

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 STATE OF CALIFORNIA

3 **MARIO ALMARAZ,**

4 *Applicant,*

5 vs.

6 **ENVIRONMENTAL RECOVERY SERVICES**
7 **(a.k.a. ENVIROSERVE); and STATE**
8 **COMPENSATION INSURANCE FUND,**

9 *Defendant(s).*

Case No. ADJ1078163 (BAK 0145426)

OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)

10 **JOYCE GUZMAN,**

11 *Applicant,*

12 vs.

13 **MILPITAS UNIFIED SCHOOL DISTRICT,**
14 **Permissibly Self-Insured; and KEENAN &**
15 **ASSOCIATES, Adjusting Agent,**

16 *Defendant(s).*

Case No. ADJ3341185 (SJO 0254688)

OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)

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

21 Because of the important legal issue as to whether and how the AMA Guides¹ portion of
22 the 2005 Schedule for Rating Permanent Disabilities (2005 Schedule or Schedule)² may be
23 rebutted, and to secure uniformity of decision in the future, the Chairman of the Appeals Board,
24 upon a majority vote of its members, assigned these cases to the Appeals Board as a whole for an

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26 ¹ In general, all references to the "AMA Guides" or to the "Guides" are to the American Medical Association's
27 *Guides to the Evaluation of Permanent Impairment* (5th Edition, 2001). However, in some instances (which should be
clear from the context, especially when we cite to out-of-state opinions issued before 2001), references to the "AMA
Guides" or the "Guides" may be to earlier editions of that publication.

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

1 en banc decision. (Lab. Code, § 115.)³

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

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

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

16 **I. BACKGROUND**

17 **A. The Almaraz Case**

18 Applicant, Mario Almaraz, sustained an admitted industrial injury to his back on November
19 5, 2004, while employed as a truck driver by Environmental Recovery Services (a.k.a.
20 Enviroserve), insured by defendant, State Compensation Insurance Fund.

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

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

26 ³ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers'
27 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).)

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

4 Applicant was evaluated by Bruce E. Fishman, M.D., as an agreed medical evaluator
5 (AME). In his initial report dated November 22, 2006, Dr. Fishman declared applicant to be
6 permanent and stationary. He concluded that applicant has 12% whole person impairment (WPI)
7 under the AMA Guides, based on a DRE lumbar category III. He also noted, however, that
8 applicant is permanently limited to light duty work and permanently precluded from prolonged
9 sitting activities. Dr. Fishman found that 20% of applicant’s current lumbosacral disability was
10 non-industrial – i.e., it was caused by the natural progression of prior non-occupational injuries, by
11 his diffuse underlying degenerative lumbar disc disease, and by pre-existing spondylosis. Dr.
12 Fishman stated that he had no job analysis for applicant, but reported that applicant had described
13 his job as involving: (1) lifting up to 100 pounds; (2) pushing and pulling drums weighing up to
14 1500 pounds; (3) bending, stooping, twisting, climbing, squatting, kneeling, and reaching
15 overhead; (4) using a pallet jack, a forklift, and dollies; and (5) working 8 to 12 hour shifts, with
16 80% of the time spent sitting and the remaining 20% spent standing or walking. In the absence of
17 a formal job analysis, Dr. Fishman indicated he could not determine whether applicant could return
18 to his job duty as a truck driver. Nevertheless, Dr. Fishman stated that applicant “clearly would be
19 unable” to move 1500 pound drums.

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

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

1 The parties stipulated that, before apportionment, applicant's injury would rate 17% under the
2 2005 Schedule and 58% under the 1997 Schedule.

3 On April 23, 2008, WCJ found that applicant's November 4, 2004 back injury caused 14%
4 permanent disability, after apportionment. In making this permanent disability determination, the
5 WCJ utilized the rating methodology established by the 2005 Schedule, including its provision that
6 the extent of an injured employee's permanent impairment is determined by use of the AMA
7 Guides. The WCJ concluded he was not free to make a permanent disability finding based on the
8 work preclusions set forth by Dr. Fishman. The WCJ said that, in enacting Labor Code section
9 4660,⁴ the Legislature "mandated the use of the AMA Guide[s]." Specifically, he cited to section
10 4660(b)(1), which provides: "For purposes of this section, the 'nature of the physical injury or
11 disfigurement' shall incorporate the descriptions and measurements of physical impairments and
12 the corresponding percentages of impairments published in the [AMA Guides]." The WCJ further
13 stated, "it is within the purview of the Legislature to establish the system for rating permanent
14 disability." Because "the Legislature has established what that system is," the WCAB "is not at
15 liberty to deviate from th[ose] criteria." Accordingly, pursuant to the parties' stipulation to 17%
16 permanent disability under the 2005 Schedule, before apportionment, the WCJ found that
17 applicant's permanent disability is 14% – after apportionment of 20% of his disability to non-
18 industrial causation.

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

25 No answer to the petition was received.

26 On July 7, 2008, we granted reconsideration.

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

1 **B. The *Guzman* Case**

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

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

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

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

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

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

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

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

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

10 In her recommended permanent disability rating, the disability evaluation specialist (rater)
11 found 12% permanent disability, which was the adjusted rating for applicant's bilateral upper
12 extremities based upon 3% WPI for each upper extremity in accordance with Dr. Feinberg's March
13 21, 2008 report.

14 On October 3, 2008, the rater was cross-examined. She testified that in issuing her
15 recommended 12% permanent disability rating she did not consider the language in Dr. Feinberg's
16 April 30, 2008 report that – based on applicant's activities of daily living (ADL) losses – each
17 upper extremity would have a 15% WPI. Although the transcript of the rater's testimony is
18 somewhat confusing, it appears the rater essentially believed it would be inappropriate to assign a
19 15% WPI to each upper extremity because: (1) in determining WPI, she is required to use the
20 AMA Guides; (2) Dr. Feinberg indicated that his 15% WPI finding for each upper extremity was
21 based on applicant's ADL losses; however, the ADL tables of the AMA Guides (i.e., Table 1-2 &
22 Table 1-3 at pp. 4 & 6-7) do not specify any particular WPI impairments for any particular ADL
23 loss; (3) Dr. Feinberg acknowledged that assigning a 15% WPI to each upper extremity based on
24 applicant's ADL losses "is not a method that is sanctioned by the AMA Guides"; and (4) page 495
25 of the Guides specifies how to determine WPI for carpal tunnel syndrome injuries. The rater
26 testified, however, that if she were allowed to consider the 15% WPI for each upper extremity,
27 then applicant's final permanent disability rating would be 39%, after adjustment for age and

1 occupation.

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

12 Applicant filed a timely petition for reconsideration, essentially arguing that the AMA
13 Guides support the opinion of Dr. Feinberg, the AME; therefore, she has a 15% WPI per upper
14 extremity based upon her loss of ADLs. In her petition, applicant quoted extensively from the
15 AMA Guides, including but not limited to the following passages: (1) the AMA Guides defines
16 impairment as "a loss, loss of use, or derangement of any body part, organ system, or organ
17 function" (AMA Guides, § 1.2a, at p. 2); (2) the impairment ratings of the AMA Guides estimate
18 functional limitations "*excluding work*" (*id.*, § 1.2a, at p. 4 [Guide's italics]); (3) "[t]he ADLs
19 listed in [Table 1-2 of the Guides] correspond to the activities that physicians should consider
20 when establishing an impairment rating" and "[a] physician can often assess a person's ability to
21 perform ADLs based on knowledge of the patient's medical condition and clinical judgment" (*id.*,
22 § 1.2a, at p. 5); (4) "[p]hysicians have the education and training to evaluate a person's health
23 status and determine the presence or absence of impairment" and "[i]f the physician has the

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

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

1 expertise and is well acquainted with the individual's activities and needs, the physician may also
2 express an opinion about the presence or absence of a specific disability" (*id.*, § 1.2b, at p. 8);
3 (5) "[t]he physician's role in performing an impairment evaluation is to provide an independent,
4 unbiased assessment of the individual's medical condition, including ... identify[ing] abilities and
5 limitations to performing activities of daily living as listed in Table 1-2" and "[p]erforming an
6 impairment evaluation requires considerable expertise and judgment" (*id.*, § 2.3, at p. 18); and
7 (6) the AMA Guides chapter on upper extremities (i.e., Chapter 16) states that "[i]f the total
8 combined whole person impairment does not seem to adequately reflect the actual extent of
9 alteration in the individual's ability to perform activities of daily living, this should be noted (*id.*,
10 § 16.1b, at p. 435). Applicant's petition then argued that the AMA Guides consistently states it is
11 but a guide, which requires the evaluating physician to exercise clinical judgment, and that
12 ultimately the AMA Guides always defers to the evaluator's clinical judgment. Accordingly,
13 applicant asserted that because a 15% WPI per upper extremity was found to be appropriate by the
14 AME through the exercise of his clinical judgment, then applicant should be found to have 39%
15 permanent disability, after adjustment for age and occupation, in accordance with the rater's
16 statement at her cross-examination.

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

26 On December 12, 2008, we granted reconsideration.

27 **II. DISCUSSION**

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

9 In its recent decision in *Brodie*, the Supreme Court discussed what permanent disability is
10 and what purpose permanent disability indemnity serves:

11 “ [P]ermanent disability is understood as “the irreversible residual
12 of an injury.” ’ (*Kopping v. Workers' Comp. Appeals Bd.* (2006)
13 142 Cal.App.4th 1099, 1111 [71 Cal.Comp.Cases 1229], quoting 1
14 Cal. Workers' Compensation Practice (Cont.Ed.Bar 4th ed. 2005)
15 § 5.1, p. 276, italics omitted.) ‘A permanent disability is one
16 “... which causes impairment of earning capacity, impairment of
17 the normal use of a member, or a competitive handicap in the open
18 labor market.” ’ (*State Compensation Ins. Fund v. Industrial Acc.*
19 *Com. [(Hutchinson)]* (1963) 59 Cal.2d 45, 52 [28 Cal.Comp.Cases
20 20].) Thus, permanent disability payments are intended to
21 compensate workers for both physical loss and the loss of some or
22 all of their future earning capacity. (Lab. Code, § 4660, subd. (a);
23 *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753 [57
24 Cal.Comp.Cases 355].)” (*Brodie*, 40 Cal.4th at p. 1320 [72
25 Cal.Comp.Cases at p. 571] (footnote omitted; Cal.Comp.Cases
26 citations substituted for other parallel citations).)⁶

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

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23 **A. A Brief History Of Labor Code Section 4660.**

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26 ⁶ See also, e.g., *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases
27 476, 479] (“Permanent disability indemnity has a dual function: to compensate both for actual incapacity to work and
for physical impairment of the worker’s body, which may or may not be incapacitating”); *Kopitske v. Workers' Comp.*
Appeals Bd. (1999) 74 Cal.App.4th 623, 632 [64 Cal.Comp.Cases 972, 977] (“PD compensates for residual handicap
and/or impairment of function after maximum recovery has been attained and also serves ‘to assist the injured worker
in his adjustment in returning to the labor market.’ ”).)

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

11 In 2004, Senate Bill 899 (SB 899) substantially amended section 4660.⁸ Section 4660(a)
12 now provides, "In determining the percentages of permanent disability, account shall be taken of
13 the nature of the physical injury or disfigurement, the occupation of the injured employee, and his
14 or her age at the time of the injury, consideration being given to an employee's diminished future
15 earning capacity." Moreover, as pertinent here, new section 4660(b)(1) provides, "For purposes of
16 this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions
17 and measures of physical impairments in the corresponding percentages of impairments published
18 in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment
19 (5th Edition)." Further, amended section 4660(d) provides, "The schedule shall promote
20 consistency, uniformity, and objectivity." However, SB 899 did *not* amend the language of section
21 4660 which provides that the Schedule "shall be prima facie evidence of the percentage of
22 permanent disability to be attributed to each injury covered by the schedule." (Lab. Code,
23 § 4660(c) [formerly, § 4660(b)].)

24 The amendments to section 4660 directed that "[o]n or before January 1, 2005, the
25 administrative director [(AD)] shall adopt regulations to implement the changes made to this

26 ⁷ Stats. 1917, ch. 586, § 9(b)(7), p. 838; Stats. 1919, ch. 471, § 4, p. 915; Stats. 1925, ch. 354, § 1, p. 642;
27 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.

1 section by th[is] act” (Lab. Code, § 4660(e).) Accordingly, by regulation, the AD adopted the
2 new Schedule, which became effective on January 1, 2005. (See Cal. Code Regs., tit. 8, § 9805.)
3 The AD’s Schedule adopted and incorporated the AMA Guides by reference. (*Id.*; see also 2005
4 Schedule, at pp. 1-3–1-5, 1-11–1-12.)

5 **B. The 2005 Schedule Is Rebuttable.**

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

15 This principle is reflected in a number of cases.

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

18 “It is no answer ... to say that the ratings schedules ... cannot be
19 questioned. The [cases cited] fully controvert any such ‘hands-off’
20 attitude toward the schedule or the presumptions used to create the
21 schedule ... [¶¶] ... [T]he rating schedule ... is not absolute,
binding and final ... It is therefore not to be considered all of the
evidence on the degree or percentage of disability.” (*Lewis*, at pp.
657, 662-663 [44 Cal.Comp.Cases at pp. 1138, 1143].)

22 Similarly, in *Glass v. Workers’ Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, 307 [45
23 Cal.Comp.Cases 441, 449] (*Glass*), the Court of Appeal said: “The Board may not rely upon
24 alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award
25 which accurately reflects his true disability. ... While the Rating Schedule is prima facie evidence

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27 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).

1 of the proper disability rating, it may be controverted and overcome.” (*Glass*, 105 Cal.App.3d at p.
2 307 [45 Cal.Comp.Cases at p. 449]; see also *Luchini v. Workmen’s Comp. Appeals Bd.* (1970) 7
3 Cal.App.3d 141, 146 [35 Cal.Comp.Cases 205, 209] (*Luchini*) (“the board cannot rely on some
4 administrative procedure [(i.e., the Schedule)] to deny to petitioner a disability award
5 commensurate with the disability that he has suffered”); *Young v. Industrial Acc. Com.* (1940) 38
6 Cal.App.2d 250, 255 [5 Cal.Comp.Cases 67, 70] (“[i]t is apparent ... from the ... provisions of the
7 Labor Code and the schedule itself, that it was not intended that it should be applied in a case ...
8 where it did not even approximately cover the disability involved”).)

9 Therefore, although the 2005 Schedule is prima facie correct in the absence of contrary
10 evidence, a party may present evidence to overcome it. (See Lab. Code, §§ 3202.5, 5705.) In this
11 regard, our Supreme Court said long ago, “prima facie evidence is that which suffices for the proof
12 of a particular fact, until contradicted and overcome by other evidence. It may, however, be
13 contradicted, and other evidence is always admissible for that purpose.” (*Vaca Valley & Clear*
14 *Lake Railroad v. Mansfield* (1890) 84 Cal. 560, 566 (*Mansfield*); accord: *In re Raymond G.* (1991)
15 230 Cal.App.3d 964, 972 (*Raymond G.*); see also, Evid. Code, § 602 (“A statute providing that a
16 fact or group of facts is prima facie evidence of another fact establishes a rebuttable
17 presumption.”).)

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

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

21 Once again, section 4660(c) still provides that the Schedule is “prima facie evidence of the
22 percentage of permanent disability to be attributed to each injury covered by the schedule.”
23 Because section 4660(c) still provides that the Schedule is rebuttable, then no portion of it –
24 including the AMA Guides portion – is conclusive. Any contrary interpretation would nullify, at
25 least in part, the language of section 4660(c). Moreover, had the Legislature intended that the
26 AMA Guides portion of the Schedule be unrebuttable, it could have expressly so stated. It did not.
27

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

7 We are aware that when SB 899 amended section 4660, the Legislature provided that “[t]he
8 schedule shall promote consistency, uniformity, and objectivity.” (Lab. Code, § 4660(d).)
9 Nevertheless, we do not believe that in enacting this provision the Legislature intended to preclude
10 an injured employee – or an employer – from rebutting the AMA Guides portion of the 2005
11 Schedule. When the Legislature enacts or amends a statute, it is presumed it is “aware of judicial
12 decisions already in existence, and to have enacted or amended [the] statute in light thereof.”
13 (*People v. Giordano* (2007) 42 Cal.4th 644, 659 [internal citations and quotation marks omitted];
14 see also *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42,
15 45] (*Fuentes*)). Similarly, when the Legislature enacts or amends a statute, it is presumed that the
16 Legislature does not intend to overthrow long-established principles of law unless such intention is
17 clearly expressed or necessarily implied. (*Brodie*, 40 Cal.4th at p. 1325 [72 Cal.Comp.Cases at p.
18 574]; *Fuentes*, 16 Cal.3d at p. 7 [41 Cal.Comp.Cases at p. 45].) Therefore, when the Legislature
19 amended section 4660 to provide that the Schedule “shall promote consistency, uniformity, and
20 objectivity” (Lab. Code, § 4660(d)), but at the same time did *not* alter the provision first enacted in
21 1939 that the Schedule is “prima facie evidence” (Lab. Code, § 4660(c)), we must assume the
22 Legislature was aware of the long-established case law that an injured employee can rebut the
23 Schedule by showing that his or her disability is actually higher than what the Schedule would
24 provide (e.g., *Glass*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449]) and, conversely,
25 that an employer can rebut the Schedule by showing that the employee’s disability is actually
26 lower (e.g., *Lewis*, 99 Cal.App.3d at pp. 657, 658-659, 662-663 [44 Cal.Comp.Cases at pp. 1138,
27 1139-1140, 1143]).

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

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

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

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

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

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

14 "Impairment percentages or ratings ... reflect the severity of the
15 medical condition and the degree to which the impairment
16 decreases an individual's ability to perform common activities of
17 daily living (ADL), *excluding work*. Impairment ratings were
18 designed to reflect functional limitations and not disability. The
19 whole person impairment percentages listed in the *Guides* estimate
20 the impact of the impairment on the individual's overall ability to
21 perform activities of daily living, *excluding work*, as listed in Table
22 1-2." (AMA Guides, § 1.2a, at p. 4 (italics in original).)

19 And:

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

23 And:

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

26 Moreover, many of the activities of daily living addressed by the AMA Guides either do
27 not relate or only partially relate to occupational demands. That is, the ADLs covered by the

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

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

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

21 Because the AMA Guides does not actually measure work impairment, the AMA Guides
22 also indicates it is but a component or tool for assessing such impairment. Accordingly, the
23 Guides provides that when making a work impairment assessment, it is appropriate in some cases
24 for a physician to consider factors outside the Guides, including the injured employee’s ability to
25 perform work and his or her need for work restrictions or accommodations.

26 Preliminarily, the AMA Guides states:

27 “As previously stated, the *Guides* is not to be used for direct
financial awards nor as the sole measure of disability. The Guides
provides a standard medical assessment for impairment

1 determination and may be used as a *component* in disability
2 assessment.” (AMA Guides, § 1.7, at p. 12 (emphasis added).)

3 Further, the AMA Guides states:

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

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

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

22 And:

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

30 And:

31 “Physicians with the appropriate skills, training, and knowledge
32 may address some of the implications of the medical impairment
33 toward work disability and future employment. ... [¶] [In some]
34 cases ... the physician is requested to make a broad judgment
35 regarding an individual’s ability to return to any job in his or her
36 field. A decision of this scope usually requires input from medical
37 and nonmedical experts, such as vocational specialists” (*Id.*, §
38 1.9, at pp. 13-14.)

39 And:

40 “A complete impairment evaluation provides valuable information
41 beyond an impairment percentage Combining the medical and
42 nonmedical information, and including detailed information about
43 essential work activities if requested, is a basis for improved
44 understanding of the degree to which the impairment may affect
45 the individual’s work ability.” (*Id.*, § 1.12, at p. 15.)

1 And:

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

6 Finally, the AMA Guides states that when a physician’s report discusses his or her
7 “impairment rating criteria,” the physician should:

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

14 Thus, the AMA Guides recognizes that an injured employee’s impairment assessment is
15 not necessarily limited to an evaluation of an injured employee’s “anatomic loss” (damage to an
16 organ system or body structure) or “functional loss” (a change in function for an organ system or
17 body structure) (see AMA Guides, § 1.2a, at p. 4) via the framework of the Guides’ various
18 chapters. Instead, a physician may assess how the industrial injury will affect the employee’s
19 ability to return to his or her job. Further, with respect to the broader job market, other evidence
20 may be appropriate – specifically including the expert opinion of “vocational specialists.” (*Id.*, §
21 1.9, at p. 14; see also § 2.6a.4, at p. 21 (“pertinent diagnostic studies ... may include rehabilitation
22 evaluations ...”).)

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

25 The AMA Guides highlights that the role of an evaluating physician is not simply to take a
26 few objective measurements and then mechanically and uncritically assign a whole person
27 impairment rating. Instead, the AMA Guides calls for the evaluating physician to draw on his or

1 her judgment and experience in reaching a determination regarding impairment. For example, the
2 AMA Guides state:

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

6 And:

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

17 And:

18 “The physician’s role in performing an impairment evaluation is to
19 provide an independent, unbiased assessment of the individual’s
20 medical condition, including its effect on function, and identify
21 abilities and limitations to performing activities of daily living
22 Performing an impairment evaluation requires considerable
23 medical expertise and judgment.” (*Id.*, § 2.3, at p. 18.)

24 And:

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

33 And:

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

1 **d. The AMA Guides Acknowledges Its Inherent Limitations.**

2 The AMA Guides recognizes that it is not all-encompassing. The Guides specifically
3 acknowledges that it “cannot provide an impairment rating for all impairments” and that “some
4 medical syndromes are poorly understood.” (AMA Guides, § 1.5, at p. 11.) Further, while the
5 AMA Guides takes subjective complaints into consideration to some extent, such complaints
6 generally are not given separate impairment ratings, even though “[t]he *Guides* does not deny the
7 existence or importance of these subjective complaints to the individual or their functional
8 impact.” (*Id.*)¹⁰ Also, the AMA Guides states that its impairment ratings are merely “consensus-
9 derived estimates” (*id.*, § 1.2a, p. 4) and that “there are limited data to support some of the ...
10 impairment percentages.” (*Id.*, § 1.2a, p. 5; see also § 1.5, at p. 10 (“[t]he *Guides* uses objective
11 and scientifically based data when available When objective data have not been identified,
12 estimates of the degree of impairment are used, based on clinical experience and consensus.”).)
13 Finally, although the AMA Guides states that future research will be used “to improve the *Guides*’
14 reliability and validity,” the Guides concedes that “[r]esearch is limited on the reproducibility and
15 validity of the *Guides*.” (*Id.*, § 1.5, at p. 10.)

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

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

20 Because the application of the AMA Guides to industrial injuries is new in California, we
21 will consider the law of other jurisdictions that have used the Guides for some time. While not
22 binding authority, the case law of other states can be persuasive and instructive. (*Lebrilla v.*
23 *Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077.) Indeed, where there is no California
24 case law directly on point, the opinions of other jurisdictions involving similar statutes and similar

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

1 factual situations “are of great value.” (*Martinez v. Enterprise Rent-A-Car Co.* (2004) 119
2 Cal.App.4th 46, 55.) California appellate courts will consider the case law of other jurisdictions,
3 including when construing workers’ compensation laws. (E.g., *S. G. Borello & Sons, Inc. v. Dept.*
4 *of Industrial Relations* (1989) 48 Cal.3d 341, 352 [54 Cal. Comp. Cases 80, 87].)

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

10 **a. Arizona AMA Guides Cases.**

11 Arizona has been using the AMA Guides for over three decades. Currently, its law
12 provides that a “physician should rate the percentage of impairment using the standards for the
13 evaluation of permanent impairment as published by the most recent edition of the [AMA Guides],
14 if applicable.” (Ariz. Admin. Code R20-5-113(B)(1) [formerly known as R4-13-113(D) or “Rule
15 13(d)”].) After issuing a series of opinions regarding the AMA Guides (see *Adams v. Industrial*
16 *Commission* (Ariz. 1976) 113 Ariz. 294 [552 P.2d 764] (*Adams*); *Smith v. Industrial Commission*
17 (Ariz. 1976) 113 Ariz. 304 [552 P.2d 1198] (*Smith*); *Gomez v. Industrial Commission* (Ariz. 1985)
18 148 Ariz. 575 [716 P.2d 32] (*Gomez*); *W.A. Krueger Co. v. Industrial Commission (Puma)* (Ariz.
19 1986) 150 Ariz. 66 [722 P.2d 234] (*Puma*)), the Arizona Supreme Court summed up its approach
20 to the Guides in *Slover Masonry, Inc. v. Industrial Commission (Williamson)* (1988) 158 Ariz. 131
21 [761 P.2d 1035] (*Williamson*), where it stated, in relevant part:

22 “... Although the AMA Guides are important in the disability
23 rating, they are not the philosopher’s stone:

24 “When they are applicable and “truly reflect the
claimant’s loss”, [the AMA Guides] may be used as

25 ¹¹ As of the 2001 publication date of its Fifth edition, the AMA Guides said that approximately 40 states were
26 using it in some manner to rate occupationally-caused permanent disability. (AMA Guides, § 1.7, at p. 12.) However,
27 some states strictly adhere to the AMA Guides and do not allow them to be rebutted under any circumstances.
Because California law provides that its permanent disability schedule may be rebutted, the case law of those states is
not useful to our discussion. Moreover, other states have little or no published case law addressing when or how it
may be appropriate to depart from or go beyond the AMA Guides. Accordingly, the law of these states will not be
directly discussed.

1 the sole indicator or factor to be considered in fixing
2 the percentage of impaired function. *Adams* ..., 113
3 Ariz. at 295 Where the ALJ finds that the
4 Guides do not provide a fair, accurate measure of the
5 degree of impairment, he or she *must* turn to other
6 factors. *Id.* *Any relevant factors ... may be*
7 *considered.* Effect on job performance is one such
8 factor. ... Evidence regarding such factors may come
9 from experts, from the literature, lay witnesses or
10 any other competent source that would assist the ALJ
11 in determining the actual percentage of partial loss of
12 use. Use of these factors fulfills the statutory
13 mandate [to accurately determine the percentage of
14 loss of use].’

15 *Gomez*, 148 Ariz. at 569 ... (emphasis added)
16 [Court’s emphasis].

17 “Indeed, non-medical factors may be vital when assessing a
18 disability, despite the AMA Guides. [Citation omitted.] In fact,
19 sometimes the AMA Guides do not apply. [Citations omitted.]
20 Therefore, when other evidence requires a different result, a
21 medical expert cannot bind the ALJ to unreasoning adherence to
22 the AMA Guides.

23 ***

24 “Here, the court of appeals’ opinion implies that the ALJ must
25 follow the AMA Guides unless a medical expert determines that
26 they are inadequate. [Citation omitted.] We disagree. The ALJ
27 must consider all competent and relevant evidence in establishing
an accurate rating of functional impairment, even if a medical
expert asserts that the AMA Guides are perfectly adequate to
measure loss ...

“The AMA Guides are only a tool adopted by administrative
regulation to assist in ascertaining an injured worker’s percentage
of disability. Thus, when the AMA Guides do not truly reflect a
claimant’s loss, the ALJ must use his discretion to hear additional
evidence and, from the whole record, establish a rating
independent of the AMA recommendations. ... If an injury has
resulted in a functional impairment not adequately reflected by
clinical measurement under the AMA Guides, then an ALJ must
consider impact on job performance ...” (*Williamson*, 158 Ariz. at
pp. 135-137.)

24 Thus, in *Williamson*, the Arizona Supreme Court vacated the opinion of the Court of Appeals and
25 reinstated the award of an administrative law judge (ALJ) of the Arizona Industrial Commission.
26 The ALJ had found that a hod carrier’s fractured tibial condyle of the right knee caused a 70%
27 impairment, even though the AMA Guides called for a 50% impairment. This increased

1 impairment rating was predicated on the facts that: (1) the applicant testified he could not perform
2 seventy-eight percent of his job; (2) the evaluating physician “made it clear that the AMA Guides
3 did not actually measure ability to perform a specific job or occupation,” he agreed with the
4 applicant’s assessment of which job functions he could no longer perform, and he concluded that
5 “the working disability the applicant suffers is not totally covered by the Guides”; and (3) a labor
6 market consultant confirmed that employee’s injury disabled him from performing sixty-five
7 percent of a hod carrier’s job.¹²

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

11 For example, in *Hunter v. Industrial Commission* (Ariz.App. 1981) 130 Ariz. 59 [633 P.2d
12 1052] (*Hunter*), a meat wrapper developed bronchial hypersensitivity (meat wrapper’s asthma) as a
13 result of exposure to polyvinyl chloride (PVC) fumes from plastic used to wrap the meat. The two
14 reporting physicians agreed that her bronchial hypersensitivity was not ratable under the AMA
15 Guides; however, they also agreed that her pulmonary condition permanently precluded her from
16 any employment that would expose her to PVC or other lung irritants. Citing to the Arizona
17 Supreme Court’s opinions in *Adams* and *Smith*, the Court of Appeals stated, “[T]he AMA guides
18 apply only to the extent that they cover the specific impairment and the percentage thereof. [Cites.]
19 Since both doctors testified that petitioner’s industrially-caused hypersensitivity permanently
20 precludes her from returning to work as a meat wrapper, we find that petitioner has met her burden
21 of proving a permanent functional impairment causally related to her employment. Accordingly,
22 she is entitled to proceed to a hearing to determine whether her impairment has caused a loss of
23 earning capacity. ... [¶¶] ... [T]he award finding no permanent impairment was in error.”

24
25 ¹² The Arizona Supreme Court, however, has emphasized that factors other than the AMA Guides – such as the
26 effect of an injury on a worker’s ability to perform his or her job – should be considered only when the AMA Guides
27 does *not* provide a fair and accurate measure of the degree of an injured employee’s impairment. (*Gomez*, 148 Ariz.
565.) In *Gomez*, the employee suffered a left knee injury that ultimately required two surgeries. All of the evaluating
physicians agreed he could not return to his work as a truck driver, which required him to lift heavy weights and to
extensively climb and bend. Nevertheless, because all of the doctors also agreed that a 30% impairment rating under
the AMA Guides provided an accurate measure of the degree of the employee’s impairment, the Court accepted the
ALJ’s 30% finding and rejected the employee’s claim of 100% impairment.

1 Later, in *Cassey v. Industrial Commission* (Ariz.App. 1987) 152 Ariz. 280 [731 P.2d 645]
2 (*Cassey*), a delivery truck driver suffered a chronic thoracolumbar sprain as the result of a lifting
3 incident. One physician concluded that the employee could not return to work because of his
4 chronic muscular pain. This physician stated, however, that the AMA Guides does not cover a
5 chronic sprain. He further stated that since the employee has no evidence of neurological
6 impairment and has full range of motion, the AMA Guides then in effect was inapplicable.
7 Another physician agreed. In rejecting the ALJ's finding of no permanent impairment, the Arizona
8 Court of Appeals began by citing to the principles set forth in earlier Arizona Supreme Court
9 decisions that the AMA Guides is "not to be blindly applied regardless of a claimant's actual
10 physical condition;" that the AMA Guides is "only a valid guideline where the stated percentage
11 [of impairment] 'truly reflects the claimant's loss' "; that where the AMA Guides is inapplicable,
12 the ALJ "must use other factors to determine the degree of impairment"; and that when the AMA
13 Guides does "not accurately assess a claimant's impairment because no objective observations are
14 available, 'sound clinical judgment' must be substituted in evaluating permanent impairment."
15 (*Cassey*, 152 Ariz. at pp. 281-282.) The Arizona Court of Appeals then said:

16 "The assessment of the effects of a permanent impairment on
17 earning capacity is accomplished through a bifurcated procedure.
18 First, claimant must establish the existence and degree of a
19 permanent impairment; second, claimant must establish that the
20 impairment diminishes his earning capacity. [Citation.] Normally,
21 the degree of the impairment can be assessed independently of its
22 resulting loss of earning capacity. Impairment is usually a question
23 of medical fact, while loss of earning capacity is a question of law.
24 [Citation.] In some cases, however, the claimant must establish the
25 disabling effect of the industrial injury in order to establish a
26 permanent impairment. ... During the first stage, the claimant
27 meets his burden of proof ... if he shows that [there is impairment]
caused by his industrial injury and [that] results in his permanent
inability to return to his former work. [Citation.] Once this initial
burden has been met, claimant is then entitled to go through the
second stage, during which he must show that the [impairment]
resulted in lost earning capacity. The claimant cannot be barred
from proceeding to this second stage by his failure to provide [an
AMA Guides] rating of impairment when none is applicable.

"In this case, claimant met his burden of showing a permanent
impairment. [A]lthough [b]oth medical experts testified that the
impairment was not ratable under the Guides ... [t]he judge found
that the claimant had a permanent industrial related condition that

1 prevents him from returning to work. Having found the foregoing
2 to be true, it was error for the judge to conclude that claimant had
suffered no permanent impairment.” (*Cassey*, 152 Ariz. at p. 283.)

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

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

26 “The AMA Guides are not to be blindly applied regardless of a
27 claimant’s actual physical condition. Rather, their purpose is to
serve as a *guideline* in rating an impairment and are valid when the

1 stated percentage ‘truly reflects the claimant’s loss.’ Where
2 however, the evidence establishes that the Guides do not ‘truly
3 reflect the claimant’s loss’ or where the medical evidence is in
4 conflict, the ALJ may use his discretion and make findings
5 independent of the Guides’ recommendations.” (*Puma*, 150 Ariz.
6 at pp. 67-68 [Court’s emphasis; internal citations omitted].)

7 **b. Florida AMA Guides Cases.**

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

10 “In order to reduce litigation and establish more certainty and
11 uniformity in the rating of permanent impairment, the [Division of
12 Workers’ Compensation (DWC)] shall establish and use a schedule
13 for determining the existence and degree of permanent impairment
14 based upon medically or scientifically demonstrable findings. The
15 schedule shall be based on generally accepted medical standards
16 for determining impairment and may incorporate all or part of any
17 one or more generally accepted schedules used for such purpose,
18 such as the [AMA Guides]. ... [P]ending the [DWC’s] adoption,
19 by rule, of a permanent schedule, [the AMA Guides] shall be the
20 temporary schedule and shall be used for purposes hereof.” (Fla.
21 Stats. 1979, ch. 79-312, § 8 [repealed Fla. Stats. 1990, ch. 90-201,
22 § 20, eff. July 1, 1990.]

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

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

1 Thus, for example, Florida’s Court of Appeal, First District, issued an en banc opinion –
2 signed by twelve Justices – in *Trindade v. Abbey Road Beef ‘N Booze* (Fla.App. 1983) 443 So.2d
3 1007 (*Trindade*). In *Trindade*, the employee’s knee injury was rated based on the “American
4 Academy of Orthopedic Surgery Guides” [sic], i.e., *not* the AMA Guides.¹⁴ This was because the
5 AMA Guides dealt only with loss of range of motion and, here, the knee instability was due to
6 excessive range of motion. In affirming this departure from the AMA Guides, the en banc Court of
7 Appeal stated that it was “reced[ing]” from its prior three-Justice opinions which had held that the
8 AMA Guides must be the exclusive measure of impairment. (*Trindade*, 443 So.2d at p. 1012.) In
9 reaching this conclusion, the en banc Court said, in relevant part:

10 “More than four years have now passed since the legislature
11 imposed upon the Division the duty of establishing such a
12 comprehensive guide, and mandated the use of the *AMA Guides* as
13 a temporary schedule. In the meantime, it has become increasingly
14 difficult (as attested by the opinions of this court reflecting the
15 actual experience of the litigants, their counsel, and the deputy
16 commissioners) to reconcile the limited scope and coverage of the
17 *Guides* with the broader command of Chapter 440 itself, which has
18 as its fundamental purpose the compensation (as well as
19 rehabilitation) of injured workers. [Footnote omitted.]

20 ***

21 “If our former approach as indicated in *Mathis* and other cases was
22 justified by the ‘temporary’ status given to the *Guides* by the
23 legislative enactment, it no longer is ...

24 “It may be observed that our experience in trying to formulate a
25 standard based on the ‘covered’ or ‘not covered’ dichotomy for
26 determining when the *Guides* permit a finding of permanent
27 impairment, and when they do not, offers little hope for a workable
28 solution. One fundamental reason for this is that the *Guides*
29 apparently were never intended to be used in this manner. Thus, it
30 is unrealistic for us to find that certain types of ‘injuries’ are ‘not
31 covered’ by the *Guides* (and therefore other medical standards can
32 be used) when, in actuality, the *Guides* (Chapter I particularly) do
33 not generally speak in terms of ‘injuries,’ to the body and its
34 extremities but speak primarily in terms of the consequences or
35 results of injury. ...

36 ***

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

1 “... [A]s a practical matter, over four years of experience have
2 shown the futility of attempting to view the *Guides* as a
3 comprehensive, all-inclusive schedule of permanent impairments.
4 This valuable treatise, viewed by the Division as the ‘best
5 available,’ is nevertheless – according to much credible medical
6 testimony reflected in the cases coming before us – incomplete and
7 unsuited to the determination of permanent impairment resulting
8 from certain types of injuries. ... The Division apparently agrees
9 with this assessment. Its brief labels it ‘an absurdity’ to require the
10 use of the *Guides* where the injury is not covered by the *Guides*,
11 and urges also that ‘coverage’ must not be governed by whether
12 the *Guides* cover ‘a particular area of the body,’ [footnote omitted]
13 but whether the *Guides* cover conditions created by the injury
14 itself.

15 ***

16 “Finally, but not least importantly, to interpret and apply the statute
17 so as to find one employee – with permanent impairment
18 manifested by restrictions in the range of motion of his body or
19 extremities – eligible for compensation for his loss of earning
20 ability, but to deny such eligibility to another employee – whose
21 non-range of motion permanent impairment has no less effect on
22 his earning ability – would ... [not] bear any reasonable
23 relationship to permissible legislative objectives

24 “We therefore hold that ... the existence and degree of permanent
25 impairment resulting from injury shall be determined pursuant to
26 the *Guides*, unless such permanent impairment cannot reasonably
27 be determined under the criteria utilized in the *Guides*, in which
event such permanent impairment may be established under other
generally accepted medical criteria for determining impairment.

“... The *Guides*, where applicable, shall be used as the primary
rating schedule, but shall not be used to deny benefits simply
because the *Guides* do not make provision for the conditions
causing the impairment.” (*Trindade*, 443 So.2d at pp. 1008-1013.)

Subsequently, in *OBS Co., Inc. v. Freeney* (Fla.App. 1985) 475 So.2d 947 (*Freeney*), a
journeyman plasterer developed contact dermatitis from exposure to wet cement. The evaluating
physician found that the employee was permanently precluded from contact with wet cement and,
therefore, cannot work as a plasterer. Nevertheless, because the employee’s condition did not
affect his “activities of daily living” within the meaning of the AMA Guides, there was no ratable
AMA Guides impairment. Yet, before the injury, the employee made more than minimum wage.
After the injury, he only could find jobs paying minimum wage. Notwithstanding the non-ratable

1 | impairment under the AMA Guides, the deputy commissioner found permanent impairment and
2 | awarded benefits. The First District Court of Appeal affirmed, stating:

3 | “Claimant clearly suffers from permanent impairment which has
4 | resulted in his ‘incapacity because of the injury to *earn in the same*
5 | or any other employment the wages which the employee was
6 | receiving at the time of the injury.’ (emphasis added) [Court’s
7 | emphasis]. Section 440.02(9), Florida Statutes. Due to his skin
8 | condition, claimant cannot work in his chosen occupation, where
9 | he earned a relatively high salary, and, in all likelihood, is unable
10 | to earn an equal wage in other employment without further
11 | training. ... Under the terms of the Guides, there is no impairment
12 | if the injury does not affect the employee’s daily living. In the
13 | case sub judice, claimant’s skin condition does *not* affect his daily
14 | living as long as he does not work in his job. Essentially, as long
15 | as claimant does nothing, there is no impairment.

16 | “*In Trindade v. Abbey Road Beef ‘n Booze*, 443 So.2d 1007, 1011
17 | (Fla. 1st DCA 1983), this court held:

18 | ‘We have the obligation of interpreting a statute in a
19 | manner consistent with the legislative intent, to the
20 | extent it is ascertainable and can lawfully be
21 | implemented’

22 | “Accordingly, although the Guides do not award the permanent
23 | impairment to claimant’s skin condition, we affirm and agree with
24 | the deputy that, under the particular factual circumstances at bar,
25 | the Guides are not exclusively controlling because the Guides do
26 | not address claimant’s evident economic loss *Trindade* at
27 | 1012.” (*Freeney*, 475 So.2d at pp. 950-951.)

28 | About two years later, the Florida Supreme Court issued an opinion in *Dayron Corp. v.*
29 | *Morehead* (Fla. 1987) 509 So.2d 930 (*Morehead*). In *Morehead*, a machinist could not continue at
30 | his job because he developed contact dermatitis from a new oil-based coolant for his metal-cutting
31 | machinery. A physician testified, however, that the employee would have no impairment if not
32 | exposed to the coolant. Nevertheless, the employee testified he could find only limited alternative
33 | work, despite his best efforts. In affirming the DWC’s award of permanent disability benefits, the
34 | Florida Supreme Court began by noting that “the AMA Guides anticipate the possible confusion of
35 | the terms ‘impairment’ and ‘disability’ which indeed has occurred in this case” and that “[e]ven in
36 | their preface, the AMA Guides note that ‘impairment’ should not be confused with ‘disability,’ the
37 | former being a medical assessment and the latter a legal issue.” (*Morehead*, 509 So.2d at p. 931.)
38 | The Supreme Court then stated, in relevant part:

1 “When an injury is not covered by the AMA Guides, it is
2 permissible to rely upon medical testimony of permanent
3 impairment based upon other generally accepted medical
4 standards. [Citation.] Here, [the employee’s] condition is
addressed in the AMA Guides, but it is evaluated only in terms of
medical impairment without regard to the wage loss which may
result from disability. ...

5 ***

6 “Economic loss is an indispensable requisite of the wage-loss
7 concept. Therefore, the AMA Guides are inapplicable when, as
8 here, they preclude a finding of permanent impairment where the
9 claimant suffered a disability due to an occupational disease which
permanently impairs his ability to work and results in economic
loss but does not affect his activities of daily living. ...”
(*Morehead*, 509 So.2d at pp. 931-932.)

10 **c. New Hampshire AMA Guides Cases.**

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

15 In *Appeal of Rainville* (N.H. 1999) 143 N.H. 624 [732 A.2d 406] (*Rainville*), a jackhammer
16 operator had been diagnosed with multifocal myofascial pain syndrome after he began
17 experiencing upper body pain, neck pain, tremors, diaphoresis, headaches, anxiety, hoarse voice,
18 and numbness in his arms. The treating physician explained that the nature of the employee’s
19 medical condition rendered his impairment incapable of measurement under the AMA Guides, so
20 he resorted to an alternative method to calculate the employee’s impairment. After a hearing,
21 however, the Department of Labor (DOL) hearing officer denied a permanent impairment award.

22 In reversing this denial, the New Hampshire Supreme Court said:

23 “[Section] 281-A:32 ... mandates that the *AMA Guides* be used to
24 calculate the percent of whole person impair[ment] ... [I]t is the
25 statute that governs whether a permanent impairment exists; the
AMA Guides applies only to the determination of appropriate
26 compensation for a permanent impairment. ...

27 “We note that the *AMA Guides* expressly acknowledges it ‘does
not and cannot provide answers about every type and degree of
impairment’ because of the ‘infinite variety of human disease,’ the
constantly evolving field of medicine, and the complex process of
human functioning. See *AMA Guides* § 1.3, at 3. Accordingly, the

1 *AMA Guides* advises that a ‘physician’s judgment and his or her
2 experience, training, skill and thoroughness in examining the
3 patient and applying the findings to *Guides* criteria will be factors
4 in estimating the degree of the patient’s impairment.’ *Id.* While
5 this estimate ‘should be based on current findings and evidence,’
6 *id.* § 2.2, at 8, ‘[i]f in spite of an observation or test result the
7 medical evidence appears not to be of sufficient weight to verify
8 that an impairment of a certain magnitude exists, the physician
9 should modify the impairment estimate accordingly, describing the
10 modification and explaining the reason for it in writing.’ *Id.* The
11 *AMA Guides* expressly allows a physician to deviate from the
12 guidelines if the physician finds it necessary to produce an
13 impairment rating more accurate than the recommended formula
14 can achieve.

15 “This decision to use alternative methodology must, however, be
16 grounded in adequate clinical information about the patient’s
17 medical condition. *See id.* § 1.2, at 3. Additionally, in order to
18 allow a third party to compare reports properly, physicians must
19 use a standard protocol in evaluating and reporting impairment.
20 *See id.* ch. 2 Preface at 7. ‘A clear, accurate, and complete report is
21 essential to support a rating of permanent impairment.’ *Id.* § 2.4, at
22 10. Within the report, an evaluating physician is expected to
23 provide a full medical evaluation, analysis of the medical findings
24 with respect to the patient’s life activities, and comparison of the
25 results of analysis with the impairment criteria. *See id.*

26 “Hence, in view of the *AMA Guides*’s own instructions and our
27 liberal construction of [the permanent impairment statute] ... , we
28 hold that if a physician, exercising competent professional skill and
29 judgment, finds that the recommended procedures in the *AMA*
30 *Guides* are inapplicable to estimate impairment, the physician may
31 use other methods not otherwise prohibited by the *AMA Guides*. ...
32 The reasons for such a deviation must be fully explained and the
33 alternative methodology set forth in sufficient detail so as to allow
34 a proper evaluation of its soundness and accuracy.

35 “We caution that our decision does not permit physicians or
36 claimants to deviate from procedures simply to achieve a more
37 desirable result. To satisfy the statutory requirements of [section]
38 281-A:32, IX, a deviation must be justified by competent medical
39 evidence and be consistent with the specific dictates and general
40 purpose of the *AMA Guides*. Whether and to what extent an
41 alternative method is proper, credible, or permissible under the
42 *AMA Guides* are questions of fact to be decided by the board. *See*
43 *Vaughn*, 824 P.2d at 827 (as trier of fact, agency entitled to rely on
44 expert testimony supporting deviation from *AMA Guides*). We
45 hold only that the board may not disregard a physician’s
46 impairment evaluation solely because it deviates from the express
47 recommended methodology of the *AMA Guides*.

“On remand, the claimant may present evidence substantiating the
calculation of his impairment rating and setting forth the reasons

1 for deviating from the *AMA Guides*.” (*Rainville*, 143 N.H. at pp.
2 631-633.)

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

11 “We reject Wal-Mart’s argument that the twenty-eight percent
12 permanent impairment evaluation accepted by the board deviated
13 from the applicable *AMA Guides* and, therefore, should have been
14 rejected. ...

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

22 **d. Hawaii AMA Guides Cases.**

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

26 In *Cabatbat v. County of Hawai’i, Dept. of Water Supply* (Haw. 2003) 103 Haw. 1 [78 P.3d
27 756] (*Cabatbat*), the Hawaii Supreme Court addressed an employee’s temporomandibular joint
(TMJ) injury. Although it was undisputed that the TMJ injury resulted in 8% impairment under
the *AMA Guides*, the treating dentist and the parties’ respective evaluating dentists all found
between 18% and 23% impairment using methods other than the *AMA Guides*, including the
Recommended Guide of the American Academy of Head, Neck, Facial Pain and TMJ Orthopedics
(now, the American Academy of Craniofacial Pain). Nevertheless, the Labor and Industrial

1 Relations Appeals Board awarded 8% permanent disability, construing Rule 12-10-21 to require
2 the use of the AMA Guides.¹⁵ In reversing the Board’s decision, the Hawaii Supreme Court
3 pointed out that the Rule, by its own terms, permits reliance on the AMA Guides, but does not
4 mandate their use to the exclusion of other appropriate guides. It further observed that a restrictive
5 interpretation of the Rule runs afoul of Hawaii’s liberal construction mandate. Then, the Court
6 went on to state:

7 “The Board also erred in relying solely on the AMA Guides
8 because the AMA Guides themselves instruct that they should not
9 be the only factor considered in assessing impairments. The AMA
10 Guides state that

11 [i]t should be understood that the Guides do[] not
12 and cannot provide answers about every type and
13 degree of impairment.... *The physician’s judgment*
14 *and his or her experience, training, skill, and*
15 *thoroughness in examining the patient and applying*
16 *the findings to Guides’ criteria will be factors in*
17 *estimating the degree of the patient’s impairment.*

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

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

“In [*Hargreaves*], 145 N.H. 635 ..., the Supreme Court of New
Hampshire held that the compensation appeals board properly
deviated from the AMA Guides to accurately evaluate the
respondent’s impairment. *Id.* at 172. In that case, the court
observed that New Hampshire’s workers’ compensation statute
specified that the AMA Guides were to be used in determining
permanent impairment. *Id.* However, the court explained that
‘[t]he *AMA Guides* expressly allow[] a physician to deviate from
the guidelines if the physician finds it necessary to produce an
impairment rating more accurate than the recommended formula
can achieve.’ *Id.* (quoting [*Rainville*], 143 N.H. 624 ... (‘[the AMA

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

1 Guides] do[] not and cannot provide answers about every type and
2 degree of impairment because of the infinite variety of human
3 disease, and the constantly evolving field of medicine, and the
4 complex process of human functioning’ (quoting the AMA Guides,
5 Fourth Edition (1993), at 3)).

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

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

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

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

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

42 In addition, the Court said:

43 “[T]he AMA also recognizes that the Guides are only ‘a tool for
44 evaluation of permanent impairment’ used by the physician, *id.* at

13, and ‘may be used as a *component in disability assessment*[,]’
id. at 12 (emphasis added [Court’s emphasis]). It is cautioned that
‘the Guides is not to be used for direct financial awards nor as the
sole measure of disability.’ Id. Rather, ‘the impairment evaluation
... is only one aspect of disability determination. A disability
determination also includes information about the individual’s
skills, education, job history, adaptability, age, and environment
requirements and modifications.’ Id. at 8. Accordingly, the AMA
recognizes that ‘assessing these factors can provide a *more
realistic picture of the effects of the impairment* on the ability to
perform complex work and social activities.’ Id. (emphasis added
[Court’s emphasis]). Hence, in applying the Guides the
impairment rating is one factor in a sum of considerations
employed in arriving at a disability decision. As emphasized by
the Fifth Edition, ‘impairment percentages derived from the Guides
criteria should not be used as direct estimates of disability.’ Id. at
13.” (*Duque*, 105 Haw. at p. 439.)

10 **e. New Mexico AMA Guides Cases.**

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

13 In *Madrid v. St. Joseph Hosp.* (N.M. 1996) 122 N.M. 524 [928 P.2d 250] (*Madrid*), the
14 New Mexico Supreme Court rejected a constitutional challenge to the use of the AMA Guides. In
15 upholding the use of the Guides, the Court relied in part on the fact that, under section 52-1-24(A),
16 “other comparable AMA publications may be utilized to evaluate impairment when the AMA
17 Guide is insufficient.” (*Madrid*, 122 N.M. at p. 534 (see also, 122 N.M. at p. 532 (“the statute
18 explicitly allows for reference to other AMA publications”).) Moreover, the Court pointed out that
19 “other jurisdictions allow workers’ compensation judges to consider generally-accepted standards
20 in awarding workers’ compensation benefits when the injury at issue is not covered by the AMA
21 Guide.” (122 N.M. at p. 534 [citing to *Morehead* (Fla. 1987) 509 So.2d 930 and *Williamson* (Ariz.
22 1988) 158 Ariz. 131].) The Court then said:

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

f. South Dakota AMA Guides Cases.

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

3 In *Cantalope v. Veterans of Foreign Wars Club* (S.D. 2004) 674 N.W.2d 329 (*Cantalope*),
4 the South Dakota Supreme Court considered the permanent disability claim of an employee who
5 had sustained industrial subcutaneous pneumomediastinum, which is a condition in which air
6 ruptures into body tissues. It was undisputed that this condition was not covered by the AMA
7 Guides. In affirming a finding of 10 to 15 percent impairment, the Supreme Court stated:

8 “In order to compute the statutory compensation allowed, a
9 claimant must be evaluated and given an impairment rating. Such
10 rating shall be ‘expressed as a percentage to the affected body part,
11 using the [AMA] Guides[.]’ SDCL 62-1-1.2. There is a
12 disclaimer in the Guides explaining that not all questions can be
13 directly answered because of the variables involved in medical
14 practice. Guides at 3. Furthermore, ‘the AMA Guides are not
15 intended to establish a rigid formula, though where use of the
16 AMA Guides is required by statute, a deviation must be justified
17 by competent medical evidence and be consistent with the specific
18 dictates and general purpose of the Guides.’ AMJUR Workers 406.
19 Here, [the employee’s] physician admitted the Guides do not
20 address her specific injury. However, the Guides offer a means to
21 assess impairment.

22 “... SDCL 62-1-1.2 mandates that the AMA Guides be used to
23 calculate the percent of the impairment to the whole person. Other
24 states also statutorily specify the use of the AMA Guides for
25 impairment assessment. [Footnote omitted.] As this Court has not
26 reviewed this statute under the circumstances presented here, we
27 will consider how other states have dealt with the Guides. In New
Hampshire, the court ‘held that if a physician, exercising
competent professional skill and judgment, finds that the
recommended procedures in the *AMA Guides* are inapplicable to
estimate impairment, the physician may use other methods not
otherwise prohibited by the *AMA Guides*.’ [Footnote omitted.] ...
Rainville ... 143 N.H. 624, 632 (1999). Similarly, in New Mexico,
the court noted, ‘[t]he AMA Guide is a general framework,
requiring flexibility in its application.[.]’ *Madrid* ... 122 N.M. 524,
532, (1996). [‘]While the AMA Guide was intended to help
standardize the evaluation of a worker’s impairment, it was not
intended to establish a rigid formula to be followed in determining
the percentage of a worker’s impairment.’ *Id.*

25 “Here, the physician used the Guides, [the employee’s] medical
26 history, and his professional experience to determine [she] had a
27 10-15% impairment rating. And while the Guides do not contain
ratings on [her] specific injury, they do contain methods for
evaluating respiratory injuries. The physician further explained
that while under one of the Guides’ rating tests [the employee]

1 would show no impairment, she nevertheless has a permanent
2 injury to her lung, greatly increasing her risk to redevelop the
3 condition and increasing her susceptibility to pneumomediastinum
4 or pneumothorax. Consequently, at trial, the physician testified
5 that [she] had a 10 to 15 percent whole person impairment under
6 that portion of the Guides that allow independent physician
7 assessment when the specific injury is not covered. ... [T]he trial
8 court ultimately found that a 10 to 15 percent impairment did exist.
9 'Whether and to what extent an alternative method is proper,
10 credible, or permissible under the *AMA Guides* are questions of
11 fact to be decided by the board.' *Rainville*, ... 143 N.H. at 632
12 (citing *City of Aurora v. Vaughn*, 824 P.2d 825, 827
13 (Colo.Ct.App.1991) ('as trier of fact, agency entitled to rely on
14 expert testimony supporting deviation from *AMA Guides*')). Here,
15 this matter was tried before the circuit court, and that trier of fact
16 found the physician's alternative methodology credible.
17 Considering the totality of the evidence, we do not conclude that
18 the trial court's finding was clearly erroneous.

19 "Where the legislature has expressly incorporated a private
20 organizations standards into our statutes and where those standards
21 expressly allow for professional discretion in reaching a
22 determination, such discretion, if supported by competent medical
23 evidence and if consistent with the general purpose of the *AMA*
24 *Guides*, satisfies the statutory requirements of SDCL 62-1-1.2."
25 (*Cantalope*, 674 N.W.2d at pp. 336-337.)

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

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

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

33 We conclude that an impairment rating strictly based on the *AMA Guides* is rebutted by
34 showing that such an impairment rating would result in a permanent disability award that would be
35 inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent
36 disability. This conclusion finds support both in California cases addressing injuries under the
37 former Schedule and in out-of-state cases addressing circumstances under which the *AMA Guides*
need not be strictly followed.

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

4 In *Luchini*, 7 Cal.App.3d 141 [35 Cal.Comp.Cases 205], the injured employee had suffered
5 a compound fracture of his leg. All of the medical experts agreed that he should have various
6 permanent work restrictions on a prophylactic basis. The WCAB, however, did not rate the
7 employee’s disability using these work restrictions, concluding that “prophylactic working
8 restrictions are not rateable factors of permanent disability” under the Schedule. In reversing and
9 remanding to the WCAB to rate the employee’s disability based on his prophylactic restrictions,
10 the Court of Appeal stated, among other things: “the board cannot rely on some administrative
11 procedure [(i.e., the Schedule)] to deny to petitioner a disability award *commensurate with the*
12 *disability that he has suffered.*” (*Luchini*, 7 Cal.App.3d at p. 146 [35 Cal.Comp.Cases at p. 209]
13 (emphasis added); accord: *Dalen v. Workmen’s Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 508
14 [37 Cal.Comp.Cases 393, 401].)

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

21 “While the customary rating may be reasonable with respect to
22 many sensitivity cases, *it is not rationally related to Applicant’s*
23 *disability in this case.* ... Applicant here is totally disabled from
24 engaging in any employment in which she comes into contact with
25 nickel or copper, and there are few, if any, occupations on the open
labor market which do not involve contact with these metals.^[16]
There is no evidence that Applicant will be able to rehabilitate
herself within one year and find employment on the open labor
market which does not involve contact with nickel or copper. [¶]

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

1 Thus the 13 percent permanent disability rating *is not rationally*
2 *related* to Applicant’s diminished ability to compete on the open
3 labor market as is required by Labor Code section 4660,
4 subdivision (a). *It is, therefore, arbitrary, unreasonable and not*
supported by the evidence in light of the entire record.” (Nielsen,
36 Cal.App.3d at p. 758 [39 Cal.Comp.Cases at p. 84] (emphasis
added; fn. omitted).)¹⁷

5 In *Abril v. Workers’ Comp. Appeals Bd.* (1976) 55 Cal.App.3d 480 [40 Cal.Comp.Cases
6 804] (*Abril*), the employee sustained an injury causing legal blindness of his left eye. A physician
7 recommended that the employee be precluded from various activities “[t]o avoid the risk of further
8 retinal detachment.” The WCAB found 25% standard disability, which was the scheduled rating
9 for the complete loss of vision of one eye. A further 3% was added in anticipation of any disability
10 that might result from further surgery. The WCAB, however, did not rate the work preclusions
11 because they were intended to reduce the risk of retinal detachment; therefore, the WCAB
12 concluded that the restrictions added nothing to the already existing rating for complete vision loss
13 of the left eye. The Court of Appeal, however, annulled the WCAB’s decision and remanded the
14 matter to re-rate the employee’s disability. The Court stated:

15 “The increase in disability [caused by the work restrictions] may be
16 ‘intangible,’ but it is nonetheless real. ... [¶] ... [A] rating that
17 ignores the intangible or non-bodily element ‘*is not rationally*
18 *related* to Applicant’s diminished ability to compete on the open
19 labor market as is required by Labor Code section 4660,
20 subdivision (a). It is, therefore, arbitrary, unreasonable and not
21 supported by the evidence in light of the entire record.’ ” (55
22 Cal.App.3d at p. 486 [40 Cal.Comp.Cases at p. 808] (emphasis
23 added) (quoting from *Nielsen*, 36 Cal.App.3d at p. 758 [39
24 Cal.Comp.Cases at p. 84].)

25 In *Lewis*, the employee was injured when she jumped over a puddle in her employer’s
26 parking lot and sprained her ankle. The AME opined that the employee should “have a
27 semisedentary work restriction for her industrial injury,” even though she had minimal objective
findings and even though the AME did not believe her condition would worsen if she exceeded the

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

1 restriction; instead, he merely believed that her minimal to slight pain at rest would be exacerbated
2 to a more than moderate level with prolonged walking or standing. The WCAB found 61%
3 permanent disability, which is what a semisedentary work restriction rated under the Schedule then
4 in effect, after adjustment for age and occupation. In rejecting the scheduled rating based on the
5 semisedentary work restriction as being too high, the Court stated:

6 “[T]he only evidence which supports the theory that the employee
7 should be confined to semisedentary work ... is the evidence of the
8 employee’s own subjective complaints and the [AME’s]
9 acceptance of that subjective complaint. There is no objective
10 evidence ... that Lewis is permanently restricted ... to
11 semisedentary work. [There are no] findings of ... any physical
12 abnormality or any functional disability of Lewis’ left foot.

13 “It is no answer to this lack of evidence to say that the ratings
14 schedules ... cannot be questioned. The [cases cited] fully
15 controvert any such ‘hands-off’ attitude toward the schedule or the
16 presumptions used to create the schedule or resulting therefrom.

17 ***

18 “... [A] court of review must... examine other facts which ... may
19 well be relevant and important when the result is examined for
20 fairness, reasonableness and proportionality in the overall scheme
21 of the law and the purposes sought to be accomplished by that law.
22 ... The basic disproportion of the award at bench to any proven
23 disability, is so clear as to compel our intervention. ... [W]hen we
24 discern an inequitable result, it is our duty to require
25 reexamination. ... [W]e conclude here that the award is so
26 disproportionate to the disability and the objectives of reasonably
27 compensating an injured worker as to be fundamentally unfair. ...
[It is] not just and fair compensation.

“The percentage of disability determined by use of the rating
schedule is only prima facie evidence of the percentage of
permanent disability to be attributed to each injury. Thus it is not
absolute, binding and final. [Citations]. It is therefore not to be
considered all of the evidence on the degree or percentage of
disability. Being prima facie it establishes only presumptive
evidence. Presumptive evidence is rebuttable, may be controverted
and overcome.”

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

28 In *Duke*, 204 Cal.App.3d 455 [53 Cal.Comp.Cases 385], the employee experienced
29 migraine headaches and vision blackouts from mixing chemicals and solvents at work. Two weeks
30 after leaving work, the symptoms cleared; therefore, the examining physician found no permanent
31

1 disability. The Court concluded, however, that the employee had ratable permanent disability
2 because the physician also had found that the employee must avoid exposure to chemicals or
3 solvents; otherwise, the migraine headaches and vision blackouts would return. The Court quoted
4 with approval the statements in *Nielsen* that where a “rating is *not rationally related* to [the]
5 Applicant’s diminished ability to compete on the open labor market,” then the rating is “*arbitrary,*
6 *unreasonable and not supported by the evidence in light of the entire record.*” (*Duke*, 204
7 Cal.App.3d at p. 460 [53 Cal.Comp.Cases at p. 388] (emphasis added).) The Court then returned
8 the matter to the WCAB to consider “how much of the labor market is closed to the worker
9 because of his preclusion from exposure to chemicals.” (*Id.*, 204 Cal.App.3d at p. 461, fn. 3 [53
10 Cal.Comp.Cases at p. 389, fn. 3].)

11 Therefore, the California cases interpreting the former Schedule suggest, by analogy, that
12 the AMA Guides portion of the 2005 Schedule is rebutted: if it is established that the AMA Guides
13 impairment rating does not “accurately reflect[] [the employee’s] true disability” (*Glass*, 105
14 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449]); if the AMA Guides impairment rating is
15 “inequitable,” “is so disproportionate to the disability and the objectives of reasonably
16 compensating an injured worker as to be fundamentally unfair,” and it does not provide “just and
17 fair compensation” (*Lewis*, 99 Cal.App.3d at p. 659 [44 Cal.Comp.Cases at p. 1140]); if the AMA
18 Guides impairment rating “is not rationally related” to the employee’s permanent disability (*Duke*,
19 204 Cal.App.3d at p. 461, fn. 3 [53 Cal.Comp.Cases at p. 389, fn. 3]; *Glass*, 105 Cal.App.3d at p.
20 306 [45 Cal.Comp.Cases at p. 448]; *Abril*, 55 Cal.App.3d at p. 486 [40 Cal.Comp.Cases at p. 808];
21 *Nielsen*, 36 Cal.App.3d at p. 758 [39 Cal.Comp.Cases at p. 84]); or if the AMA Guides impairment
22 rating is not “commensurate with the disability that [the employee] has suffered” (*Luchini*, 7
23 Cal.App.3d at p. 146 [35 Cal.Comp.Cases at p. 209]).

24 The out-of-state AMA Guides cases support this interpretation. For example, the Arizona
25 Supreme Court has repeatedly held that the AMA Guides should not be followed if its impairment
26 rating does not “truly reflect the claimant’s loss” and “do[es] not provide a fair, accurate measure
27 of the degree of impairment.” (*Williamson*, 158 Ariz. at p. 135; *Puma*, 150 Ariz. at pp. 67-68;

1 *Gomez*, 148 Ariz. at p. 152; *Adams*, 113 Ariz. at p. 295.) The Hawaii Supreme Court has
2 specifically agreed with the Arizona Supreme Court that the AMA Guides need not be relied upon
3 “where [the Guides] do[es] not truly reflect the claimant’s loss.” (*Cabatbat*, 103 Haw. at p. 9.)
4 Similarly, the Florida Supreme Court has held that the AMA Guides should not be followed where
5 “the Guides do[es] not address claimant’s evident economic loss.” (*Morehead*, 509 So.2d at p.
6 932.) Further, in a 12-Justice en banc opinion, the Florida Court of Appeal held that departures
7 from the AMA Guides are appropriate where the impairment rating under the Guides “bears no
8 reasonable relationship to [the employee’s] economic loss” (*Trindade*, 443 So.2d at p. 1012) or
9 where the employee’s “permanent impairment cannot reasonably be determined under the criteria
10 utilized in the Guides” (*id.*).

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

15 It appears likely, for example, that an AMA Guides rating will be deemed to have been
16 rebutted where the employee’s injury has no permanent effect on his or her “activities of daily
17 living” or it is simply not covered by the Guides – thereby resulting in *no* ratable AMA Guides
18 impairment – but the injury seriously impacts the employee’s ability to perform his or her usual
19 occupation and, therefore, significantly affects his or her future earning capacity. Such a
20 conclusion would be consistent with: (1) what permanent disability is and what purpose permanent
21 disability payments serve (*Brodie*, 40 Cal.4th at p. 1320 [72 Cal.Comp.Cases at p. 571] (“A
22 permanent disability is one ... which causes impairment of earning capacity, impairment of the
23 normal use of a member, or a competitive handicap in the open labor market. ... Thus, permanent
24 disability payments are intended to compensate workers for both physical loss and the loss of some
25 or all of their future earning capacity.” (internal quotations omitted)); (2) pre-AMA Guides
26 California case law (see, e.g., *Duke*, 204 Cal.App.3d 455 [53 Cal.Comp.Cases 385] (employee who
27 was permanently required to avoid exposure to chemicals or solvents was entitled to a rating for

1 his disability, even though no rating was called for by the former Schedule)); and (3) the AMA
2 Guides

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7 case law of other jurisdictions, as discussed above.¹⁸ We emphasize, however, that our references
8 to these cases are merely illustrative. We do not mean to suggest that all chemical and skin
9 sensitivity cases necessarily will result in no impairment under the AMA Guides. To the contrary,
10 some such conditions may cause a ratable impairment under the respiratory system, skin, or other
11 chapters of the Guides. Nevertheless, we reiterate that the AMA Guides focuses on activities of
12 daily living *excluding* work. (See AMA Guides, §§ 1.2a, 1.2b, 1.8 at pp. 4-5, 9, 13.) Therefore,
13 some conditions may result in little or no AMA Guides impairment, but only if the employee does
14 not engage in his or her normal work.

15 Beyond that, however, we also agree with the 12-Justice en banc decision of the Florida
16 Court of Appeal in *Trindade*, that the question of whether the AMA Guides have been rebutted
17 should not be resolved “based on the ‘covered’ or ‘not covered’ dichotomy.” (443 So.2d at p.
18 1010.) Indeed, many of the cases discussed above allowed departures from the AMA Guides even
19 where the Guides covered the employee’s condition to some extent and, therefore, provided for
20 some impairment rating. (E.g., *Cabatbat* (2003) 103 Haw. 1 (Hawaii Supreme Court rejected

21
22 ¹⁸ See *Cantalope* (S.D. 2004) 674 N.W.2d 329 (employee entitled to rating for subcutaneous
23 pneumomediastinum, even though not ratable under the AMA Guides); *Rainville* (N.H. 1999) 509 143 N.H. 624
24 (jackhammer operator entitled to rating for myofascial pain syndrome, even though not ratable under the AMA
25 Guides); *Benafield* (Ariz.App. 1998) 193 Ariz. 531 (secretary entitled to rating for post-surgical bilateral carpal
26 syndrome, even though not ratable under the AMA Guides, where she could no longer perform keyboarding due to
27 permanent preclusions from repetitive use of her hands); *Morehead* (Fla. 1987) 509 So.2d 930 (machinist entitled to
rating for permanent sensitivity to oil-based machine coolant, even though not ratable under the AMA Guides);
Cassey (Ariz.App. 1987) 152 Ariz. 280 (truck driver entitled to rating for chronic back strain, even though not ratable
under the AMA Guides, where he could not return to work because of chronic pain); *Freeney* (Fla.App. 1985) 475
So.2d 947 (journeyman plasterer entitled to rating for permanent preclusion from contact with wet cement, even
though not ratable under the AMA Guides); *Trindade* (Fla.App. 1983 [en banc]) 443 So.2d 1007 (employee entitled to
rating for knee instability due to *excessive* range of motion, even though the AMA Guides covered only *loss* of range
of motion); *Hunter* (Ariz.App. 1981) 130 Ariz. 59 (meat wrapper entitled to rating for bronchial hypersensitivity, it
even though not ratable impairment under the AMA Guides, where her permanent limitations from exposure to PVC
or other lung irritants precluded her from returning to work as a meat wrapper)).

1 Board's finding of 8% impairment under the AMA Guides for a TMJ injury, where all three
2 reporting dentists found between 18% and 23% impairment using methods other than the AMA
3 Guides); *Williamson* (1988) 158 Ariz. 131 (Arizona Supreme Court upheld 70% impairment
4 finding for hod carrier's fractured tibial condyle, even though the AMA Guides called for a 50%
5 impairment).) Such a view is consistent with the California pre-AMA Guides case law regarding
6 injuries that were covered, but not adequately covered, by the former Schedule. (See, e.g., *LeBoeuf*
7 *v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 242-243 [48 Cal.Comp.Cases 587, 594]
8 (*LeBoeuf*) (a rating called for by the former Schedule could be rebutted by vocational expert
9 opinion that the injured employee's permanent disability was in fact greater because of his or her
10 inability or limited ability to be vocationally retrained for suitable gainful employment); *Abril*, 55
11 Cal.App.3d 480 [40 Cal.Comp.Cases 804] (employee rated under the former Schedule for legal
12 blindness of the left eye was also entitled to be rated for work restrictions imposed to avoid the risk
13 of further retinal detachment); cf. *Nielsen*, 36 Cal.App.3d 756 [39 Cal.Comp.Cases 83] (bank teller
14 who developed sensitivity to nickel and copper not limited to customary 13% standard rating for
15 skin sensitivity cases, which had been based on the assumption that the employee could be
16 rehabilitated to gainful employment within one year.)

17 But, as indicated above, a defendant also can show that an AMA Guides rating should not
18 be followed where it is inequitably high. (*Puma*, 150 Ariz. 66 (Arizona Supreme Court affirmed
19 0% rating for employee who had a cervical discectomy, where all post-surgical objective tests were
20 normal and where surveillance films showed him performing a variety of physical activities
21 without any apparent difficulty, in sharp contrast to his complaints of severe pain and minimal
22 ability to move his head during his post-surgical evaluation by physicians).) Once again, this is
23 consistent with pre-AMA Guides California case law. (E.g., *LeBoeuf*, 34 Cal.3d at pp. 242-243 [48
24 Cal.Comp.Cases at p. 594] (a rating called for by the former Schedule could be rebutted by
25 vocational expert opinion that the injured employee's permanent disability was in fact less because
26 his or her completion of vocational rehabilitation increased the employee's ability to compete in
27 the open labor market); *Lewis*, 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133] (Court rejected 61%

1 permanent disability rating based on semisedentary work restriction for employee who sprained
2 her ankle while jumping over a puddle, where there were minimal objective findings and where her
3 subjective pain complaints were minimal to slight at rest, increasing to more than moderate with
4 prolonged walking or standing.)

5 ///

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

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

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

1 Therefore, a physician may depart from the specific recommendations of the AMA Guides
2 and draw analogies to the Guides’ other chapters, tables, or methods of assessing impairment. This
3 is consistent with the long-established principle in California that non-scheduled ratings may be
4 arrived at by making comparisons and drawing analogies to scheduled ratings. (*Glass*, 105
5 Cal.App.3d at pp. 306-307 [45 Cal.Comp.Cases at p. 448]; *Dept. of Motor Vehicles v. Workers’*
6 *Comp. Appeals Bd. (Payne)* (1971) 20 Cal.App.3d 1039, 1044-1045 [36 Cal.Comp.Cases 692,
7 696].)

8 Also, in evaluating impairment in a manner outside of or in addition to that prescribed by
9 the AMA Guides, the physician may consider other generally accepted medical literature or
10 criteria. Such additional or alternative literature could include, but would not necessarily be
11 limited to, other AMA publications or the publications of other established medical
12 organizations.¹⁹ (See, generally, *Cantalope* (S.D. 2004) 674 N.W.2d at pp. 336-337 (an
13 “alternative methodology” may be used to rate impairment “if supported by competent medical
14 evidence”); *Cabatbat* (Haw. 2003) 103 Haw. at p. 9 (“According to the AMA Guides and [the
15 three reporting physicians], the Board should not have relied solely upon the AMA Guides to
16 evaluate [the employee’s] injury”); *Williamson* (Ariz. 1988) 158 Ariz. at pp. 135-137 (“[a]ny
17 relevant factors” and “all competent and relevant evidence” may be used to establish an accurate
18 rating of functional impairment); *Morehead* (Fla. 1987) 509 So.2d at pp. 931-932 (impairment
19 determination may be “based upon other generally accepted medical standards”); *Trindade*
20 (Fla.App. 1983 [en banc]) 443 So.2d at pp. 1008-1013 (if “permanent impairment cannot
21 reasonably be determined under the criteria utilized in the *Guides*, ... such permanent impairment
22 may be established under other generally accepted medical criteria for determining
23 impairment”).)²⁰

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

27 ²⁰ See also former Ga. Code, § 34-9-1(5) (“ratings shall be based upon [the AMA Guides] or any other
recognized medical books or guides”); Haw. Admin. Rules, § 12-10-21(a) (ratings may be based on “guides issued by
the American Medical Association, American Academy of Orthopedic Surgeons, and any other such guides which the

1 Moreover, in reaching an impairment opinion that is not based on a strict application of the
2 AMA Guides, a physician may consider a wide variety of medical and non-medical information.
3 For example, the AMA Guides analyzes whether an injured employee’s injury impairs his or her
4 ability to perform activities of daily living, *excluding work*. (AMA Guides, §§ 1.2a, 1.2b, 1.8, at
5 pp. 4, 9, 13.) Therefore, when a physician believes that an impairment rating based on the AMA
6 Guides would not provide a fair and accurate measure of the injured employee’s degree of
7 impairment, then the physician may assess how the permanent effects of the employee’s injury
8 impair his or her ability to perform *work* activities, as well as assess the medical consequences of
9 performing certain work activities. (*Id.*, §§ 1.2a, 1.9, 1.12, 2.3, 2.6a.2, 2.6a.8, 2.6a.9, at pp. 5, 13-
10 14, 15, 18, 21, 22; see also *Williamson* (Ariz. 1988) 158 Ariz. at pp. 135-137 (“Where the ALJ
11 finds that the Guides do not provide a fair, accurate measure of the degree of impairment, he or she
12 *must* turn to other factors. *Any relevant factors ... may be considered*. Effect on job performance
13 is one such factor. [¶¶] ... If an injury has resulted in a functional impairment not adequately
14 reflected by clinical measurement under the AMA Guides, then an ALJ must consider impact on
15 job performance.” (Court’s emphasis; citations omitted).) In addition, a physician may take into
16 account pertinent diagnostic studies, such as functional capacity and rehabilitation evaluations.
17 (AMA Guides, § 2.6a.4, at p. 21.) Finally, if the employee has been evaluated by a vocational
18 rehabilitation expert, the physician may review and consider the vocational specialist’s opinion
19 regarding what jobs the employee might be able to perform and what effect the injury may have on
20 his or her ability to earn. (*Id.*, § 1.9, at p. 14.)

21 We emphasize, however, our agreement with the New Hampshire Supreme Court that:
22 (1) “our decision does not permit physicians ... to deviate from [the AMA Guides] simply to
23 achieve a more desirable result”; (2) “[t]he reasons for such a deviation must be fully explained
24 and the alternative methodology set forth in sufficient detail so as to allow a proper evaluation of
25 its soundness and accuracy”; and (3) therefore, “[w]ithin the report, an evaluating physician is
26 expected to provide a full medical evaluation, analysis of the medical findings with respect to the

27 director deems appropriate and proper”); N.M. Stats., § 52-1-24(A) (ratings may be “based upon the most recent
 edition of the [AMA Guides] or comparable publications of the American medical association”).

1 patient's life activities, and comparison of the results of analysis with the impairment criteria."
2 (*Rainville* (N.H. 1999) 143 N.H. at pp. 631-633.) As stated by the AMA Guides, "[a] clear,
3 accurate, and complete report is essential to support a rating of permanent impairment" and the
4 report should "explain" its impairment conclusions. (AMA Guides, § 2.6, at pp. 21-22.) In other
5 words, if a physician finds an impairment in a manner at variance, in whole or in part, with the
6 AMA Guides, then the physician's report must constitute substantial evidence upon which the
7 WCAB may properly rely.

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

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

14 In Section II-E, above, we described the factors that a physician may consider when
15 assessing impairment outside the four corners of the AMA Guides. Based on these factors, the
16 physician should state his or her best opinion regarding the employee's percentage of impairment
17 and explain how and why this impairment percentage was determined. (See *Escobedo v. Marshalls*
18 (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

19 Of course, it is the WCAB, and not any particular physician, which is the ultimate trier-of-
20 fact. (See, *Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54
21 Cal.Comp.Cases 251, 252] ("the WCJ, not the physician, is the trier of fact"); *Robinson v.*
22 *Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792-793 [52 Cal.Comp.Cases 419, 425]
23 ("the Board and not the physician is the trier of fact"); *Johns-Manville Products Corp. v. Workers'*
24 *Comp. Appeals Bd. (Carey)* (1978) 87 Cal.App.3d 740, 753 [43 Cal.Comp.Cases 1372, 1379]
25 ("While the appeals board must utilize expert medical opinion on many issues, it and not the
26 physician is the trier of fact" [internal citation omitted]).) Moreover, the WCAB may make any
27 finding that is supported by substantial evidence when the record is viewed as a whole. (Lab. Code,
§ 5952(d); *Lamb*, 11 Cal.3d at p. 281 [39 Cal.Comp.Cases at p. 314]; *Zenith Ins. Co. v. Workers'*

1 *Comp. Appeals Bd. (Cugini)* (2008) 159 Cal.App.4th 483, 490, 495 [73 Cal.Comp.Cases 81, 82,
2 90].) Therefore, the WCAB may accept the opinion of a single physician or it may make a finding
3 within the range of the medical evidence presented. (*Serafin*, 33 Cal.2d at p. 94 [13
4 Cal.Comp.Cases at p. 270] (the WCAB “may make a determination within the range of the
5 evidence as to the degree of disability,” it need “not adopt exactly the view of any expert witness,”
6 and it “may accept the evidence of any one expert or choose a figure between them based on all of
7 the evidence”); *U.S. Auto Stores v. Workers Comp. Appeals Bd. (Brenner)* (1971) 4 Cal.3d 469,
8 474-475 [36 Cal.Comp.Cases 173, 176] (a “decision is supported by substantial evidence if the
9 degree of disability found by the [WCAB] is within the *range* of evidence in the record. It is not
10 necessary that there be evidence of the exact degree of disability.” (Court’s italics).)

11 Medicine, though, is not a precise science. To the contrary, a physician’s “[c]linical
12 judgment” regarding impairment “combin[es] both the ‘art’ and the ‘science’ of medicine.” (AMA
13 Guides, at § 1.5, p. 11.) And, as our Supreme Court has observed, “Arriving at a decision on the
14 exact degree of disability is a difficult task under the most favorable circumstances. It necessarily
15 involves some measure of conjecture and compromise” (*Serafin*, 33 Cal.2d at p. 93 [13
16 Cal.Comp.Cases at p. 270]; see also *Foremost Dairies, Inc. v. Industrial Acc. Com. (McDannald)*
17 (1965) 237 Cal.App.2d 560, 572 [30 Cal.Comp.Cases 320, 329] (“Of necessity every medical
18 opinion must be in a sense speculative [but] this does not destroy the probative value of such an
19 opinion.”).) Therefore, a physician’s estimate of the percentage of the employee’s impairment may
20 be accepted even though this estimate is not exact, provided that the physician’s opinion is
21 adequately explained and is based on the factors set forth in Section II-E, above – including the
22 physician’s judgment, experience, training, and skill. Such a conclusion is consistent with recent
23 appellate case law regarding estimates of what percentage of an injured employee’s permanent
24 disability should be apportioned to non-industrial causation. (See *Anderson v. Workers’ Comp.*
25 *Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1382 [72 Cal.Comp.Cases 389, 398] (the fact that an
26 apportionment determination is “not precise and require[s] some intuition and medical judgment ...
27 does not mean [the] conclusions are speculative [where the physician] stated the factual bases for

1 his determinations based on his medical expertise”); *E.L. Yeager Construction v. Workers’ Comp.*
2 *Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687, 1693] (a
3 physician’s apportionment opinion “cannot be disregarded as being speculative when it was based
4 on his expertise in evaluating the significance of the[] facts”).)

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

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

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

20 “Unfortunately, there is no validated formula that assigns accurate
21 weights to determine how a medical condition can be combined
22 with other factors ... to calculate the effect of the medical
23 impairment on future employment. Therefore, each commissioner
24 or hearing official bases a decision on the assessment of the
available medical and nonmedical information. The *Guides* may
help resolve such a situation, but it cannot provide complete and
definitive answers. Each administrative or legal system that bases
disability ratings on permanent impairment [must] define[] its own

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

1 process of converting impairment ratings into a disability
2 rating ...” (AMA Guides, § 1.8, at p. 13.)

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

7 **III. CONCLUSION**

8 In sum, we conclude that the AMA Guides portion of the 2005 Schedule may be rebutted
9 by a showing that an impairment based on the AMA Guides would result in a permanent disability
10 award that would be inequitable, disproportionate, and not a fair and accurate measure of the
11 injured employee’s permanent disability. Moreover, when the AMA Guides portion of the 2005
12 Schedule has been rebutted, the WCAB may make an impairment determination that considers
13 medical opinions regarding impairment that are not based or are only partially based on the AMA
14 Guides. We believe this conclusion is consistent with the language of section 4660, particularly its
15 provision that the Schedule is merely “prima facie evidence of the percentage of permanent
16 disability.” (Lab. Code, § 4660(c).) It also is consistent with the nature of prima facie evidence,
17 i.e., “prima facie evidence is that which suffices for the proof of a particular fact, until contradicted
18 and overcome by other evidence.” (*Mansfield*, 84 Cal. at p. 566; *Raymond G.*, 230 Cal.App.3d at p.
19 972.) Further, our conclusion is consistent with the language of the AMA Guides itself and with
20 relevant out-of-state cases interpreting the Guides. Finally, our conclusion is consistent with the
21 language of the Supreme Court’s recent decision in *Brodie*, in which it describes permanent
22 disability as causing “impairment of earning capacity, impairment of the normal use of a member,
23 or a competitive handicap in the open labor market” and in which it states that “permanent
24 disability payments are intended to compensate workers for both physical loss and the loss of some
25 or all of their future earning capacity.” (*Brodie*, 40 Cal.4th at p. 1320 [72 Cal.Comp.Cases at p.
26 571] (internal quotation marks omitted).)

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

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

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

14 For the foregoing reasons,

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

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

24 **FINDINGS OF FACT**

25 ***

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

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

1 reserved.

2 ***

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

5 **AWARD**

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

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

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

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

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

21 **FINDINGS OF FACT**

22 ***

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

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

AWARD

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

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

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

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

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

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further proceedings and new decisions, consistent with this opinion.

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WORKERS' COMPENSATION APPEALS BOARD

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

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

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

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

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

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

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

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

2/3/2009

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

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

NPS/aml