUBSTITUTED** therefor:

FINDINGS OF FACT

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

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

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AWARD

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

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

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

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

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

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further proceedings and new decisions, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

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

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

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

/s/ Ronnie G. Caplane

RONNIE G. CAPLANE, Commissioner

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

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

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

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

2/3/2009

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

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

NPS/aml