WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WANDA OGILVIE, ***Applicant,*** **vs.** **CITY AND COUNTY OF SAN FRANCISCO, Permissibly Self-Insured,** ***Defendant(s).***	**Case No. ADJ1177048 (SFO 0487779)** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

We granted the petition for reconsideration of defendant, the City and County of San Francisco, to allow time to further study the record and applicable law. Because of the important legal issue as to whether and how the diminished future earning capacity (DFEC) portion of the current Schedule for Rating Permanent Disabilities (Schedule or 2005 Schedule)[1] may be rebutted, and to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)[2]

For the reasons below, we hold in summary that: (1) the DFEC portion of the 2005 Schedule is rebuttable; (2) the DFEC portion of the 2005 Schedule ordinarily is *not* rebutted by establishing the percentage to which an injured employee's future earning capacity has been diminished; (3) the DFEC portion of the 2005 Schedule is *not* rebutted by taking two-thirds of the injured employee's estimated diminished future earnings, and then comparing the resulting sum to the permanent disability money chart to approximate a corresponding permanent disability rating; and (4) the DFEC portion of the 2005 Schedule may be rebutted in a manner consistent with Labor

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

2 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).)

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

Here, the workers' compensation administrative law judge (WCJ) did not follow the correct method of determining whether and how the DFEC portion of the 2005 Schedule may be rebutted. Accordingly, we will rescind the WCJ's findings on permanent disability, apportionment, and attorney's fees and remand the matter to the WCJ for further proceedings and a new decision on those issues consistent with our opinion.

I. BACKGROUND

Applicant, Wanda Ogilvie, sustained an admitted industrial injury to her right knee, low back and neck on April 1, 2004, while employed as a transit operator (occupational group 250) by defendant. She was 59 years old at the time of her injury.

On September 14, 2004, applicant had a right knee arthroscopy, partial medial meniscectomy, and chondroplasty. On May 8, 2006, she had a right knee replacement. Although a spine surgeon recommended that applicant have a posterior lumbar laminectomy and interbody fusion at L4-L5 and L5-S1, applicant declined to have the surgery. She did not return to work following her April 1, 2004 injury.

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

Applicant selected Dominic Tse, M.D., as her qualified medical evaluator (QME) in orthopedics. In his March 8, 2007 report, Dr. Tse declared applicant to be permanent and stationary. With regard to her right knee, Dr. Tse found that she had 20% whole person impairment (WPI) under the AMA Guides, but he further noted that applicant's right knee condition limited her to semi-sedentary work, contemplating the ability to work approximately 50% of the time in a sitting position and 50% of the time in a standing or walking position, with a minimum of demand for physical effort while standing, walking or sitting. With respect to applicant's spine, Dr. Tse found 10 to 13% WPI of the lumbar spine (i.e., DRE lumbar category III) and 15 to 18% WPI of the cervical spine (i.e. DRE cervical category III), based on the AMA Guides. He also concluded that applicant's spinal disability precluded substantial work, contemplating the loss of approximately 80% of her pre-injury capacity for performing such activities as bending, stooping, lifting, pushing, pulling, climbing, or other activities involving comparable physical effort. Dr. Tse opined that 80% of the right knee disability was caused by the April 1, 2004 injury, with the remaining 20% caused by other factors. He further opined that 34% of the spinal disability was caused by the injury, with 66% caused by other factors. He concluded that applicant could no longer work as a transit operator.

Defendant selected Eugene A. Baciocco, M.D., as its QME in orthopedics. In his February 21, 2006 report, Dr. Baciocco found 4% WPI of the right knee and 8% WPI of the lumbar spine (i.e., DRE lumbar category II), resulting in a combined WPI of 10% under the AMA Guides. Following applicant's May 8, 2006 right knee surgery, Dr. Baciocco issued two supplemental reports of August 8, 2006 and April 4, 2007; however, he never provided a post-surgical assessment of her disability under the AMA Guides.

On August 20, 2008, applicant's claim went to trial on the issues of permanent disability, apportionment, and attorney's fees. At trial, the parties stipulated that, if applicant's disability was rated in accordance with the 2005 Schedule, it would rate 28% after adjustment for age and occupation and after apportionment – equating to permanent disability indemnity in the total sum of $26,700.00. This agreed scheduled rating was based on a compromise between the opinions of

Drs. Tse and Baciocco, together with a stipulation that 25% of *any* permanent disability in the case would be apportionable to non-industrial and pre-existing causes. However, applicant sought to rebut the agreed 28% scheduled rating.

At trial, applicant testified that she took a service retirement in 2007 and is on Social Security disability. She believed she would be unable to return to her job as a bus driver. She was not offered modified or alternative employment by defendant.

Also, at trial, the parties stipulated that Eugene E. Van de Bittner, Ph.D., and Jeff Malmuth, M.S. – who are both certified rehabilitation counselors – qualified as experts in the fields of vocational rehabilitation and diminished future earnings capacity. The parties further agreed to submit the reports of these experts in lieu of their testimony.

Dr. Van de Bittner, who was defendant's expert, concluded in his February 16, 2008 report that, absent her industrial injury, applicant likely would have earned $335,680.80 during the remaining 6.09 years of her expected work life. Further, based on two different scenarios, Dr. Van de Bittner found that, after sustaining her industrial injury, applicant could likely earn either $169,391.25 or $177,654.88 during her remaining expected work life. This is between $158,025.92 and $166,289.55 less than her pre-injury earning capacity. Therefore, Dr. Van de Bittner opined that, to a reasonable degree of vocational probability, applicant's diminished future earning capacity ranged from 51.31% to 53.77%.

The September 25, 2007 report of applicant's expert, Mr. Malmuth, concluded that applicant's pre-injury earning capacity during the 6.26 years of her estimated remaining work life would be $364,482.24. He further found that, following the injury, applicant's earning capacity over the same time period would be $178,562.88, which is $185,919.36 less than her pre-injury earning capacity. Accordingly, Mr. Malmuth estimated applicant's diminished future earning capacity to be 51%.

On September 17, 2008, the WCJ issued a Findings and Award which determined that applicant's April 1, 2004 injury caused permanent disability of 40%, after adjustment for age and occupation and after apportionment. In essence, the WCJ concluded that applicant had rebutted

the 2005 Schedule because the $26,700.00 in permanent disability indemnity she would receive if the 28% agreed scheduled rating was used would not fairly, adequately and proportionally compensate applicant for her $158,025.92 to $178,562.88 in lost future earnings (i.e., her diminished future earning capacity of 51% to 53.77%), as determined by the vocational rehabilitation experts.

In arriving at his 40% permanent disability rating, the WCJ took into consideration three alternative rating methods.

With respect to the first method, the WCJ observed that the 2005 Schedule states as follows:

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

The WCJ then said, "A logical inference to be drawn from the foregoing … is that the percentage of an injured worker's diminished future earning capacity could be the measure of the worker's permanent disability rating. … For example, … a 50% loss of earning capacity would justify a 50% permanent disability rating." The WCJ further pointed out that Mr. Malmuth found a DFEC of 51%, while Dr. Van de Bittner found a DFEC of 51.31% to 53.77%. Moreover, the WCJ said that in reaching their DFEC opinions, both experts considered applicant's age, occupation, and medical condition. Therefore, the WCJ implicitly found that their opinions take into account all of the elements set forth in the paramount paragraph of section 4660, which 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." (Lab. Code, § 4660(a).) Accordingly, under his first method, the WCJ concluded that applicant's permanent disability could appropriately rate from 51% to 53%. Therefore, after the stipulated

25% apportionment, her permanent disability could rate from 38% to 40%, warranting a permanent disability indemnity award of between $40,350.00 and $43,150.00.

With respect to the second method, the WCJ stated that applicant's lost future earnings are $172,000.00, which is within the range of the $158,025.92 to $178,562.88 in lost future earnings found by Mr. Malmuth and Dr. Van de Bittner – who, once again, took into consideration all of the permanent disability elements set forth in section 4660(a). Then, "relying on the premise that injured workers should not be compensated for more than two-thirds of their loss of future earnings" (see Lab. Code, § 4658),[4] the WCJ determined that applicant's "compensable" earnings loss is $114,667.00 (i.e., ⅔ x $172,000.00). This approximately equates to the compensation warranted by a 71.5% permanent disability rating. This 71.5% rating, however, must be reduced by the agreed apportionment of 25%, resulting in a 54% rating, warranting a permanent disability award of $63,600.00. This $63,600.00 award is $36,900.00 greater than the $26,700.00 award which would result from the agreed Scheduled rating of 28%.

With respect to the third method, the WCJ said that, under the 2005 Schedule, a permanent disability rating is calculated by multiplying the employee's WPI by a DFEC adjustment factor, and then further adjusting the resulting rating for age and occupation. Here, applicant's scheduled DFEC adjustment factors are 1.14 for the knee and 1.27 for the low back; but, the parties did not specify what portion of the agreed 28% scheduled rating was attributable to each body part. The WCJ inferred, however, that applicant's knee disability was more significant than her spinal disability; accordingly, he found an "average" DFEC adjustment factor of 1.18. This corresponds to an 18% increase in the WPI rating. Nevertheless, the WCJ reiterated that the agreed scheduled rating "does not adequately and fairly compensate applicant for her diminished future earning capacity." Therefore, he concluded that he must "increas[e] the average DFEC adjustment factor [of 1.18] to a sum sufficient to produce an award more commensurate with applicant's loss of

[4] Section 4658 sets the "[n]umber of weeks for which two-thirds of average weekly earnings [are] allowed for each 1% of permanent disability within [each specified] percentage range." However, section 4453 sets certain maximums for average weekly earnings; therefore, an employee's permanent disability payments do not necessarily correspond to two-thirds of his or her average weekly earnings.

future earnings." At this point, the WCJ took the $114,667.00 "compensable" earnings loss he found under his second method, above, and observed that this figure is 4.29 times higher than the $26,700.00 award for the agreed scheduled rating. Then, he multiplied the 18% increase in the WPI rating by 4.29, to arrive at an increase in the standard impairment of 77% (i.e., a DFEC adjustment factor of 1.77). The WCJ multiplied the 28% agreed scheduled rating by 1.77, to arrive at a rating of 49%. Next, however, he stated that because 18% of the increase in the WPI rating was previously accounted for, then this 18% had to be subtracted from the 77%. The WCJ found that this resulted in a 49% [sic] overall increase in the WPI rating (i.e., a DFEC adjustment factor of 1.49).[5] Accordingly, he multiplied the 28% agreed Scheduled rating by 1.49, to arrive at a new rating of 42%. He said that this 42% rating would not be modified for age, occupation, or apportionment, because the parties already had accounted for these factors when they stipulated to the 28% scheduled rating.

Finally, "[g]iving some weight to each of the [three] foregoing methods," the WCJ concluded that a 40% rating after apportionment "is the most fair and adequate rating in light of the evidence of actual diminished future earnings in this case."

Defendant filed a timely petition for reconsideration, contending in substance that: (1) applicant failed to meet her burden of establishing that the presumptively correct 2005 Schedule is arbitrary, capricious or unreasonable; (2) each of the alternative methods the WCJ utilized to assess applicant's permanent disability has no basis in law and is inconsistent with the intent of section 4660, as amended by Senate Bill 899 (SB 899),[6] to create uniformity, objectivity, and consistency in permanent disability determinations; and (3) the Minutes of Hearing failed to list a document submitted by defendant at trial.

Applicant filed an answer to defendant's petition.

On December 15, 2008, we granted reconsideration.

II. DISCUSSION

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5 The WCJ made a mathematical error, because 77% minus 18% equals 59%, not 49%.

6 Stats. 2004, ch. 34, § 32.

The chief issues before us relate to rebutting the DFEC portion of the 2005 Schedule. We will focus almost exclusively on these issues and only briefly address the other issues that defendant raises.

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); section 4660, however, did consistently provide 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, however, 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)(2) provides, "For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the

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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.

Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies." 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, § 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.)

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

[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).

> 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*, 99 Cal.App.3d at pp. 657, 658-659, 662-663 [44 Cal.Comp.Cases at pp. 1138, 1139-1140, 1143].)

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.").)

Therefore, even though the standards for rating permanent disability under the 2005 Schedule have changed, the 2005 Schedule still is prima facie evidence of an injured employee's disability; therefore, 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 DFEC Portion Of The 2005 Schedule Is Rebuttable

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

Most importantly, 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 declares that the Schedule is rebuttable, then no portion of it – including the DFEC 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 DFEC portion of the Schedule be unrebuttable, it could have expressly so stated. It did not.

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 DFEC 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 v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1325 [72 Cal.Comp.Cases 565, 574] (*Brodie*); *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 a defendant 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 specifically conclude that the DFEC portion of the 2005 Schedule is rebuttable and not conclusive.

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D. The DFEC Portion Of The 2005 Schedule Ordinarily Is Not Rebutted By Establishing The Percentage To Which An Injured Employee's Future Earning Capacity Has Been Diminished Because, At Least In Most Cases, The Employee's DFEC Percentage Is Not Tantamount To His Or Her Percentage Of Permanent Disability.

As discussed above, in determining that the DFEC portion of the Schedule had been rebutted in this case, the WCJ utilized three different methodologies. Because two of these methods have some appeal, we will specifically address them now, beginning with his first method.

Under his first method, the WCJ equated applicant's permanent disability percentage to her DFEC percentage, as found by the vocational rehabilitation experts. The WCJ believed that this method was justified for two reasons.

First, he stated that, in arriving at their DFEC percentages, the vocational rehabilitation experts took into consideration the nature of applicant's injury, her occupation, and her age. Therefore, the WCJ implicitly concluded that basing the permanent disability rating on the vocational rehabilitation experts' opinions of applicant's DFEC percentage would be consistent with section 4660(a), which provides: "In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of injury, consideration being given to an employee's diminished future earning capacity."

Second, the WCJ believed that equating applicant's permanent disability rating to her DFEC percentage would be consistent with the language of the 2005 Schedule itself, which states:

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

In essence, the WCJ concluded that because the 2005 Schedule indicates that 0% permanent disability equates to no reduction of earning capacity and that 100% permanent disability equates to total loss of earning capacity, then a 10% loss of earning capacity equates to a 10% permanent disability rating, a 20% loss of earning capacity equates to a 20% permanent disability rating, etc.

Although there are degrees of both logic and simplicity to this approach that are appealing, it has some inherent problems.

The fundamental difficulty with this approach is that, if the Legislature had intended that an injured employee's permanent disability percentage could be the same as a vocational rehabilitation expert's opinion of the employee's DFEC percentage, then why did the Legislature not say so? Indeed, why would the Legislature even require a Schedule at all? A Schedule would not be needed to determine a percentage of permanent disability if that percentage could simply be established by the DFEC opinion of a vocational rehabilitation expert who, in reaching his or her DFEC opinion, took into consideration the employee's age and occupation and the nature of the employee's physical injury or disfigurement.

Also, the approach is not consonant with the language of section 4660.

First, the Legislature did not leave "diminished future earning capacity" undefined. Instead, in the first sentence of section 4660(b)(2), the Legislature specifically defined "diminished future earning capacity" to mean "a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees." Then, in the second sentence of section 4660(b)(2), the Legislature went on to indicate that the "empirical data and findings" to which the first sentence refers comes from "the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies." As we will discuss more extensively in section II-F, below, the 2003 RAND Study (and the companion 2004 RAND Study) used empirical wage data from the Employment Development Department (EDD) to compare the post-injury earnings of injured employees who

had permanent disability ratings to the earnings during the same period of similarly situated employees who did not have permanent disability ratings.

Arguably, a vocational rehabilitation expert's DFEC percentage is based on a "numeric formula" in the generic sense of a ÷ b = c. That is, the DFEC percentage results from dividing the amount the injured employee likely will earn over his or her remaining expected work life, after the injury, by the amount the injured employee likely would have earned over his or her remaining expected work life, absent the injury. Nevertheless, a vocational rehabilitation expert's DFEC percentage is not a "numeric formula" within the meaning of section 4660(b)(2). This is because it is not based on aggregate empirical wage data, from EDD or another source, that compares the post-injury earnings of an injured employee to the earnings of similarly situated employees.

Second, the Legislature declared its general intention that SB 899 would "provide relief to the state from the effects of the current workers' compensation crisis." (Stats. 2004, ch. 34, § 49.) As the appellate courts have repeatedly made clear, this statement means that SB 899 was intended to reduce the costs of the workers' compensation system.[10] Furthermore, the Legislature declared its specific intention that "[t]he [permanent disability] schedule shall promote consistency, uniformity, and objectivity." (Lab. Code, § 4660(d).)

It seems likely that neither of the Legislature's intentions would be served if the DFEC opinions of vocational rehabilitation experts are the primary basis for determining an employee's permanent disability. That is, if parties routinely use dueling vocational experts, or even one agreed vocational expert, then the costs of administering the workers' compensation system may well increase. This would defeat the Legislature's intention to reduce costs. Also, if the assessment of an injured employee's permanent disability was largely based on vocational experts' opinions on DFEC (which, by experience, can vary much more widely than the vocational expert

10 See *Brodie*, 40 Cal.4th at p. 1329 [72 Cal.Comp.Cases at p. 578] (SB 899 was adopted as "an urgency measure designed to alleviate a perceived crisis in skyrocketing workers' compensation costs"); *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 655 [73 Cal.Comp.Cases 785, 796] (SB 899 represented "a major reform of the state's workers' compensation system, a system perceived to be in dire financial straits at the time"); *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (*Chavez*) (2007) 151 Cal.App.4th 148, 155 [72 Cal.Comp.Cases 582, 587 ("the workers' compensation … reforms [of SB 899] were enacted as urgency legislation to drastically reduce the cost of workers' compensation insurance").

opinions here), then the employee's permanent disability rating would largely be determined by which expert the trier-of-fact accepted. This would defeat the Legislature's intention to "promote consistency, uniformity, and objectivity" in permanent disability determinations.

Accordingly, we conclude that, in the usual case, there is not a one-to-one correlation between an injured employee's diminished future earning capacity and his or her disability.[11]

E. The DFEC Portion Of The 2005 Schedule Is Not Rebutted By Taking Two-Thirds Of The Injured Employee's Estimated Diminished Future Earnings, And Then Comparing The Resulting Sum To The Permanent Disability Money Chart To Approximate A Corresponding Permanent Disability Rating.

Under his second method for determining that the DFEC portion of the 2005 Schedule had been rebutted, the WCJ estimated that, as result of her injury, applicant's earning capacity has been diminished by $172,000.00 over her remaining work life. This $172,000.00 figure is within the $158,025.92 to $178,562.88 range of diminished future earnings found, respectively, by Mr. Malmuth and Dr. Van de Bittner. Then, "relying on the premise that injured workers should not be compensated for more than two-thirds of their loss of future earnings," the WCJ determined that applicant's "compensable" earnings loss is $114,667.00 (i.e., ⅔ x $172,000.00). This figure is roughly the amount of the indemnity that would be payable if applicant had permanent disability of 71.5%. (See Lab. Code, § 4658.) Then, taking applicant's overall permanent disability to be 71.5%, the WCJ reduced her permanent disability rating to 54%, based on the parties' agreement that 25% of her disability was caused by non-industrial factors.

This second method of rebutting the DFEC portion of the 2005 Schedule suffers from some of the same defects as the WCJ's first method. That is, it fails to take into account that the Legislature specifically defined "diminished future earning capacity" to mean "a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees." (Lab. Code,

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[11] We recognize, however, that there may be some circumstances where an injured employee's DFEC might be the sole or dominant factor in determining permanent disability, such as where the employee's injury causes a total loss of earning capacity or something approaching a total loss of earning capacity (see, Lab. Code, § 4662). This question, though, is not before us now.

§ 4660(b)(2).) Also, because it still relies heavily on the opinions of vocational rehabilitation experts, it will neither promote reduced costs (see Stats. 2004, ch. 34, § 49) nor "promote consistency, uniformity, and objectivity" in the determinations of permanent disability (see Lab. Code, § 4660(d)).

In addition to these defects, however, there are at least two additional problems.

First, if the Legislature had intended California to be a "wage loss" state for permanent disability indemnity, it would have said so. Instead, the Labor Code declares, "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 injury, consideration being given to an employee's diminished future earning capacity." (Lab. Code, § 4660(a).) Accordingly, in California, an injured employee may be found to have permanent disability even if his or her injury does not cause any actual wage loss. Indeed, if the WCJ's proposed method of rebutting the 2005 Schedule were to be followed, then two injured employees having the same impairment under the AMA Guides could have radically different permanent disability ratings if, in one case, the employee rebuts the Schedule by showing very significant lost future earnings while, in another case, the defendant rebuts the Schedule by establishing that the employee returned to work at full wages.

Second, there is a logical flaw in the WCJ's analysis because a given permanent disability percentage does *not* necessarily equate to a particular amount of permanent disability indemnity. For example, here, the WCJ concluded that applicant's April 1, 2004 injury caused "compensable" earnings loss of $114,667.00, which the WCJ equated to a 71.5% unapportioned permanent disability rating. However, this approach avails only for injured employees who are "maximum" wage earners. That is, for an employee with an April 2004 date of injury who had average weekly earnings of at least $375.00 per week (Lab. Code, § 4453(b)(7)(E)), then a 71.5% rating would result in indemnity totaling $114,937.50, i.e., 459.75 weeks of indemnity at $250.00 per week (i.e., two-thirds of $375.00 per week). (Lab. Code, § 4658(c).) If, however, the employee was a "minimum" wage earner, i.e., having average weekly earnings of $157.50 per week or less (Lab.

Code, § 4453(b)(7)(E)), then a 71.5% rating would result in indemnity totaling only $48,273.75, i.e., 459.75 weeks of indemnity at $105.00 per week (i.e., two thirds of $157.50 per week). (Lab. Code, § 4658(c).) Accordingly, a permanent disability rating cannot be based, directly or indirectly, on how closely the amount of an injured employee's lost earnings correspond to the permanent disability indemnity on a money chart.

Having rejected the WCJ's proposed methods for rebutting the DFEC portion of the 2005 Schedule, we now address the proper method for such a rebuttal.

F. In The Usual Case, The DFEC Portion Of The 2005 Schedule May Be Rebutted In A Manner Consistent With Section 4660 – Including Section 4660(b)(2) And The RAND Data To Which Section 4660(b)(2) Refers.

1. The Language Of Section 4660 And The History Of The DFEC Portion Of The Schedule.

In order to understand how the DFEC portion of the 2005 Schedule may properly be rebutted, it is first necessary to examine the language of section 4660 and the history of the DFEC portion of the Schedule.

Section 4660, as amended by SB 899, directed the Administrative Director to adopt a new permanent disability Schedule on or before January 1, 2005. (Lab. Code, § 4660(e), (b)(2), (c).) In relevant part, section 4660(b)(2) provides:

> "For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies."

Based on this statutory directive, the DFEC portion of the 2005 Schedule was predicated both on empirical data from the 2003 RAND Study, as specifically referenced in section

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4660(b)(2), and on the 2004 RAND Study's refinement of that empirical data.[12] (See 2005 Schedule, at pp. 1-5 – 1-6.)

The 2003 RAND Study addressed several issues. As relevant here, however, it determined the ratio of the average permanent disability ratings to the average proportional earnings losses for a large number of employees who suffered industrial injuries to various body parts. (2003 RAND Study, at pp. 18-31.)

Specifically, the 2003 RAND Study began with 241,685 employees who had sustained industrial injuries between January 1, 1991 and April 1, 1997 and who had received formal permanent disability ratings from the Disability Evaluation Unit of the Division of Workers' Compensation (DEU). (*Id*., at p. 18.) Then, using wages paid data from EDD, the 2003 RAND Study determined the actual post-injury earnings of each of these injured employees. (*Id*.)

Next, again using EDD wage data, the 2003 Study compared the post-injury earnings of each of these 241,685 injured employees to the earnings during the same period of "a control group of workers at the same firm with similar pre-injury earnings" who had *not* sustained industrial

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12 The "2003 RAND Study" refers to Reville, Robert T., et. al., "Evaluation of California's Permanent Disability Rating Schedule – Interim Report," RAND Institute for Civil Justice (December 2003). The "2004 RAND Study" refers to Seabury, Seth A., et. al., "Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899," RAND Institute for Civil Justice (December 2004).

Although neither the 2003 RAND Study nor the 2004 RAND Study is in evidence, we deem it appropriate to consider them. For one, section 4660(b)(2) expressly required the Administrative Director to consider the 2003 RAND Study in formulating the new Schedule. Moreover, the new Schedule specifically indicates that its FEC Rank and DFEC adjustment factor provisions were derived from the 2003 and 2004 RAND Studies (see 2005 Schedule, at pp. 1-5 & 1-6) and section 4660 specifically indicates that the provisions of the Schedule may be considered by the WCAB "without formal introduction in evidence." (Lab. Code, § 4660(c).) Further, mandatory judicial notice must be taken of California administrative regulations (Evid. Code, § 451(b)) and discretionary judicial notice may be taken of official acts and records of the California executive branch (Evid. Code, § 452(c)). Of course, the new Schedule was adopted by regulation (Cal. Code Regs., tit. 8, § 9805) and the Administrative Director's rule-making record (see Gov. Code, § 11347.3) specifically states that she "relied upon" the 2003 and 2004 RAND Studies. (See http://www.dir.ca.gov/dwc/dwcpropregs/PDRS_ISOR.doc, at p. 2 [Initial Statement of Reasons].) Finally, discretionary judicial notice may be taken of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy (Evid. Code, § 452(h)). The RAND Studies are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, i.e., RAND's own website. (See http://www.rand.org/pubs/documented_briefings/DB443/DB443.pdf (2003 RAND Study) and http://www.rand.org/pubs/working_papers/2004/RAND_WR214.pdf (2004 RAND Study.)

injuries resulting in formal permanent disability ratings. (*Id*., at p. 19.) The control group's earnings "represent[ed] what [each] injured worker would have received if he or she had never been injured." (*Id*.) The earnings of each injured employee and the earnings of his or her corresponding control group were compared for a three-year period following the particular employee's date of injury. (*Id*., at pp. 21, 23.) The difference between the earnings of each injured employee and the earnings of his or her corresponding control group in this three-year post-injury period constituted the estimated earnings loss of each injured employee. (*Id*., at p. 19.)

Next, each injured employee's estimated earnings loss was divided by the earnings of the employee's corresponding control group, in order to obtain an estimate of his or her proportional earnings loss. (*Id*.) Thereafter, the 241,685 employees were separated into 27 groups based on their types of impairments (i.e., injured body parts). (*Id*., at p. 28.) Then the permanent disability rating for each employee within a particular group (e.g., all employees having knee impairments) was divided by his or her estimated proportional earnings loss; at which point, the individual ratings to proportional earnings loss ratios of each injured employee within each impairment group were combined to determine an average permanent disability rating over average proportional earnings loss ratio for that impairment group. (*Id*., at pp. 28-31.)

These ratios of average ratings to average proportional earnings losses varied significantly, depending on the particular impairment involved. For example, the average ratio of ratings to proportional earnings loss for knee injuries was 1.77, but for psychiatric injuries it was 0.58. (*Id*., at pp. 28, 30.) This means that, under the Permanent Disability Schedules in effect from 1991 through 1997 (i.e., the period that was the subject of the RAND Studies), knee injuries received higher permanent disability benefits than did psychiatric injuries of similar severity. (*Id*., at p. 28.)

The 2004 RAND Study (which issued after the April 19, 2004 effective date of section 4660) further refined these ratings to proportional wage loss ratio data, with the intent that the revised data could be used to compute the DFEC adjustment factors for the new Schedule, as required by SB 899. (See 2004 RAND Study, at pp. 2, 14, 15.) The 2004 RAND Study used the same DEU and EDD data as the 2003 RAND Study (*id*., at p. 2), however, there are three chief

differences between the 2003 Study and the 2004 Study. First, the former used *final* permanent disability ratings for the ratios, but the latter used *standard* permanent disability ratings. (*Id*., at p. 2.) The 2004 Study explained, "given that the age and occupation adjustments are still going to be used in the new schedule, it seemed that the initial *standard rating*, is a more appropriate tool with which to calculate the diminished future earnings capacity adjustments." (*Id*. (emphasis in original).) Second, the 2004 Study made some statistical modifications to the proportional earnings loss data by dropping out the top and bottom percentiles to eliminate the undue effect of "extreme" cases (e.g., cases where the injured employee's post-injury earnings substantially *exceeded* the control group's earnings, such as where the control group's earnings were quite low or even zero). (*Id*., at pp. 3-7.) Third, the 2004 Study separated spinal impairments into three different regions, i.e., lumbar, cervical, and thoracic. (*Id*., at pp. 8-9.) The results of the 2004 RAND Study were that, for 22 specific impairment categories (including three spinal region categories) and one "other" category (for miscellaneous injuries), the average ratios of standard ratings over proportional earnings losses ranged from 0.45 (for psychiatric impairments) to 1.81 (both for hand/finger impairments and for vision impairments), with all of the ratios being set out in Table 5 of the Study. (*Id*., at pp. 12-13.)

The 2005 Schedule adopted the average standard ratings to average proportional earnings losses ratios for various impairments from Table 5 of the 2004 RAND Study and, except for some slight differences, incorporated these ratios into Table B of the Schedule. (2005 Schedule, at pp. 1-6 [Paragraph (a)-1], 1-7 [Table B], 1-8.)[13] Next, the 2005 Schedule consolidated these 22 average ratings to proportional earnings loss ratios into eight FEC Ranks. (2005 Schedule, at pp. 1-6 [Paragraph (a)-2], 1-7 [Table B].) For example, FEC Rank One included impairments that had average ratings to proportional earnings loss ratios within the range of 1.647 to 1.810, while FEC Rank Eight included impairments that had average ratios within the range of 0.450 to 0.620. (2005

[13] There are 22 categories of body parts listed in Table B, including an "other" category, which covers 14 miscellaneous categories of injuries. (2005 Schedule, at p. 1-8.) The 2004 RAND Study, however, had 23 categories, including an "other" category. (2004 RAND Study, at p. 13 [Table 5].) The RAND category for "headaches" was not included in the 2005 Schedule.

Schedule, at p. 1-7 [Tables A & B].) Then, the Schedule established a series of eight DFEC adjustment factors corresponding to each FEC Rank. (2005 Schedule, at pp. 1-6 [Paragraph (a)-3], 1-7 [Table A].) The minimum DFEC adjustment factor is 1.100000 for FEC Rank One and the maximum DFEC adjustment factor is 1.400000 for FEC Rank Eight. (*Id*.)[14] These minimum and maximum DFEC adjustment factors established by the Schedule were calculated by using the numeric formula **([1.81/a] x .1]) + 1**, where "**a**" corresponds to both the minimum and the maximum ratings to wage loss ratios from Table B of the Schedule. (2005 Schedule, at p. 1-6 [Paragraph (a)-4].)[15]

Under the 2005 Schedule, the eight DFEC adjustment factors are used to multiply the injured employee's standard whole person impairment rating under the AMA Guides. (2005 Schedule, at pp. 1-6 – 1-7 [Paragraph (a)-4].) For example, the minimum 1.100000 adjustment factor results in a 10% increase in the WPI rating and the maximum 1.400000 adjustment factor results in a 40% increase. (2005 Schedule, at p. 1-6 [Paragraph (a)-3].)

2. Consistent With Section 4660(b)(2) And The RAND Study Data To Which It Refers, The First Step In Determining Whether The DFEC Portion Of The 2005 Schedule Has Been Rebutted Is To Establish The Injured Employee's Individualized Proportional Earnings Loss.

Once again, section 4660(b)(2) provides that "[f]or purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees." Section 4660(b)(2) further provides that "the administrative director shall formulate the adjusted rating schedule based on empirical data and

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14 These adjustment factors came from a policy decision made by the Administrative Director. (See *Costa I*, *supra*, 71 Cal.Comp.Cases at p. 1816; *Boughner v. Comp USA, Inc*. (2008) 73 Cal.Comp.Cases 854, 867-868 (Appeals Board en banc).) It appears that the 1.81 in the formula is derived from the 1.810 rating to proportional earnings loss ratios for hand/finger impairments and for vision impairments, which are the highest such ratios in the Schedule. (See 2005 Schedule, at p. 1-7, Table B.)

15 Thus, the minimum DFEC adjustment factor of 1.100000 was calculated by using the highest ratio for any of the impairments in the RAND Studies – i.e., 1.810 (which was the rating/wage loss ratio for both hands/fingers impairments and vision impairments) – and then plugging this 1.810 ratio into the formula – i.e., ([1.81/1.810] x .1) + 1 = 1.100000. The maximum DFEC adjustment factor of 1.400000 was calculated by using the lowest ratio for any of the impairments in the RAND Studies – i.e., 0.450 (which was the rating/wage loss ratio for the psyche) – and then plugging this 0.450 ratio into the formula – i.e., ([1.81/0.450] x .1) + 1 = 1.402222, which was rounded to 1.400000.

findings from the [2003 RAND Study] and upon data from additional empirical studies."

As discussed in greater detail above, the Administrative Director utilized the aggregate empirical data and findings from both the 2003 and 2004 RAND Studies in formulating the DFEC portion of the 2005 Schedule. In reaching their findings, the 2003 and 2004 RAND Studies began by determining – for each of the 241,685 injured employees in the study – what their actual earnings were (if any) in the three years following their respective injuries, based on each employee's post-injury EDD earnings data. (See 2003 RAND Study, at pp. 18, 21, 23; 2004 RAND Study, at pp. 2, 3, 12.) Next, the 2003 and 2004 RAND Studies determined what each individual employee in the study likely would have earned, absent the industrial injury, by examining EDD data on what uninjured workers at the "same firm" in similar jobs (i.e., the control group) actually earned during the same period. (See 2003 RAND Study, at p. 19; 2004 RAND Study, at p. 3.) Then, the 2003 and 2004 RAND Studies took the difference between the earnings of each injured employee and the earnings of his or her corresponding control group as being the estimated earnings loss of each injured employee for the three-year post-injury period. (*Id*.) Finally, as relevant to this portion of our discussion, each injured employee's estimated earnings loss was divided by the actual earnings of his or her corresponding control group, in order to obtain an estimate of his or her proportional earnings loss during this three-year period. (See 2003 RAND Study, at p. 19; 2004 RAND Study, at pp. ii, 3-4.)

Consistent with section 4660(b)(2) and the 2003 and 2004 RAND Studies, when a party seeks to rebut the DFEC portion of the Schedule in a particular case, the starting point will be to establish the employee's individualized proportional earnings loss. This is done in four steps.

a. Determining The Injured Employee's Post-Injury Earnings

In determining an individual employee's proportional earnings loss, the first step ordinarily will be to establish the employee's actual earnings in the three years following his or her injury (as did the RAND Studies), using the employee's EDD wage data or other empirical wage information. Generally, this will be accomplished by having the employee obtain his or her wage information from EDD (Unemp. Ins. Code, § 1094(e)), either voluntarily or through an order

compelling. However, other empirical earnings information also may be used, including earnings records from the Social Security Administration. (42 U.S.C. §§ 405(c)(3), 1306; 20 C.F.R. §§ 401.100(a), 404.810(a); 5 U.S.C. § 552a(b); see also, *Jimenez v. San Joaquin Valley Labor* (2002) 67 Cal.Comp.Cases 74, 84 (Appeals Board en banc) (*Jimenez*); *Garber v. Worker's Comp. Appeals Bd*. (1999) 64 Cal.Comp.Cases 248 (writ den.).) Moreover, while federal and state tax records, including W-2 forms, are privileged (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718-723 (*Schnabel*); *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd*. (*Rhooms*) (1996) 42 Cal.App.4th 1260, 1289 [61 Cal. Comp. Cases 149, 170] (*Rhooms*)), "[t]he privilege is not absolute" and does not apply where a stronger public policy controls or when a party has waived the privilege. (*Schnabel*, 5 Cal.4th at p. 718; *Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268, 274; *Jimenez*, 67 Cal.Comp.Cases at p. 84.)

Yet, although the 2003 and 2004 RAND Studies used three years of post-injury earnings as the basis for their proportional earnings loss calculations, there is nothing magical about a three-year period. This is because the 2003 and 2004 RAND Studies used three-year proportional earnings losses only "because these data provide the best balance between representing long-term outcomes and a sufficient number of observations with which to conduct [an] analysis" for a large-scale study. (See 2004 RAND Study, at p. 3.) In cases of individual injured employees, however, a longer or shorter period of post-injury earnings may be appropriate. For example, if an employee's injury results in a long period of temporary disability, then it might be appropriate to use a longer period than three years – or a three-year period with a starting date later than the date of injury, such as the injured employee's permanent and stationary date – for assessing the injured employee's "long-term loss of income." (Lab. Code, § 4660(b)(2).) As another example, where an injured employee becomes permanent and stationary (i.e., reaches maximum medical improvement) shortly after the date of his or her industrial injury, then an attempt to rebut the DFEC portion of the 2005 Schedule need not be delayed until three years of post-injury wage data becomes available. In such a case, it might be appropriate to use a shorter period of wage data or

to make projections that *estimate* three years of post-injury earnings.[16]

b. Determining The Post-Injury Earnings Of Similarly Situated Employees.

Once the injured employee's actual or estimated post-injury earnings for three years (or another appropriate period) have been determined, then, consistent with section 4660(b)(2) and the 2003 and 2004 RAND Studies, the second step is to examine EDD wage data or other empirical wage information to establish what "similarly situated employees" earned during the same three-year (or other) period.

Of course, in the RAND Studies these "similarly situated employees" were "a control group of workers at the same firm with similar pre-injury earnings" to the injured employee (see 2003 RAND Study, at p. 19), i.e., "uninjured workers [at the same firm] who appeared to observably similar to the injured worker[] prior to the injury" (see 2004 RAND Study, at p. 3). Moreover, the RAND Studies had been provided with access to EDD wage data regarding the quarterly earnings of each control group worker, as reported by his or her employer(s). (See 2003 RAND Study, at p. 18; 2004 RAND Study, at pp. 2-3.)[17]

However, when dealing with the workers' compensation claim of a particular injured employee, the earnings of "similarly situated employees" generally cannot be established through EDD wage data on each individual co-worker. This is because, absent an applicable exception, wage information gathered by EDD is confidential. (Unemp. Ins. Code, §§ 1094, 2111.) Moreover, in most cases, there will be significant limitations on the compelled disclosure of wage information by a co-worker or the co-worker's employer. Under the privacy provisions of the California Constitution (Cal. Const., art. I, § 1), "the right of privacy extends to one's confidential financial affairs" and, unless there is a compelling public interest, third parties have a right "to

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16 We deem it unnecessary, at this point, to determine how any such projections might be made. If, on remand, the WCJ concludes that earnings estimates must be projected, he may decide this question in the first instance.

17 The RAND Studies were conducted under contracts with the California Commission on Health and Safety and Workers' Compensation and the California Division of Workers' Compensation. (See 2003 RAND Study, at p. v; 2004 RAND Study, at p. iii.) According to EDD's website, it may provide confidential information to government agencies or their contractors for economic planning and development purposes," however, the "[r]ecipients of confidential data may use it only for statistical purposes and are restricted from releasing it to unauthorized parties" (http://www.labormarketinfo.edd.ca.gov/article.asp?ARTICLEID=1222&SEGMENTID=3).

maintain reasonable privacy regarding their financial affairs." (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656-657; see also *Rhooms*, 42 Cal.App.4th at p. 1287 [61 Cal.Comp.Cases at p. 169] ("The right to privacy in disclosure of financial information affects the scope of discovery.").)

Accordingly, in the usual case, the earnings of "similarly situated employees" will have to be estimated. This may be accomplished in several ways. Often, empirical wage data on "similarly situated employees" may be gathered from EDD's Labor Market Information Division (LMID) website[18] The LMID website aggregates the wage information of a large number of workers within a particular occupation for particular time periods, either statewide or by county. For example, LMID's Occupational Employment Statistics (OES) website currently provides wage data by occupation and geographic area for one quarter of each year from 2001 through 2008.[19] Wage information also can be found at LMID's Occupational Profile website[20] and its Occupational Wages Data Search Tool website.[21] Additional wage data is available at the website of the United States Department of Labor, Bureau of Labor Statistics (BLS), which covers geographical areas within the United States, both inside and outside of California.[22]

In some cases, though, there may be problems with or limitations to LMID website wage data because, for example, the data may not cover or be adequate for the occupation, geographic area, and/or time frames in question – or it simply may be difficult or unduly time-consuming to find. Therefore, to estimate the earnings of "similarly situated employees," it may be appropriate

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18 The LMID home page is at http://www.labormarketinfo.edd.ca.gov/.

19 See http://www.labormarketinfo.edd.ca.gov/?pageid=152. This website provides information on the mean hourly wage, mean annual wage, 25th percentile hourly wage, 50th percentile (median) hourly wage, and 75th percentile hourly wage for each calendar year, by occupation and county (or other regional area). Because the gathering and compilation of this wage data is so labor-intensive, the LMID OES website provides wage data for only one quarter of each year. However, extrapolations may be made from this quarterly data, if necessary.

20 See http://www.labormarketinfo.edd.ca.gov/cgi/databrowsing/occexplorerqsselection.asp?menuchoice=occexplorer.

21 See http://www.labormarketinfo.edd.ca.gov/cgi/dataanalysis/areaselection.asp?tablename=oeswage.

22 See, e.g., http://www.bls.gov/bls/blswage.htm or http://www.bls.gov/data/. BLS wage data may be useful, for example, in the case of an injured employee who is working outside of California but who is nevertheless covered by California's workers' compensation laws. (See Lab. Code, §§ 5305, 3600.5(a).)

for a party to obtain customized empirical wage information from EDD.[23] Alternatively, it may be appropriate to hire a vocational expert to obtain the empirical wage information data.

In other cases, however, the earnings of similarly situated employees can be established directly. These might include, for example: (1) public employment cases, such as the case before us,[24] (2) cases where the co-workers' wages are established by a collective bargaining agreement, which also may be applicable to the case before us,[25] or (3) cases where co-workers voluntarily disclose their wage information.[26] Of course, where the earnings of "similarly situated employees" may be directly established, such direct empirical wage data may be used in lieu of earnings estimates.

c. Determining The Injured Employee's Estimated Earnings Loss.

The third step, consistent with section 4660(b)(2) and the RAND Studies, is to determine the injured employee's estimated earnings loss. This is done by subtracting the actual or estimated post-injury earnings of the injured employee from the average earnings of his or her corresponding control group during the same three-year (or other) period.

d. Determining The Injured Employee's Proportional Earnings Loss.

Consistent with section 4660(b)(2) and the RAND Studies, the fourth and final step of this phase is to determine the injured employee's proportional earnings loss. This is accomplished by dividing his or her estimated earnings loss during the three-year (or other) post-injury period by the average earnings of his or her corresponding control group during the same period.

e. Illustrating The Four Steps To Determining Proportional Earnings Loss.

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23 For a fee, LMID can produce various kinds of customized reports. (See http://www.labormarketinfo.edd.ca.gov/article.asp?ARTICLEID=1222.)

24 See *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319 (salaries of public employees are not exempt from public disclosure under the California Public Records Act and are not protected by the constitutional right to privacy because "public employees do not have a reasonable expectation of privacy in the amount of their salaries").

25 Cf., Lab. Code, § 1773 (in determining prevailing wage rates for public works, consideration is given to collective bargaining agreements, within the locality and in the nearest labor market area, or data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification, or type of work involved).

26 See Lab. Code, § 232.

To illustrate, we will use the following hypothetical. Based on an injured employee's EDD wage data, the employee earned a total of $25,000 during the three years following the injury. Based on EDD-LMID wage data, the average earnings of the employee's "control group" for the same period were $150,000.[27] Therefore, the injured employee's estimated earnings loss during this period would be $125,000 (i.e., $150,000 – $25,000 = $125,000). Accordingly, the injured employee's proportional earnings loss would be 0.83 or 83% ($125,000 ÷ $150,000 = 0.83).[28]

After the injured employee's proportional earnings loss has been established, it is then time to move on to the next phase for determining whether the DFEC portion of the 2005 Schedule has been rebutted.

3. Consistent With Section 4660(b)(2) And The RAND Study Data To Which It Refers, The Second Phase In Determining Whether The DFEC Portion Of The 2005 Schedule Has Been Rebutted Is To Divide The Employee's Standard Whole Person Impairment Rating By His Or Her Proportional Earnings Loss To Calculate An Individualized Ratio Of Rating Over Proportional Earnings Loss.

As discussed above, the language of 4660(b)(2) specifically calls for consideration of empirical data and findings from the 2003 RAND Study and other empirical data – which, of course, would include the 2004 RAND Study. The 2003 RAND Study divided each individual injured employee's actual final permanent disability rating by his or her estimated proportional earnings loss to come up with a rating to proportional earnings loss ratio. The 2004 RAND Study refined this data by using each injured employee's actual standard permanent disability rating, instead of the final rating.

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27 Incidentally, this is consistent with most recent U.S. Department of Labor data on the state average weekly wage (SAWW) in California, which is $956.20 per week or roughly $49,859 per year. (See Division of Workers' Compensation Newsline No. 66-08, at http://www.dir.ca.gov/dwc/dwc_newslines/2008/Newsline_66-08.html.)

28 LMID's Occupational Employment Statistics website does not list empirical wage data for every occupational group in every county. Moreover, "Bus Drivers, Transit and Intercity" for San Francisco County is one of the very few regional occupational groups for which wage data is not listed for certain years. If, however, relevant wage data on applicant's "similarly situated employees" cannot be obtained from the LMID website, then that wage data might be obtained by other means. For example, applicant was a county-employed transit operator. Therefore, consistent with the discussion above, wage data on similarly situated employees might be obtained by making a Public Records Act request and/or by reference to a collective bargaining agreement. Also, analogies conceivably could be made to "Bus Drivers, Transit and Intercity" for another county or counties in the Bay Area. However, we leave these issues for the WCJ to resolve in the first instance.

Therefore, consonant with the language of 4660(b)(2) and its reference to RAND, the next phase in any attempt to rebut the DFEC portion of the 2005 Schedule is to take the injured employee's standard WPI rating and then divide this rating by his or her estimated proportional earnings loss, to come up with an individualized rating to proportional earnings loss ratio (rating to loss ratio).

Thus, using the example above, if the injured employee's individualized proportional earnings loss is 0.83 or 83%, and his or her whole person impairment is 5%, then the individualized rating to loss ratio would be 0.06024 (i.e., 5% ÷ 83% = 0.06024).

4. Determining Whether An Injured Employee's Individualized Ratio Of Rating Over Proportional Earnings Loss Rebuts The DFEC Portion Of The 2005 Schedule.

As discussed above, the 2005 Schedule basically took the average standard ratings to average proportional earnings losses ratios for various impairments (i.e., body parts) from Table 5 of the 2004 RAND Study and incorporated these ratios into Table B of the Schedule. Then, the 2005 Schedule compressed all of these proportional earnings loss ratios into eight FEC Ranks and assigned a DFEC adjustment factor to each rank. For example, FEC Rank One, which included impairments that had average ratings to proportional earnings loss ratios within the range of 1.647 to 1.810, was assigned a DFEC adjustment factor of 1.100000.

a. Situations In Which The 2005 Schedule Is Not Rebutted.

In light of this, we conclude that the Schedule is *not* rebutted if the injured employee's individualized rating to loss ratio either (1) is the *same* as the ratio contained in Table B of the 2005 Schedule for the same impairment (i.e., body part) or (2) falls within the range of ratios of the FEC Rank for that impairment (and, therefore, takes the same DFEC adjustment factor as the impairment otherwise would).

To illustrate, we will examine a hypothetical neck impairment. Under the Schedule, the average rating to loss ratio for neck impairments is 1.060, which is within FEC Rank Five. (2005 Schedule, at p. 1-7 [Table B].) Yet, FEC Rank Five also includes all rating to loss ratios ranging from 0.963 to 1.133, and all the ratios within that Rank take a DFEC adjustment factor of

1.271429. (2005 Schedule, at p. 1-7 [Table A].) Thus, if the evidence presented establishes that an injured employee with a neck impairment has an individualized rating to loss ratio of 1.060, then that ratio is no different than the 1.060 average ratio listed by the Schedule for neck impairments. Therefore, the Schedule has not been rebutted and the employee's standard WPI rating would be multiplied by the DFEC adjustment factor of 1.271429, i.e., the adjustment factor for FEC Rank Five. However, the same would be true if the evidence establishes an individualized rating to loss ratio of anywhere between 0.963 to 1.133, because these ratios also fall within FEC Rank Five and also take a DFEC adjustment factor of 1.271429. Accordingly, in either case, a hypothetical whole person impairment rating of 5% for the neck would adjust to 6% (i.e., 1.271429 x 5% = 6.357145), before adjustment for age and occupation.[29] A hypothetical neck impairment rating of 25% would adjust to 32% (i.e., 1.271429 x 25% = 31.785725), before adjustment for age and occupation.

b. Situations In Which The 2005 Schedule Is Rebutted.

If, however, the employee's individualized rating to loss ratio (1) is *less than or greater than* the ratio contained in Table B of the 2005 Schedule for the same impairment (i.e., body part) *and* (2) falls outside of the range of ratios of the FEC Rank for that impairment, then the Schedule has been rebutted. What happens next depends on whether the individualized rating to loss ratio does or does not fall within any of the range of ratios for the other seven FEC Ranks.

i. Where The Individualized Rating To Proportional Wage Loss Ratio Falls Outside The Range Of Ratios Of The FEC Rank For The Particular Impairment, But Falls Within The Range Of Ratios For One Of The Other Seven FEC Ranks.

If the individualized rating to loss ratio falls within one of the other seven range of ratios in Table A of the 2005 Schedule, then the FEC Rank and DFEC adjustment factor corresponding to that particular range of ratios shall be used, even if it results in a higher or lower FEC Rank and a higher or lower DFEC adjustment factor than what the Schedule itself would establish for the particular impairment (body part) involved.

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29 The Schedule provides that when a standard whole person impairment rating is multiplied by the appropriate DFEC adjustment factor, the product is rounded to the nearest whole number percentage. (2005 Schedule, at pp. 1-6 – 1-7.)

For example, let us once again take a hypothetical injured employee with a neck impairment. As discussed above, under the Schedule, neck impairments have an average rating to loss ratio of 1.060, which falls within FEC Rank Five. FEC Rank Five includes all average ratings to loss ratios that range from 0.963 to 1.133 – and all ratios within FEC Rank Five's range take a DFEC adjustment factor of 1.271429. If, however, the evidence establishes that a particular employee's individualized rating to loss ratio is 0.525, then that ratio falls within the 0.450 to 0.620 range of ratios and for FEC Rank Eight, which takes a DFEC adjustment factor of 1.400000. Thus, in calculating the employee's permanent disability rating, the 1.400000 DFEC adjustment factor would be used, instead of the 1.271429 adjustment factor ordinarily used for neck impairments per the Schedule. In that circumstance, a hypothetical neck impairment rating of 5% would adjust to 7% (i.e., 1.400000 x 5% = 7.000000), before adjustment for age and occupation. A hypothetical neck impairment rating of 25% would adjust to 35% (i.e., 1.400000 x 25% = 35.000000), before adjustment for age and occupation.

On the other end of the spectrum, however, let us assume it is shown that the injured employee's individualized rating to loss ratio is 1.720. Because 1.720 falls within the range of ratios for FEC Rank One (i.e., 1.647 to 1.810), then the DFEC adjustment factor of 1.100000 for that Rank would be used to rate the neck impairment, rather than the 1.271429 adjustment factor for neck impairments under the Schedule. In that circumstance, a hypothetical neck impairment rating of 5% would adjust to 6% (i.e., 1.100000 x 5% = 5.500000), before adjustment for age and occupation. A hypothetical neck impairment rating of 25% would adjust to 28% (i.e., 1.100000 x 25% = 27.500000), before adjustment for age and occupation.

Therefore, where it is established that an individual employee's particularized rating to loss ratio is *somewhat* higher or *somewhat* lower than the average rating to loss ratio for his or her impairment under the Schedule – but the employee's ratio still falls within the range of ratios for one of the seven other FEC Ranks of the Schedule, then the DFEC adjustment factor used to multiply the employee's WPI under the AMA Guides generally will be *somewhat* lower or *somewhat* higher than the adjustment factor called for by the Schedule. Nevertheless, in these

somewhat lower or higher situations, when the employee's WPI is multiplied by this unscheduled DFEC adjustment factor, the resulting adjusted rating is not dramatically different than the rating the Schedule would provide.

The bigger question, though, is what happens if the injured employee's individualized rating to loss ratio does *not* fall within any of the range of ratios for the eight FEC Ranks in Table A of the 2005 Schedule – that is, if the employee's individualized ratio is *higher than 1.810* (i.e., the highest average ratings to wage loss ratio within FEC Rank One) or if the individualized ratio *is lower than 0.450* (i.e., the lowest average ratings to wage loss ratio within FEC Rank Eight).

ii. Where The Individualized Rating To Proportional Wage Loss Ratio Falls Outside All Of The Range Of Ratios For All FEC Ranks.

We conclude that if the employee's individualized rating to loss ratio does *not* fall within any of the range of ratios for any of the eight FEC Ranks, then the employee's DFEC adjustment factor shall be determined by applying the formula of **([1.81/a] x .1) + 1**, where "**a**" is the employee's individualized rating to loss ratio. This approach is appropriate because it is consistent with section 4660(b)(2)'s requirement that a "numeric formula" be used and because the Schedule used this very same numeric formula for determining its minimum and maximum DFEC adjustment factors. (2005 Schedule, at p. 1-6 [paragraph (a)-4].)

To illustrate applications of this formula, we will use some hypothetical scenarios, all involving hypothetical neck impairments.

The opening scenario is a hypothetical 5% neck impairment rating and a hypothetical individualized proportional earnings loss of 0.83 or 83% (as in the hypothetical at pp. 27-28, *supra*). To start, the 5% rating (i.e., 0.05) is divided by the 83% (i.e., 0.83) proportional earnings loss to get an individualized rating to loss ratio of 0.060 (i.e., 5 ÷ 83 = 0.06024 or 0.05 ÷ 0.83 = 0.06024). This individualized ratio of 0.060 falls well below any of the range of ratios within Table A of the 2005 Schedule (i.e., it is nearly ten times lower than the 0.450 to 0.620 range of ratios for FEC Rank Eight). Accordingly, in this scenario, the 0.060 will now be substituted for the "**a**" in the **([1.81/a] x .1]) + 1** formula found on page 1-6 of the Schedule. In accordance with this

formula, the 1.81 is divided by the 0.060, resulting in 30.166666 (i.e., 1.81 ÷ 0.060 = 30.166666). Then, per the formula, this 30.166666 is multiplied by 0.1, resulting in 3.016666 (i.e., 30.166 x 0.1 = 3.016666). Finally, per the formula, 1.0 is added to the 3.016666, resulting in 4.016666 (i.e., 3.016666 + 1 = 4.016666). Accordingly, in this hypothetical 5% neck impairment and 0.83 individualized proportional earnings loss scenario, an individualized DFEC adjustment factor of 4.016666 would be used to multiply the injured employee's 5% standard impairment rating, resulting in a partially adjusted impairment rating (before adjustment for age and occupation) of 20% (i.e., 4.016666 x 5% = 20.083333%). This rating is roughly three times higher than the 6% partially adjusted rating (before adjustment for age and occupation) that would have resulted if the Scheduled DFEC adjustment factor of 1.271429 had been applied.

The second scenario is a hypothetical 25% neck impairment rating and a hypothetical individualized proportional earnings loss of 0.83. To start, the 25% rating (i.e., 0.25) is divided by the 0.83 proportional earnings loss to get an individualized rating to loss ratio of 0.301 (i.e., 0.25 ÷ 0.83 = 0.301). This individualized 0.301 ratio is once again lower than any of the average rating to loss ratio for neck impairments for any of the FEC Ranks of the Schedule (although not significantly lower than the 0.450 lowest ratio for FEC Rank Eight). Therefore, the 0.301 ratio is substituted for the "**a**" in the **([1.81/a] x .1]) + 1** formula found on page 1-6 of the Schedule. So, first, the 1.81 is divided by the 0.301, resulting in 6.013289 (i.e., 1.81 ÷ 0.301 = 6.013289). Next, in accordance with the formula, this 6.013289 is multiplied by 0.1, resulting in 0.601329 (i.e., 6.01 x 0.1 = 0.601329). Finally, per the formula, 1.0 is added to the 0.601329, resulting in 1.601329 (i.e., 0.601329 + 1 = 1.601329). Accordingly, in this hypothetical 25% neck impairment and 0.83 proportional earnings loss scenario, an individualized DFEC adjustment factor of 1.601329 would be used to multiply the injured employee's 25% standard impairment rating, resulting in a partially adjusted impairment rating (before adjustment for age and occupation) of 40% (i.e., 1.601329 x 25% = 40.033222%). This 40% rating represents an approximately 25.8% increase over the 32% partially adjusted rating that would have resulted if the Scheduled DFEC adjustment factor of 1.271429 had been applied (i.e., 1.271429 x 25% = 31.785725).

Accordingly, where an injured employee's individualized rating to proportional earnings loss ratio is lower than the lowest average rating to proportional earnings loss ratio in Table A of the Schedule, then the employee's partially adjusted rating (before adjustment for age and occupation) can be higher than the partially adjusted rating called for by the Schedule. This is consistent with the principles that, notwithstanding the Schedule, an injured employee's permanent disability award should "accurately reflect[] his [or her] true disability" (*Glass*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449]), it should not be "inequitable" and "so disproportionate to the disability and the objectives of reasonably compensating an injured worker as to be fundamentally unfair" (*Lewis*, *supra*, 99 Cal.App.3d at p. 659 [44 Cal.Comp.Cases at p. 1140]), and it should be "commensurate with the disability that he [or she] has suffered" (*Luchini*, 7 Cal.App.3d at p. 146 [35 Cal.Comp.Cases at p. 209]).

5. Possible Exceptions To Using The Foregoing Method.

The foregoing method for determining whether the DFEC portion of the 2005 Schedule has been rebutted – and, if so, for determining an individualized DFEC adjustment factor – may be used in most cases. Nevertheless, there may be exceptions where the foregoing method should not be used.

For example, an individualized proportional earnings loss can be negative when the injured employee's post-injury earnings exceed that of his or her corresponding control group. (See 2004 RAND Study, at p. 4.) Moreover, although we believe that the following scenario is likely to be rare (since, in most cases, an injured employee's post-injury earnings likely will be less than or about the same as his or her control group), if the control group's post-injury earnings are very low relative to the post-injury earnings of the injured employee, then this negative number can approach infinity. (*Id*.) The RAND Study was able to deal with such "outliers" by "trimming" the "extreme" numbers from the study data in order to bring the *average* proportional earnings loss to "sensible" and "reasonable levels." (*Id*., at pp. 4-7.) Of course, the RAND Study data involved hundreds of thousands of injured employees, so it was possible for the study to eliminate data for a small percentage of individual employees for averaging purposes. However, in assessing whether

the DFEC portion of the 2005 Schedule has been rebutted in a particular injured employee's case, it is not possible to disregard all of the earnings data relating to that employee. Therefore, in cases where the injured employee's actual post-injury earnings are significantly higher than the earnings of his or her control group during the same period, some alternative method may have to be utilized to determine whether the Schedule has been rebutted and, if so, how the employee's overall permanent disability rating should be calculated. We need not resolve this question now, however.[30]

Also, there may be instances where it is not proper to use the injured employee's actual post-injury earnings in determining his or her proportional earnings loss. In establishing their average proportional earnings loss figures, the 2003 and 2004 RAND Studies followed three years of post-injury earnings for 241,685 employees who had sustained industrial injuries over a more than six-year period between January 1, 1991 and April 1, 1997. Given the large number of employees and the broad period of time involved in the RAND Studies, those Studies had no need to consider (and, as a practical matter, probably could not consider) factors that may have skewed the post-injury earnings of particular employees. Yet, when a proportional earnings loss calculation is made for a particular employee in a DFEC rebuttal case, the employee's post-injury earnings portion of that calculation may not accurately reflect his or her true earning capacity. As the Supreme Court stated years ago in *Argonaut Ins. Co. v. Industrial Acc. Com.* (*Montana*) (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130, 133] (*Montana*):

> "An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. … [A] prediction [of earning capacity for purposes of permanent disability] is … complex because the compensation is for loss of earning power over a long span of time. … In making a permanent award, [reliance on an injured employee's] earning history alone may be misleading. … [A]ll facts relevant and helpful to making the estimate must be considered. The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and

30 We do observe, though, that conceivable alternatives might be to throw out certain earnings periods for the control group (e.g., if their low earnings are due to some unusual time-limited circumstances) or to use a broader control group.

> employment opportunities for persons similarly situated are all relevant." (*Montana*, *supra*, 57 Cal.2d at pp. 594-595 [27 Cal.Comp.Cases at p. 133] (internal citations omitted).)

Certainly, an individual employee should not be able to manipulate the proportional earnings loss calculation through malingering or otherwise deliberately minimizing his or her post-injury earnings. Similarly, motivational or other factors may play a role in determining whether a particular employee's post-injury earnings accurately reflect his or her true post-injury earning capacity. Further, an employee may voluntarily retire or partially retire for reasons unrelated to the industrial injury. (*Pham v. Workers' Comp. Appeals Bd.* (2000) 78 Cal.App.4th 626, 637-638 [65 Cal.Comp.Cases 139]; *Gonzalez v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843, 847-848 [63 Cal.Comp.Cases 1477, 1478-1479].) Temporary economic downturns or other factors may also come into play. Accordingly, the trier-of-fact may need to take a variety of factors into consideration.

The foregoing examples, however, are merely illustrative of some instances where it *might* be inappropriate to use the method set out above. These examples are neither all-inclusive nor absolute. The question of whether the DFEC rebuttal method discussed above should or should not be used in any particular case must be determined on a case-by-case basis. Moreover, when the foregoing method is not appropriate, it initially will be up to the assigned WCJ to decide what alternative method might be used.

6. Comments On The Dissent.

Preliminarily, the dissent essentially takes the position that section 4660 is strictly a permanent disability *schedule* statute. That is, the dissent asserts that section 4660 does not define "permanent disability"; instead, it merely sets forth the criteria for the Administrative Director to use in preparing and amending permanent disability rating schedules. The dissent's basic premise, therefore, is that when the 2005 Schedule has been rebutted, it takes the determination of the injured employee's permanent disability entirely outside of section 4660.

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We agree that section 4660 does not define the term "permanent disability" per se.[31] Nevertheless, as discussed earlier in our opinion, section 4660(a) specifically sets forth what factors are to be considered "[i]n determining the percentages of permanent disability" – including the injured employee's "diminished future earning capacity." Moreover, the first sentence of section 4660(b)(2) states that, "[f]or purposes *of this section*, diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees." (Emphasis added.) Then, the second sentence of section 4660(b)(2) makes clear that the "empirical data and findings" to which the first sentence refers come from the 2003 RAND Study and other similar studies (such as the 2004 RAND Study). As we have emphasized, the RAND Studies compared the post-injury earnings of a large number of industrially disabled workers to the earnings over the same time periods of each employee's relevant control group.

Given the express language of section 4660, we conclude that a method of "determining the percentages of permanent disability" that bears absolutely no relationship to the statutory scheme cannot be justified. Accordingly, we cannot accept a method that determines an injured employee's permanent disability percentage by equating it with a vocational expert's opinion of the employee's diminished future earning capacity, particularly where the expert's definition of

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31 In its recent decision in *Brodie*, the Supreme Court said:

> " '[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].)" (*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).)

"diminished future earning capacity" is completely at variance with the language of section 4660 and where the expert's opinion does not consider the injured employee's earnings in relation to "similarly situated employees."

Moreover, we find none of the dissent's several criticisms of the DFEC rebuttal method we have adopted to be persuasive.

The dissent suggests that our DFEC rebuttal method "will also require [the use of] vocational experts in some cases to estimate [an] applicant's long-term earnings" and that, therefore, our method will not further the Legislature's intent to reduce costs (see Stats. 2004, ch. 34, § 49) any more than the method suggested by the dissent. The dissent miscomprehends our DFEC rebuttal approach. Our approach relies on earnings information that generally may be obtained without the use of vocational experts. The injured employee's own wage data may be obtained from EDD; wage data regarding similarly situated employees may be obtained from EDD's readily accessible LMID websites. Once this wage data is obtained, it is a relatively simple matter to calculate the injured employee's proportional earnings loss[32] and, from there, to calculate his or her individualized rating to proportional earnings loss ratio.[33] After that, it is easy to determine whether the employee's individualized rating to proportional earnings loss ratio falls within any of the ranges of ratios of FEC Ranks One to Eight. If it does, then the corresponding scheduled DFEC adjustment factor is used. If it does not, then the employee's individualized DFEC adjustment factor is determined by application of the comparatively non-complex numeric formula **([1.81/a] x .1]) + 1**, where "**a**" corresponds to the employee's individualized rating to proportional earnings loss ratio. Therefore, vocational experts, if necessary at all, might be needed only for exceptional cases where there is no EDD LMID wage data for similarly situated workers. In such circumstances, however, the vocational experts would be used only for the limited purpose of gathering or estimating wage data for similarly situated workers. However, in

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32 That is, it is a simple formula of [a – b] ÷ a = c, where "a" is the earnings of similarly situated employees, "b" is the injured employee's earnings, and "c" is the proportional earnings loss.

33 That is, it is a simple formula of a ÷ b = c, where "a" is the injured employee's whole person impairment rating, "b" is his or her proportional earnings loss, and "c" is the rating to proportional earnings loss ratio.

any case where a party attempts to rebut the DFEC portion of the 2005 Schedule, the method suggested by the dissent will *always* require paid vocational experts, who will have to do *extensive* analyses (see below). Moreover, as a practical matter, the dissent's proposed method will largely be unavailable to unrepresented injured employees, who will rarely have the knowledge and ability to identify and properly utilize vocational experts.

Of course, we recognize that not all unrepresented injured employees will have access to or the expertise to use a computer to obtain EDD LMID wage data, or will not have the mathematical background to apply the **([1.81/a] x .1]) + 1** formula. In such instances, however, an unrepresented injured employee may obtain free assistance from the Information and Assistance Office. (See Lab. Code, § 5450; Cal. Code Regs., tit. 8, § 9924(b).) Also, the WCAB could order a defendant to obtain the wage data.

The dissent also asserts that our DFEC rebuttal method is "designed to apply to only an undefined subset of cases in which a party may be able to rebut the [DFEC portion of] the 2005 Schedule." The dissent is correct, as we expressly acknowledge above, that it might be inappropriate to use our DFEC rebuttal method in some cases. Yet, we believe it will be rare that an injured employee's actual post-injury earnings are significantly higher than the earnings of his or her control group during the same period (and extraordinarily rare that the control group's earnings will be zero). Moreover, we have footnoted some conceivable alternative approaches in such situations. Also, in calculating an individual injured employee's proportional earnings loss, there may be occasions where the portion of that calculation relating to the employee's post-injury earnings will not accurately reflect his or her true earning capacity – or where the employee's diminished post-injury earnings are partially caused by factors other than the injury itself. These problems, however, will also exist when vocational experts assess an injured employee's post-injury earning capacity. So, in either case, the question will have to be resolved by the trier-of-fact.

Finally, the dissent suggests that its proposed approach is "operationally simple" and follows the principle of Occam's razor, i.e., that "the simplest of competing theories should be

preferred over more complex and subtle ones." (*Brodie*, 40 Cal.4th at p. 1328, fn. 10 [72 Cal.Comp.Cases at p. 577, fn. 10].) Yet, while the Occam's razor principle may be valid when construing a statute in a manner consistent with its language and intent, the Occam's razor principle cannot trump that language and intent. In any event, we do not agree that the dissent's proposed method is simpler than our approach. While it may be relatively easy to *hire* a vocational expert, our experience informs us that the DFEC analyses performed by vocational experts are quite involved and complex. This is readily evidenced by the vocational expert reports in this case.

The February 16, 2008 report of defendant's vocational expert, Dr. Van de Bittner, is 21 single-spaced pages long, including extensive discussions of applicant's personal/social/financial information, her medical information, her work history, her vocational testing (including Dvorine Color Vision test, Wide Range Achievement test, Wechsler Abbreviated Scale of Intelligence test, Purdue Pegboard test, Bennett Hand-Tool Dexterity test, Minnesota Clerical test, Bennett Mechanical Comprehension test, and Gates-MacGinitie Reading tests), her transferable skills analysis, her rehabilitation plan options, and an analysis of her access to the labor market. It concludes with four pages of calculations regarding applicant's pre-injury earning capacity, post-injury earning capacity, and diminished future earning capacity. Then, appended to the report are four pages of source references (*including four EDD-LMID wage data websites*), 10 pages of test results and data analysis, and 12 pages of record review (i.e., medical records, vocational rehabilitation records, investigation reports and videotape and other documents). Thus, Dr. Vander Bittner took 48 pages to reach his conclusions.

The September 25, 2007 report of applicant's vocational expert, Mr. Malmuth, is 24 single-spaced pages long, including a discussion of his methodology and an extensive discussion of applicant's personal/social/financial information, her activities of daily living, her medication, her medical information, her work and educational history, her vocational testing (including verbal ability, arithmetic reasoning, computation, spatial ability, form perception, clerical perception, motor coordination, finger dexterity, and manual dexterity), an analysis of her

transferable skills, a determination of medically and vocationally suitable post-injury occupations, a discussion of occupational employment statistics (including pre-injury and post-injury OES wages), and conclusions regarding her diminished future earning capacity. The report appends five pages of pre-injury earning capacity, post-injury earning capacity, and diminished earning capacity calculations. It also appends 13 pages of miscellaneous material, including discussions of the AMA Guides, various provisions of the Code of Federal Regulations, and the Dictionary of Occupational Titles – as well as a six-page unpublished appellate decision. Thus, Mr. Malmuth took 42 pages to reach his conclusions.

Accordingly, we fail to see how the dissent's proposed approach is "simpler" than the approach we have adopted. As we stated at the outset, our DFEC rebuttal approach basically boils down to (1) obtaining two sets of wage data (one for the injured employee and one for similarly situated employees), (2) doing some simple mathematical calculations with that wage data to determine the injured employee's proportional earnings loss, (3) dividing the employee's whole person impairment by the proportional earnings loss to obtain a ratio, and (4) seeing if the ratio falls within certain ranges of ratios in Table A of the 2005 Schedule. If it does, the determination of the employee's DFEC adjustment factor is simple. If it does not, then a non-complex formula is used to do a few additional calculations to determine an individualized DFEC adjustment factor.

G. The Remaining Issues.

Two ancillary issues raised by defendant's petition still need to be addressed.

First, defendant asserts that, based on our en banc decisions in *Costa I*, 71 Cal.Comp.Cases 1797, and *Boughner v. CompUSA, Inc.*, 73 Cal.Comp.Cases 854, applicant has failed to meet her burden of establishing that the presumptively correct 2005 Schedule is arbitrary, capricious, or unreasonable. Defendant, however, completely misconstrues our decisions in *Costa I* and *Boughner*. In those cases, the injured employees were attempting to establish that the Administrative Director's regulation adopting the 2005 Schedule was inconsistent with its

authorizing statute and, therefore, the *entire* 2005 Schedule was invalid. Here, however, applicant is not challenging the validity of the 2005 Schedule. Instead, she is merely attempting to rebut the Scheduled permanent disability rating in her particular case. Both *Costa I* and *Costa II* specifically recognized that a scheduled rating may be rebutted. (*Costa I*, 71 Cal.Comp.Cases at pp. 1817-1819; *Costa II*, 72 Cal.Comp.Cases at pp. 1496-1497.)

Second, defendant asserts that the WCJ failed to list and admit defendant's Exhibit D, which is a copy of a Domestic Return Receipt signed by applicant on January 17, 2007. Because we are deferring and remanding the permanent disability and apportionment issues, we will leave it to the trial judge to address this question in the first instance.

III. CONCLUSION

Because the WCJ's September 17, 2008 decision did not follow the correct method for determining whether the DFEC portion of the 2005 Schedule has been rebutted, we will rescind his findings on permanent disability, apportionment, and attorney's fees and remand this matter to the WCJ for further proceedings and a new decision consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (en banc), that the Findings and Award issued on September 17, 2008 is **AMENDED** such that Findings of Fact Nos. 2 and 3 and the Award in its entirety are **STRICKEN** therefrom and the following are **SUBSTITUTED** therefor:

FINDINGS OF FACT

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2. The issues of permanent disability and apportionment are deferred, with jurisdiction reserved.

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

AWARD

AWARD IS MADE in favor of **WANDA OGILVIE** and against the **CITY AND COUNTY OF SAN FRANCISCO**, Permissibly Self-Insured, of:

(a) All further medical treatment reasonably required to cure or relieve from the effects of the injury.

IT IS FURTHER ORDERED that this matter is **REMANDED** to the workers' compensation administrative law judge for further proceedings and a new decision, 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/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

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

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

I DISSENT
(See attached Dissenting Opinion)

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

Wanda Ogilvie
Office of the City Attorney
Law Office of Joseph C. Waxman

NPS/aml

DISSENTING OPINION OF COMMISSIONER CAPLANE

I concur with the majority in reaffirming our prior holdings that the 2005 Permanent Disability Rating Schedule (2005 Schedule) is rebuttable. However, following the principle of Occam's razor,[34] I would hold that the 2005 Schedule is rebutted when a party proves that applicant's diminished future earning capacity is disproportionate to the rating under the 2005 Schedule. I would further hold that once the 2005 Schedule is rebutted, the permanent disability rating is the percentage loss of future earning capacity. Therefore, I dissent.

The majority has outlined the history of section 4660 (Section II-A). Prior section 4660(a) 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" (emphasis added). Prior section 4660(b) provided in relevant part: "The administrative director may prepare, adopt, and from time to time amend a schedule *for the determination of permanent disabilities* in accordance with this section" (emphasis added). The permanent disability rating that resulted from the use of the schedule "is a numeric representation, expressed as a whole number percent, of the degree to which the permanent effects of the injury have *diminished the capacity of the employee to compete for and maintain employment in an open labor market*" (*Schedule for Rating Permanent Disabilities* (April 1997), page 1-2 (emphasis added).

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" (emphasis added). Sections 4660(b)(1) and (b)(2) define "nature of physical injury or disfigurement" and "diminished future earning capacity."

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34 "[T]he simplest of competing theories should be preferred over more complex and subtle ones." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329, fn. 10 [72 Cal.Comp.Cases 565, 577, fn. 10] (citations omitted).)

Section 4660(c) provides in relevant part: "The administrative director shall amend the schedule for the *determination of the percentage of permanent disability* in accordance with this schedule at least once every five years" (emphasis added). "A permanent disability rating can range from 0% to 100%. Zero percent signifies *no reduction in earning capacity*, while 100% represents permanent total disability … . Permanent total disability represents a level of disability at which an employee *has sustained a total loss of earning capacity*" (*Schedule for Rating Permanent Disabilities* (January 2005), pages 1-2 – 1-3 (emphasis added)).

Thus, neither prior nor present section 4660 defines "permanent disability."[35] Instead, they set forth the criteria for the administrative director to use in preparing and amending permanent disability rating schedules. Therefore, when the rating schedules are rebutted, it is all of section 4660 and the rating schedules that they create that are rebutted, not simply the "diminished ability … to compete in an open labor market" or "diminished future earning capacity" clauses.

When our Supreme Court considered prior section 4660, it stated: "A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability. A prior permanent disability rating and award which fails to reflect that fact is inequitable" (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587, 597]). The Court reached this conclusion despite the fact that prior section 4660 said nothing about vocational rehabilitation. Nor did the Court require the injured employee to restate his permanent disability in terms of the schedule created by former section 4660, except to the extent that the disability affected his ability to compete in an open labor market.

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35 " '[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, 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.* (1963) 59 Cal.2d 45, 52.) 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* (1993) 2 Cal.4th 744, 753)" (*Brodie*, 40 Cal.4th at p. 1320 [72 Cal.Comp.Cases at p. 571] (footnote omitted).

Here, the majority does not dispute that applicant has proved that her actual diminished future earning capacity is substantially disproportionate to her rating under the 2005 Schedule. Because she has proved that, I believe that she has successfully rebutted the 2005 Schedule as to herself. By doing so, applicant has also rebutted the language in section 4660 that creates that schedule. The percentage of her actual loss of future earnings as demonstrated by both parties' expert witnesses is the most accurate reflection of her diminished future earning capacity. Therefore, her permanent disability rating should be the percentage of her lost future earning capacity and not the rating produced by the labored and complicated formula proposed by the majority.

The method that I propose is comprehensive, analytically sound, and operationally simple. It would require vocational or other experts to estimate the injured employee's post-injury earning capacity based upon medical opinions evaluating her permanent impairments and earning capacity had she not suffered the industrial injury, both to be determined from the permanent and stationary date through her projected years in the work force.[36] Such expert testimony is common in marriage dissolution cases,[37] personal injury cases,[38] and employment cases. Indeed, the vocational experts in this case provided expert opinions that were remarkably consistent with each other, a fact that indicates that their methodologies are well enough understood to provide reliable evidence.

The majority fears that this exception to the 2005 Schedule will swallow the rule and this result was not intended by the Legislature. But there is no reason to believe that parties would attempt to rebut the schedule in every case. Indeed, the vast majority of cases decided between *LeBoeuf* and SB899 were based upon the schedule then in use, not vocational rehabilitation evidence, despite the fact that vocational rehabilitation evidence was authorized by the Supreme

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36 Thus, in this case the fact that applicant has not returned to work after her injury was found not to preclude a finding that she has residual earning capacity after her injury.

37 See Family Code section 4331.

38 See, e.g., *Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023, 1037 [55 Cal.Comp.Cases 470, 478-479]: "In a personal injury matter, compensatory damages … include … the value of … loss or impairment of future earning capacity."

Court. In any case, this objection is not a reason to fail to determine permanent disability efficiently and fairly.

The majority also objects to my method on the basis of cost. "[I]f parties routinely use dueling vocational experts, or even one agreed vocational expert, then the costs of administering the workers' compensation may well increase" (slp. opn., page 14). The majority believes that its method does not require expert evidence. However, the plan may well require expert evidence to determine what may be an "other appropriate period" if the three years following date of injury is not appropriate; to estimate what applicant's post-injury earnings should be where applicant has received temporary disability indemnity or has not returned to work after the injury; to determine who are "similarly situated employees" where LMID data does not correspond to applicant's occupation; and to provide evidence when a WCJ determines that the majority's plan does not apply. Furthermore, since each case will require two determinations by the WCJ (i.e., which method should be applied, followed by whether the 2005 Schedule has been rebutted), the majority's plan requires increased litigation costs in each case. Whether this increased cost is more or less than the cost of my method is impossible to determine at this time, but it cannot be said that the majority's plan is cost-free.

In place of the relatively simple method that I propose, the majority adopts a plan that is complicated and limited. First, the applicant's post-injury earnings in the three years following his or her injury or some "other appropriate period" are determined. This figure is deducted from what "similarly situated employees" earned during the same three-year or other period. The parties are to look to collective bargaining agreement, if any, or EDD wage data to determine the earnings of "similarly situated employees." The difference between these two numbers is the estimated earnings loss of the injured employee. Then, the estimated earnings loss is divided by the average earnings of the "control group" to produce the "proportional earnings loss." The employee's standard WPI rating under the AME Guides is then divided by the proportional earnings loss. The result is called "individualized rating to loss" (IRL) ratio. If the IRL ratio is the same as or within the range of ratios in Table B of the 2005 Schedule for the same

impairment, the Schedule is not rebutted. If the IRL ratio is less than or greater than the scheduled ratios, the Schedule is rebutted. If the IRL ratio is within the range or ratios in Table A of the Schedule, that ratio shall be used. If the IRL ratio is not within that range of ratios, the DFEC adjustment factor shall be obtained by the formula ([1.81/a] x .1) + 1.

In addition to the obvious complexity of this plan, there are other problems.

The majority hold that an injured employee's post-injury earnings should be determined for a period of three years from the *date of injury*, although "there is nothing magical about a three-year period" (slp. opn., page 23). This three-year period is based on the 2003 and 2004 RAND Studies (see slp. opn., page 18, n. 12). However, for most injured employees who sustain permanent disabilities, as for the applicant in this case, there is a period of temporary disability for which the employee receives temporary disability indemnity. But temporary disability indemnity is not earnings. "Temporary disability benefits are intended primarily to replace lost earnings" (*Western Growers Insurance Company v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227 [58 Cal.Comp.Cases 323, 327]). The measure of temporary disability indemnity is *pre-injury* earnings, not *post-injury* earnings.[39] So what is the significance of temporary disability indemnity that an injured employee receives during the three years after the date of injury? The majority does not explain.

A more significant problem with the majority's plan is that despite its complicated machinery, it is designed to apply to only an undefined subset of cases in which a party may be able to rebut the 2005 Schedule. The majority recognize this limitation (slp. opn., pages 33-35). As to those exceptions, the majority give no guidance at all: "The question of whether the DFEC rebuttal method discussed above should or should not be used in any particular case must be determined on a case-by-case basis. Moreover, when the foregoing method is not appropriate, it initially will be up to the assigned WCJ to decide what alternative method might be used" (slp. opn., page 35).

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39 Labor Code section 4453.

So the majority's plan is a two-step process. First, the WCJ determines whether the majority's method applies to the case. If the method does apply, the parties then attempt to obtain the data required by the method and to apply the formula. If the method does not apply, the WCJ must decide what method her or she will require in the case, and then the parties will attempt to obtain the data required by the WCJ. Only then will the WCJ decide whether the schedule has been rebutted. All of these determinations will be made on a case-by-case basis.

Thus, the majority presents a complicated plan that applies to only a subset of cases where a party attempts to rebut the 2005 Schedule, and the majority does not determine what that subset might be, leaving it for case-by-case determination. The California Constitution requires that "the administration of [workers' compensation] legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character" (Art. XIV, § 4). The majority's plan is neither expeditious nor inexpensive, and whether it accomplishes substantial justice is difficult to determine.

In contrast, my method requires the same categories of data in every case, and it requires expert evidence that is widely used in other kinds of cases. Because this method would be easily understood, it would allow the parties to evaluate their cases and settle them, rather than requiring trials in each case to determine the method that should be applied to determining whether the 2005 Schedule has been rebutted and then to determine whether the Schedule has in fact been rebutted.

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For all of the foregoing reasons, I would adopt the method that I have outlined above, and therefore I dissent.

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

Wanda Ogilvie
Office of the City Attorney
Law Office of Joseph C. Waxman

MR/aml