

**IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

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

Petitioner,

vs.

**WORKERS' COMPENSATION APPEALS
BOARD and MARIO ALMARAZ,**

Respondents.

Fifth District Case No.: **F058698**

WCAB No. ADJ1078163 (BAK 0145426)
WCJ Terrance McEvoy

**APPLICATION FOR *AMICUS CURIAE* STATUS
AND PROPOSED *AMICUS CURIAE* BRIEF**

IN SUPPORT OF PETITIONERS ENVIRONMENTAL RECOVERY SERVICES
(A.K.A. ENVIROSERVE) AND STATE COMPENSATION INSURANCE FUND

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I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court 8.208

Name of Interested Entity or Person	Nature of Interest
Mario Almaraz	Respondent injured worker
Workers' Compensation Appeals Board	Respondent Court
Environmental Recovery Services (a.k.a. Enviroserve)	Petitioner employer
State Compensation Insurance Fund	Petitioner insurance carrier
California Chamber of Commerce	<i>Amicus curiae</i> on behalf of Petitioners

Dated: December 2, 2009

Respectfully submitted,

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IV. APPLICATION FOR AMICUS CURIAE STATUS

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES
OF THE FIFTH DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA:

Pursuant to California Rule of Court 8.200(c), the California Chamber of Commerce hereby requests status to file the attached *Amicus Curiae* Brief in support of City and County of San Francisco.

The California Chamber of Commerce is comprised of over 15,000 member employers, both large and small. CalChamber is dedicated to improving California's business climate by providing businesses with a voice in state politics, legislative activities, and judicial matters. CalChamber is interested in administrative, statutory, and judicial matters that substantively affect the system of workers' compensation created by Article XIV, Section 4, of the Constitution of the State of California. On behalf of its membership, CalChamber has made numerous appearances as *amicus curiae* before the California Supreme Court and Courts of Appeal, including the cases of *Hertz Corp. v. WCAB (Aguilar)* (2009), *Palm Medical Group v. SCIF* (2008), *Facundo-Guerrero v. WCAB* (2008), *Brodie v. WCAB* (2007), *Nabors v. WCAB* (2006), *SCIF v. Superior Court* (2001), *Vacanti v. SCIF* (2000), *DaFonte v. Up-Right* (1992), and *Thomas v. Sports Chalet* (1977).

As appears more fully below, the California Chamber of Commerce is familiar with the parties, the law, and the issues raised in this matter, and has completely reviewed all of the briefs heretofore submitted to this Court.

Pursuant to California Rule of Court 8.200(c), the California Chamber of Commerce respectfully seeks status as *amicus curiae* in support of Petitioners Environmental Recovery Services (a.k.a. Enviroserve) and State Compensation Insurance Fund. The issues of law upon which CalChamber wishes to address this Court are:

- Where the Legislative has expressly stated its intent to create consistency, uniformity, and objectivity in permanent disability ratings through the use of the AMA Guides, has the WCAB erred by sanctioning an alternative methodology that misapplies the AMA Guides and permits subjective factors in the determination of permanent disability?
- Where the Administrative Director has already established a Schedule mandated by statute, has the Board engaged in impermissible rule-making activities by issuing a decision that sanctions an alternative methodology?
- Should this Court uphold the legislative intent behind SB 899 to reduce costs to California employers?

CalChamber respectfully requests status as *amicus curiae* in this action, and further requests that the attached *Amicus Curiae* Brief be accepted for consideration by this Court. As required, all parties are hereby served with this Application and the proposed *Amicus Curiae* Brief.

December 2, 2009

FINNEGAN, MARKS, THEOFEL & DESMOND
A Professional Corporation

ELLEN SIMS LANGILLE, ESQ.

V. VERIFICATION

I, Ellen Sims Langille, swear that I have read the within Application for Amicus Curiae Status and Amicus Curiae Brief and know the contents thereof; that the within brief contains xxx words, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts stated therein are true and on that ground allege that such matters are true; that I make such verification because the officers of the California Chamber of Commerce are absent from the County where my office is located and are unable to verify the petition, and because as attorney for the California Chamber of Commerce I am more familiar with such facts than are the officers.

Sworn and executed this 2nd day of December, 2009, at San Francisco, California.

ELLEN SIMS LANGILLE, ESQ.

VI. INTRODUCTION

Pursuant to Rule of Court 8.200(c), the California Chamber of Commerce submits this *amicus curiae* brief on behalf of the Petitioners, Environmental Recovery Services (a.k.a. Enviroserve) and State Compensation Insurance Fund. We urge this Court to overturn the erroneous WCAB decision below.

In enacting SB 899, the Legislature exercised its plenary discretion over workers' compensation. It decided as a matter of state public policy that costs, especially permanent disability indemnity costs, must be controlled. The Legislature sought to eliminate the vagueness and subjectivity of the old system by setting forth a mandatory method for calculating the percentage of permanent disability. The stated purpose of the new statute was to promote "consistency, uniformity and objectivity." The statute accomplished that goal by defining the elements that make up the permanent disability percentage calculation in terms of objective, measurable factors, empirical evidence and aggregate and averaged data. In short, the new system eliminated subjectivity and guesswork from permanent disability calculations, thereby ensuring that similarly-situated employees are treated equally, promoting fairness and consistency across the board.

Yet in its decision below, the Board has treated one element of the calculation – the required use of the AMA Guides – as rebuttable even though the statute does not permit rebuttal of any of the *elements* that make up the calculation of permanent disability percentage. The statute permits only the *end product* of the calculation – *i.e.*, the *percentage* of permanent disability – to be rebutted, within the terms defined by the

statute. Secondly, the decision below permits the use of the AMA Guides in unsanctioned ways, even though neither the statute nor the AMA Guides actually authorizes such unsanctioned methodologies. To the contrary, the statute requires that the impairment must be based on the AMA Guides, and that the Schedule must be used.

In the decision below, instead of addressing the workers' compensation crisis as legislatively mandated, the WCAB has ensured that every single case will be *more* expensive. Like Alice's fabled adventures in Wonderland,¹ the decision below is akin to a fall down the rabbit hole of classic intellectual nonsense, and quite literally turns section 4660 on its head. In order to preserve the cost-savings promised to California employers by the SB 899 reform package, the decision below must be overturned.

VII. LEGAL ARGUMENT

In the decision below,² the Board has pretended to adhere to the statutory mandate to use the AMA Guides, but in fact permits the AMA Guides to be used in ways that neither the authors of the Guides nor the Legislature ever imagined.

While ostensibly acknowledging that the use of the AMA Guides is mandated by section 4660, the WCAB has made an end run around that requirement, by permitting a

¹ "If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't. And contrary wise, what is, it wouldn't be. And what it wouldn't be, it would. You see?" - Alice, *Alice's Adventures in Wonderland* (Lewis Carroll, 1865).

² The joint decision below is entitled *Almaraz v. Environmental Recovery Svcs. (aka Enviroserve) and State Comp. Ins. Fund / Guzman v. Milpitas Unified Sch. Dist., admin. by Keenan & Assoc.* (2009) 74 Cal. Comp. Cases 1084 (*Almaraz/Guman II*). The *Almaraz/Guzman II* decision references and affirms much of the Board's prior decision in *Almaraz v. Environmental Recovery Svcs. (aka Enviroserve) and State Comp. Ins. Fund / Guzman v. Milpitas Unified Sch. Dist., admin. by Keenan & Assoc.* (2009) 74 Cal. Comp. Cases 201 (*Almaraz/Guzman I*). The *Guzman* portion of the *Almaraz/Guzman II* decision is currently pending on appeal at the Sixth District.

physician to “utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee’s impairment.”³ Under the Board’s view, the detailed, precise instructions for measurement of a specific impairment as contained in the AMA Guides may be wholly ignored -- so long as the individual physician subjectively believes that a “more accurate” rating is really found in some other Chapter.

For example, rather than requiring a description of impairment for a lumbar spine injury based on a three-part verified measurement using dual inclinometers in order to obtain a reproducible result, pursuant to the Range of Motion method set forth in Chapter Fifteen (Spine) of the AMA Guides, the decision below would actually allow a physician to base impairment in Chapter Six (Digestive System), ordinarily reserved for impairment due to a hernia -- *even in the absence of a hernia* -- if the physician decides that it really is “more accurate.” Or, even though the Guides specifically disfavor impairment ratings based on “grip loss” or “gait derangement” due to the inherently subjective nature of the testing, the decision below would permit a finding of impairment based on these disapproved methods rather than the objectively verifiable and reproducible testing required by the AMA Guides, so long as the physician subjectively believes that they really provide a more accurate representation of the impairment.

But the Board’s reasoning rests on incorrect assumptions, is based on a faulty reading of the statute, and impermissibly substitutes the Board’s view of public policy for that of the Legislature. It must be overturned.

³ *Almaraz/Guzman II, supra*, at p. 2 [emphasis added].

A. BY PERMITTING THE AMA GUIDES TO BE APPLIED IN AN UNAUTHORIZED MANNER, THE DECISION BELOW IGNORES THE LEGISLATIVE MANDATE FOR OBJECTIVITY, UNIFORMITY, AND CONSISTENCY IN THE DETERMINATION OF PERMANENT DISABILITY.

1. IN OVERHAULING LABOR CODE SECTION 4660, THE LEGISLATURE REVAMPED THE PROCESS OF RATING PERMANENT DISABILITY BY IMPOSING CONSISTENT, UNIFORM, AND OBJECTIVE STANDARDS TO RANK THE DISABILITY.

A defining characteristic of permanent partial disability is that more severely-injured workers are entitled to more benefits than those less severely injured.⁴ This requires a system for ranking the severity of various impairments, to ensure that workers with similar degrees of impairment are compensated similarly, and that more severe injuries receive greater compensation than those of lesser severity. This helps to ensure uniformity and consistency across the board.⁵

But California’s previous system was not equal to the task. Far from it, the old approach encouraged and promoted disparate treatment among similarly-situated applicants via its pervasive use of subjective factors that defied quantification or objective measurement.⁶ This reliance on “‘subjective’ criteria and work restrictions”

⁴ RAND Institute for Civil Justice, “An Evaluation of California’s Permanent Disability Rating System” (2005), p. xix (“2005 RAND Study”). This report is located at http://www.rand.org/pubs/monographs/2005/RAND_MG258.pdf.

⁵ *Id.*, at xix; *see also id.*, at pp. 14-15.

⁶ 2005 RAND Study, *supra*, at pp. xxvi – xxvii.

was “the most controversial feature of the [prior] California system”⁷ and one of the main criticisms leveled by a legislative committee.⁸

The revamped system changed all that. As its overarching philosophy, new Labor Code section 4660 announced a statement of purpose that had been entirely absent from the prior version: The express goal of section 4660 was the promotion of “consistency, uniformity and objectivity.”⁹

Every part of the new statute is consistent with that stated purpose, because each subdivision now ties the ultimate permanent disability ranking to *objective* factors. For example, the statute now requires: (1) mandatory use of the objective AMA Guides to quantify the injury or disfigurement; (2) determination of the DFEC adjustment by reference to objective empirical data representing the “aggregate” and “average” nature of the adjustment; (3) the continued use of the existing occupational adjustments, and (4) the continued use of the existing age adjustments.¹⁰ Every step in the process of determining a percentage of permanent disability must now be based on objective evidence, on quantifiable measurement not susceptible to interpretation, and on aggregate empirical data.

After SB 899, section 4660 for the first time: *defines* the components used to calculate the percentage of permanent disability; defines these element in *objective* terms;

⁷ *Id.* at p. 4.

⁸ *See id.* at pp. 24-25, quoting a Senate Interim Committee report describing “Incredible Inconsistencies in Rating Specialists’ Computations.” The committee report observed that “‘slight,’ ‘moderate,’ and ‘severe’ have different meanings as to different persons involved in the judicial process of the commission. What may be ‘slight’ or ‘severe’ as the case may be, to litigants and referees alike, may prove to be something different to the rating specialist. . . .” *Id.* at pp. 25-26 fn. 10.

⁹ Lab. Code § 4660(d).

and makes the use of those objective definitions *mandatory* in the calculation of the permanent disability percentage.

2. IN EACH STEP OF THE PERMANENT DISABILITY RATING FORMULA, THE LEGISLATURE HAS MANDATED THE USE OF OBJECTIVE CRITERIA IN ORDER TO ACHIEVE UNIFORMITY IN THE RESULTS.

Section 4660 requires the calculation of the Permanent Disability percentage through a mandatory four-part formula: (1) determination of the impairment, (2) adjustment for diminished earning capacity, (3) adjustment for occupation, and (4) adjustment for age.¹¹ Each of the four elements of the rating formula is now statutorily based on objective criteria in order to obtain uniform results between similarly situated employees.

As immediately relevant here, the Legislature adopted the objective criteria used by the AMA Guides to quantitatively measure the worker's impairment, thereby avoiding the inconsistent results inherent in the old, subjective calculation method. The statute now defines "physical injury or disfigurement" impairment by reference to objective, reproducible, uniformly-applicable criteria pursuant to the "descriptions and measurements of physical impairments and the corresponding percentages of impairments" in the AMA Guides, 5th edition.¹²

¹⁰ The occupational and age adjustments are already based on aggregate and averaged data.

¹¹ Lab. Code § 4660(a) requires that "account shall be taken of" the nature of the physical injury or disfigurement; the occupation of the injured employee; age at the time of the injury; with consideration being given to an employee's diminished future earning capacity.

¹² Lab. Code § 4660(b)(1) defines the term "nature of the physical injury or disfigurement," when it says this term "*shall* incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments" of the AMA Guides, 5th edition [emphasis added].

Determining the percentage of permanent disability in this manner corresponds with objective medical standards, largely eliminating the unpredictable, subjective, unquantifiable, and unverifiable considerations that pervaded the prior statutory scheme.

Similarly, the Legislature abandoned the vague, open-ended notion of compensating for an injured employee's "diminished ability to compete in an open labor market," and in its place substituted a standardized adjustment for "diminished future earning capacity."¹³ Here again, the drafters defined the DFEC factor in objective terms, as a "numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss on income resulting from each type of injury for similarly situated employees."¹⁴

After SB 899, both the determination of the standard impairment and the DFEC adjustment now operate in the same objective fashion as the age and occupation adjustments, which have always been grounded in objective fact, *i.e.*, the aggregate effect of age and occupation on the disability.¹⁵

As explained by the 2005 RAND Study, "[t]he key feature of the [new] California rating system is that it is designed to convert all the relevant information about a disability – specifically, the severity of impairment, age, and occupation – into a single *quantitative* measure. For this system to achieve horizontal and vertical equity, it must

¹³ Lab. Code § 4660(a).

¹⁴ Lab. Code § 4660(b)(2) [emphasis added]. For purposes of preparing a table to determine a specific diminished future earning capacity adjustment, the statute required the Administrative Director to use the 2003 RAND report as well as data from additional empirical studies. Lab. Code § 4660(b)(2). Thus, the diminished future earning capacity adjustment no longer reflects an *individual evaluation*. It is now based on the *aggregate* effect of different types of injuries on similarly situated workers in a defined category.

¹⁵ See 2005 Schedule, pp. 1-9 and 1-10.

systematically assign higher ratings to more severely disabled workers both within and between different types of impairments.”¹⁶ The policy goals of section 4660 can only be achieved through the consistent, systematic use of objective, verifiable criteria.

3. NO SINGLE ELEMENT OF THE FOUR-PART PERMANENT DISABILITY CALCULATION IS REBUTTABLE.

The decision below relied on subdivision (c) of section 4660 to conclude that each of the individual components that make up the PD percentage is rebuttable. But that misreads the statute. By its own terms, the statute permits only the *end-product* of the four elements used to calculate the permanent disability percentage to be rebutted: “[The Schedule] shall be prima facie evidence of the *percentage* of permanent disability to be attributed to each injury covered by the schedule.”¹⁷ Only the *percentage rating* is rebuttable, not the individual elements themselves.¹⁸

The Board has misread the statute to permit a party to rebut any of the *elements* that make up the percentage, *e.g.*, the proper application of the AMA Guides.¹⁹ The

¹⁶ 2005 RAND Study, *supra*, at p. 39 [emphasis added, citation omitted]. “Horizontal” and “vertical” equity reflect the goal of ensuring that similarly-situated workers are treated similarly, *i.e.*, workers with equal earning losses should receive equal benefits, and workers with differing losses of income should receive benefits proportionate to their losses.

¹⁷ Lab. Code § 4660(c) [emphasis added].

¹⁸ The Board appeared to recognize this in *Costa v. Hardy Diagnostic* (2006) 71 Cal. Comp. Cases 1797, 1818-1819, noting that it the Legislature intended to “allow the parties the opportunity to present rebuttal evidence to ratings under the new PDRS” [emphasis added].

¹⁹ *Calif. Schools Employees Ass’n v. South Orange Co. Comm. Col. Dist.* (2004) 124 Cal. App. 4th 574 (courts, under guise of construction, may not re-write law or give words effect different from plain and direct import of terms used).

language of the statute does not support that interpretation.²⁰ The statute defines what each component means, and it makes those definitions mandatory, *i.e.*, those definitions *must* be used in the permanent disability percentage calculation.²¹ Had the Legislature intended each of these elements to be rebuttable, it would not have required that these definitions be used in the permanent disability calculation.

Because the decision below ignores the legislative mandate for uniformity and consistency by permitting the AMA Guides to be applied in ways never intended by either the Legislature or the authors of the AMA Guides, it must be overturned.

²⁰ There is one authority which might justify the suggested method of construction: “When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean -- neither more nor less.” (*Through the Looking Glass*, Lewis Carroll, 1871; *see also TVA v. Hill* (1978) 437 U.S. 153, 173 fn. 18). Like the fictional egghead, the WCAB has here turned a blind eye to the plain meaning of the statutory language in order to arrive at an interpretation that suits it.

²¹ Lab. Code § 4660(b)(1) defines the term “nature of the physical injury or disfigurement,” when it says this term “**shall** incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments” of the AMA Guides, 5th edition. Section 4660(b)(2) defines DFEC by providing that “an employee's diminished future earning capacity **shall** be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees....The administrative director **shall** formulate the adjusted rating schedule based on empirical data and findings” of the 2003 RAND Study “and upon data from additional empirical studies.” And section 4660(c) mandates that the “administrative director **shall** amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years.” [emphasis added]. From the repeated use of the mandatory “shall” several things are clear: the objective AMA Guides *must* be used to determine the nature of the injury or disfigurement; the DFEC *must* be based on the Director’s Schedule, which, in turn, *must* be based on “empirical data and findings;” and the Schedule *must* be used.

B. WHERE SECTION 4660 REQUIRES THE APPLICATION OF THE AMA GUIDES TO DETERMINE THE DISABILITY, THE WCAB MAY NOT SUBVERT THAT REQUIREMENT BY PERMITTING AN ALTERNATIVE MIS-APPLICATION OF THE GUIDES.

1. THE WCAB IS NOT PERMITTED TO PROMULGATE ITS OWN REGULATORY SCHEME OR TO CREATE AN ALTERNATIVE SCHEDULE OF RATING PERMANENT DISABILITIES.

An agency's regulation carries a strong presumption of validity and is accorded the most deferential level of judicial scrutiny.²² Review is limited to a determination that the regulation is within the scope of the agency's authority, is reasonably necessary to effectuate the purpose of the statute, and involves no evaluation of the regulation's perceived wisdom.²³ In the absence of "an arbitrary and capricious decision," a judicial body may not superimpose its own policy judgments over those of the agency.²⁴

In the guise of exercising its judicial role to *implement* section 4660, the Board is not permitted to *promulgate* its own regulatory scheme in derogation of that required by the Legislature.²⁵ Its judicial function is to confirm whether regulations violate authorizing statutes. Judicial bodies may not inject their own policy preferences into the regulatory process.²⁶ The Legislature ordered the Administrative Director to promulgate

²² *Boughner v. CompUSA* (2008) 73 Cal. Comp. Cases 854, 859 (writ den. sub nom. *Boughner v. Workers' Comp. Appeals Bd.* (2009) 74 Cal. Comp. Cases 770); see also *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, 78 Cal. Rptr.2d 1.

²³ *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1040, 12 Cal. Rptr.3d 343.

²⁴ *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411, 128 Cal. Rptr. 183.

²⁵ The powers of the legislative and judicial branches are distinct, and it would violate the Separation of Powers Doctrine for the Board to substitute its own view of public policy for that expressed by the Legislature in section 4660. Cal. Const., art. III, § 3 ("Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

²⁶ See *Agricultural Labor Relations Bd.*, *supra*, 16 Cal.3d at 411.

the Schedule. The Schedule is mandatory, it was promulgated pursuant to the Legislature's direction, and it must be followed.²⁷ The Board simply lacks the constitutional power to create an alternative schedule of its own.²⁸

Yet the practical effect of the decision below is to create an *alternate* method for determining the “nature of the physical injury or disfigurement” – one which nominally uses the Guides but does so in a completely non-sanctioned way – even though the statute makes use of the Guides mandatory for this determination, and says nothing about using any alternative interpretations of the Guides.

The new statute eliminated the inequities inherent in the old system, where an injured worker's benefits turned on unpredictable, subjective factors such as the judge's individual views – or the rater's, or the doctor's. It equalized treatment of injured workers across the board.

The use of standardized tables, which aggregate the average percentage effect with regard to a particular issue in an identified group, is well-established in determining permanent disability. Both the occupational adjustment and the age adjustment have operated in exactly that fashion for many years.²⁹ In the new statute, the Legislature has simply extended the use of objective factors to every element of the PD percentage calculation.

²⁷ See, e.g., *Boughner, supra*, 73 Cal. Comp. Cases at 21; *Costa, supra*, 71 Cal. Comp. Cases at 55-60.

²⁸ As a judicial body, the Board does not exercise legislative powers. Lab. Code, § 111(a); and see Cal. Const. art. III, § 3 and art. 14, § 4. It must enforce and apply statutes as the drafters intended. See *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1038, 25 Cal. Rptr.2d 539, 58 Cal. Comp. Cases 793 (Board has no authority to rule on validity of statutes).

²⁹ See 2005 Schedule, 1-8 to 1-9.

In the decision below and contrary to the legislative mandate, the Board has overstepped its bounds by authorizing an unworkable, individualized framework of procedures promulgated in violation of the Administrative Procedure Act.³⁰ The proposed procedures are much more extensive than “general legal conclusions or policies produced after interpretation of applicable statutes or law in the context of a specific case.”³¹

Because Section 4660 requires the Administrative Director to establish a Schedule based on the AMA Guides, and mandates the use of that Schedule, neither the Schedule nor the mandatory use of the AMA Guides may be subverted by the impermissible, alternative methodology advocated by the Board.

2. WHERE THE LEGISLATURE HAS ALREADY IMPLEMENTED A STATUTORY FRAMEWORK REQUIRING THE USE OF THE AMA GUIDES, THE WCAB HAS ERRED BY AUTHORIZING AN ALTERNATE METHODOLOGY BASED ON SUBJECTIVE FACTORS.

In subdivision (b)(1) of section 4660, the Legislature defined compensable physical injury and disfigurement as a physical impairment “incorporating the descriptions and measurements of physical impairments and the corresponding percentages of impairments published” in the 5th edition of the AMA Guides.³² It made the use of that portion of the AMA Guides mandatory. The Legislature was careful to adopt only those portions of the AMA Guides which objectively measured and described

³⁰ Gov. Code §§ 11340 et seq.; see *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-569, 59 Cal. Rptr.2d 186.

³¹ *Rea v. Workers’ Comp. Appeals Bd. (Milbauer)* 127 Cal. App.4th 625, 648, 25 Cal. Rptr. 3d 828, 70 Cal. Comp. Cases 312.

³² Lab. Code § 4660(b)(1).

physical impairments, in furtherance of its stated goal of promoting consistency, uniformity and objectivity across the board.

The decision below has questioned the wisdom of the Legislature’s choice of the AMA Guides, basing its criticism on the first two chapters by noting, *e.g.*, that even the Guides themselves recognize their limitations. But the Board’s function is to apply section 4660 – including the designated portion of the Guides – as the Legislature intended, not to question the wisdom of that choice. “It is for the Legislature, not the courts, to pass upon the social wisdom of . . . enactment[s].”³³ Only the Legislature has plenary power over workers’ compensation matters and only it sets public policy.³⁴

The decision below rejected the Legislature’s mandatory use of the objective AMA Guides in favor of a policy permitting and encouraging subjective considerations, with no restriction other than requiring an opinion of a treating or evaluating doctor, and without any need to evaluate the doctor’s opinion against the objective evidence. The decision below permits the compulsory AMA Guides to be rebutted whenever the evaluating physician or the WCJ considers that the standardized result is really “inaccurate.”³⁵ This would impose an ad hoc, case-by-case approach that undermines the very foundation of the new statute, with its emphasis on objective evidence, verified testing, and reproducible results. It would render the AMA Guides – the use of which is

³³ *Rio Linda, supra*, 131 Cal.App.4th at 532 (courts cannot “second-guess” the Legislature’s policy decisions).

³⁴ Moreover, the Board’s prior decisions relied heavily on pre-SB 899 cases which applied the term “permanent disability.” But new section 4660 rewrote what is meant by “permanent disability” by defining the elements on which it is based. Thus, reliance on those cases is inappropriate.

³⁵ cite case below

mandatory – *irrelevant* whenever a evaluating physician and/or the WCJ disagrees with the result.

3. THE PUBLIC POLICY BEHIND THE LEGISLATURE’S MANDATED USE OF THE AMA GUIDES IS NOT SUPPORTED BY THE WCAB’S INDIVIDUALIZED, AD HOC METHODOLOGY.

The whole point of the statutory changes under SB 899 was to promote similar outcomes as between similarly situated injured workers. The decision below analyzed impairment and accuracy only to the *particular* injured worker, ignoring the Legislature’s goal of promoting consistency, uniformity, and objectivity.

When section 4660’s new objective factors are applied as intended, an Anaheim worker with a broken leg can be assigned the same degree of impairment as a worker in Alameda, without the wide disparities flowing from the subjective personal views of particular doctors, judges, or raters. That is fair, and it is a determination of policy entirely within the Legislature’s exclusive province. The mandatory use of objective criteria promotes the consistency, uniformity and fairness that were the goals of the Legislature. The use of a subjective determination of “accuracy” that is necessarily influenced by personal factors in the evaluating physician (or the rater, or the WCJ) does not reflect the legislative intent.

What is “accurate” cannot be measured against what the worker might have received under the law as it existed prior to SB 899. That some workers will now receive fewer benefits, or a lower PD percentage, is not the test of accuracy. “[T]he fact that the statute may have a devastating effect on some honest claimants does not show the Legislature did not mean what it said. This court has no power to rewrite the statute so as

to make it conform to a presumed intention which is not expressed.”³⁶ If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent.³⁷

The entire concept of what is fair or “accurate” is a decision within the Legislature’s exercise of its plenary discretion over workers’ compensation. The Board, as a judicial body, cannot substitute its own policy decisions for that of the drafters of section 4660. The Legislature considered the cost of the old system to employers, and the economic crisis that threatened the viability of the system as a whole. It concluded something must be done, and did it. As a result, and *by design*, the new schedule will sometimes reduce the amount of benefits paid out for a permanent disability.³⁸ Section 4660 represents the balance struck by the Legislature as part of its sweeping reforms. It is a policy decision that must be respected and implemented as intended.

If this Court permits the decision below to stand, the practical result would be that the AMA Guides will rarely – if ever – be applied as intended. The Guides could be rebutted whenever they yield a result that someone concludes is “inaccurate.” That would revive the very approach – the undefined, and subjective approach – that the Legislature squarely rejected in SB 899. Application of subjective, undefined principles cannot override the plain language of the statute, which makes use of the Guides mandatory and not subject to rebuttal.

³⁶ *Lockheed Martin Corp. v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1237, 1248-1249, 117 Cal. Rptr.2d 865, 67 Cal. Comp. Cases 245 [citations and internal quotations omitted].

³⁷ *Green v. State of California* (2007) 42 Cal. 4th 254, 260.

³⁸ *Genlyte Group, LLC v. Workers’ Comp. Appeals Bd.* (2008) 158 Cal.App.4th 705, 715-716, 69 Cal. Rptr.3d 903, 73 Cal. Comp. Cases 6 (citing *Vera v. Workers’ Comp. Appeals Bd.* (2007) 154 Cal.App.4th 996, 1000, 72 Cal. Comp. Cases 1115).

C. THE ISSUE PRESENTED BY THIS CASE MUST BE DETERMINED IN A MANNER CONSISTENT WITH THE CONTEXTUAL FRAMEWORK IN WHICH SB 899 WAS ENACTED.

1. THROUGH SB 899, THE LEGISLATURE EXERCISED ITS PLENARY POWER TO REFORM CALIFORNIA WORKERS' COMPENSATION IN ORDER TO ADDRESS THE URGENT CRISIS OF SKYROCKETING COSTS TO CALIFORNIA EMPLOYERS.

The California Constitution expressly vests the Legislature with “plenary power” to create and enforce a complete system of workers’ compensation through legislation.³⁹ Since workers’ compensation did not exist at common law, the right to any such benefits is wholly statutory.⁴⁰ Thus, pursuant to its plenary powers, the Legislature controls the all rights under the workers’ compensation system and is free to alter them as necessary.⁴¹

Exercising its plenary power, the Legislature enacted SB 899 -- a series of dramatic reforms regarding how workers’ compensation benefits are determined and awarded. A significant part of the cost-reduction program was accomplished by a sweeping overhaul of permanent disability awards.⁴² The underlying philosophy of how permanent disability awards are calculated was fundamentally altered, including the

³⁹ Cal. Const., art XIV, § 4; *see also City and County of San Francisco v. Workers’ Comp. Appeals Bd. (Wiebe)* (1978) 22 Cal.3d 103, 114, 43 Cal. Comp. Cases 984 (use of the word “plenary” “affirms the legislative prerogative in the workers’ compensation realm in broad and sweeping language”). The stated goal of enacting workers’ compensation legislation is to “accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the public policy of this State”

⁴⁰ *Dubois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 383, 388, 20 Cal. Rptr.2d 523, 58 Cal. Comp. Cases 286; *Longval v. Workers’ Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 799, 59 Cal. Rptr.2d 463, 61 Cal. Comp. Cases 1396.

⁴¹ *Longval, supra*, 51 Cal.App.4th at 799.

⁴² *See Costco Wholesale Corporation v. Workers’ Comp. Appeals Bd. (Chavez)* (2007) 151 Cal.App.4th 148, 155, 59 Cal. Rptr.3d 611, 72 Cal. Comp. Cases 582.

conditions under which an applicant would be entitled to a permanent disability award, how awards would be apportioned, and the means required to attain the new legislative goals.⁴³

With SB 899, California enacted the largest workers' compensation reform package in a decade. The context in which SB 899 was passed is **critical** to an understanding of the legislative intent. The California workers' compensation system was in peril, due to the high costs imposed upon private sector employers. It was widely acknowledged that employers were leaving the state as a consequence.⁴⁴

- The 2005 report prepared by the RAND Institute for Civil Justice at the request of the California Commission on Health and Safety and Workers' Compensation found: "By 2004, the state's workers' compensation system was associated with *the highest employer costs in the nation* despite evidence indicating that the state's injured workers were not being adequately compensated."⁴⁵
- As system costs and litigation increased, nearly two dozen workers' compensation insurers were forced out of business and others reduced or stopped offering workers' compensation insurance in the state.⁴⁶
- SB 899 was enacted as compromise legislation, largely to avoid a systemic crisis. The Legislature passed this legislation by an overwhelming margin, and the bill was immediately signed into law by Gov. Schwarzenegger.⁴⁷

⁴³ See *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328-1329, 57 Cal. Rptr.3d 644, 72 Cal. Comp. Cases 565 (highlighting a series of intended changes in the apportionment rules wrought by SB 899); *Benson v. WCAB* (2009) 170 Cal. App.4th 1535, 1556-1557, 271 Cal. Rptr.3d 166, 74 Cal. Comp. Cases 113 (legislative history demonstrates clear intent to define permanent disability under entirely new causation regime).

⁴⁴ See, e.g., Garcia & Cohen, "Learning from California: The Macroeconomic Consequences of Structural Changes" (1993) Berkeley Roundtable on the International Economy, § 4.2.

⁴⁵ 2005 RAND Study, at 1 [emphasis added]; see also *Brodie, supra*, 40 Cal.4th at 1330-1331 (SB 899 was intended to alleviate California's skyrocketing workers' compensation costs, which were highest in the nation).

⁴⁶ California Insurance Commissioner, Conservation & Liquidation Office. To view a list of 25 insurance companies placed in conservation or liquidation, see www.caclo.org/perl/insolvent.pl.

⁴⁷ The Assembly passed the bill 77-3, followed by a Senate vote of 33-3. Governor Schwarzenegger signed the bill on 4/19/04.

The importance of the Legislature’s efforts in enacting SB 899 cannot be overstated. The bill itself included a full recitation of the need for its immediate implementation:

SEC 49: This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety...and shall go into immediate effect. [¶] The facts constituting the necessity are: *In order to provide relief to the state from the effects of the current workers’ compensation crisis at the earliest possible time*, it is necessary for this act to take effect immediately.⁴⁸

Understood in its complete context, the essential purpose of SB 899 was to reduce employer costs in order to save the system itself.⁴⁹ The Board’s decision below is a poorly disguised attempt to reinstate the permanent disability values under the prior system, which would of course obviate the Legislature’s efforts to reduce the crisis and the skyrocketing costs.⁵⁰ The consequence of the decision below -- *i.e.*, permitting the use of the AMA Guides in an unauthorized manner to determine the nature of the

⁴⁸ Stats. 2004, ch. 34, § 49 [emphasis added].

⁴⁹ See, e.g., *Schefner v. Workers’ Comp. Appeals Bd.* (2005) 131 Cal. App.4th 517, 532, 31 Cal. Rptr.3d 789, 70 Cal. Comp. Cases 999 (noting Legislature’s policy decision in enacting SB 899 to address the workers’ compensation crisis, and to change the laws in order to obtain cost-savings at the earliest possible time); *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal. 4th 1313, 1329-1330 (discussing the “crisis in skyrocketing workers’ compensation costs”); and *Green v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1441, 26 Cal. Rptr.3d 527, 70 Cal. Comp. Cases 294.

⁵⁰ There is no evidence that the reform legislation was meant to provide a simple method of equating new schedule ratings into the values previously assigned in the old schedule. Indeed, some of the new ratings intentionally reduced the assigned disability in order to combat the widespread use of “underground” ratings (*e.g.*, upper extremity work restrictions).

individual impairment -- would *increase* costs to employers virtually across the board, and is flatly irreconcilable with the express legislative intent.⁵¹

2. ORDINARY RULES OF STATUTORY INTERPRETATION REQUIRE THAT THIS COURT UPHOLD THE EXPRESS INTENT OF THE LEGISLATURE .

The guiding principle of statutory interpretation is to ascertain the intent of the Legislature so as to effectuate the purpose of the law.⁵² The larger statutory scheme must be given a reasonable and practical interpretation.⁵³ Statutes must be given a fair and reasonable interpretation, with due regard to the language used and the purpose sought to be accomplished.⁵⁴ Finally, words of a statute must be given such interpretation as will promote rather than defeat the general purpose and policy of the law.⁵⁵

In the instant case, there is an express and unequivocal expression of legislative intent in the language of section 4660. The express goal of section 4660 was the promotion of “consistency, uniformity and objectivity.”⁵⁶ The only reasonable implementation of this overriding legislative intent is to enforce the normal application and use of the AMA Guides as authorized by the Schedule, and to disallow the unauthorized and individualized impairment determinations sanctioned by the Board’s decision below.

⁵¹ For a thorough review and analysis of the proposed legislation’s cost savings, see “Response to Request for Information on Cost-Benefits of Potential Workers’ Compensation Reforms,” prepared for Governor Arnold Schwarzenegger and Senate President Pro Tem John Burton, by Commission on Health and Safety and Workers’ Compensation (dated 4/13/04).

⁵² *Dyna-Med v. Fair Employment & Housing* (1987) 43 Cal. 3d 1379, 1386, 241 Cal. Rptr. 67.

⁵³ *Fortenberry v. Weber* (1971) 18 Cal. App.3d 213, 95 Cal. Rptr. 834.

⁵⁴ *Cedars of Lebanon Hosp. v. County of L. A.* (1950) 35 Cal.2d 729, 734-735, 221 P.2d 31; *People v. Sciortino* (1959) 175 Cal. App.2d Supp. 905, 908-909, 345 P.2d 594.

⁵⁵ *Rushing v. Powell* (1976) 61 Cal. App.3d 597, 603-604, 130 Cal. Rptr. 110.

⁵⁶ Lab. Code § 4660(d).

4. THE WORKERS' COMPENSATION SYSTEM WAS OUT OF BALANCE, AND SB 899 WAS INTENDED TO RESTORE THAT BALANCE BY REDUCING COSTS TO THE EMPLOYER.

In interpreting statutory language, courts may also look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.⁵⁷

At the time SB 899 was enacted, workers' compensation costs were prohibitive. Employers were fleeing the State in droves, and the very lifeblood of the State's economy was in jeopardy. SB 899 was designed to reduce the skyrocketing costs of workers' compensation to employers and the corresponding drain on the California economy and its businesses.⁵⁸

The goal of the new legislation was to correct a gross imbalance in the statutory structure that had triggered a crisis in the workers' compensation system. In enacting SB 899 as urgency legislation, the Legislature declared its express intent "to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time."⁵⁹

Viewed in this context, the overriding purpose of SB 899 was clearly to reduce costs to California employers. Curiouser and curiouser, by introducing subjectivity,

⁵⁷ *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744, 38 Cal. Rptr. 2d 650; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008, 239 Cal. Rptr. 656.

⁵⁸ For a more full discussion by the Supreme Court of the legislative intent behind SB 899, see *Brodie v. WCAB* (2007) 40 Cal.4th 1313, 1330, 57 Cal.Rptr.3d 644, 72 Cal. Comp. Cases 565.

⁵⁹ Stats. 2004, ch. 34, § 49.

conjecture, and uncertainty into the process, the Board’s decision below will have precisely the opposite effect.⁶⁰

5. UNLESS THIS COURT UPHOLDS THE STATED INTENT BEHIND SB 899, CALIFORNIA EMPLOYERS WILL NOT RECEIVE THE PROMISED BENEFITS OF THE NEW LAWS.

By enacting SB 899, the Legislature intended to reduce indemnity compensation and to increase savings for employers. As one appellate court noted, the Legislature repeatedly indicated its specific intent in SB 899 “to meet the overarching legislative goal of cost reduction.”⁶¹

The new laws enacted by SB 899 were intended to give employers premium reduction, and thereby create a more business-friendly environment so that California businesses could be more competitive in the global marketplace.

The costs of the decision below do not simply fall upon the insurer. It is the policyholder’s money that pays the premiums, and that means that California employers will end up paying the price for a flawed interpretation of SB 899, instead of receiving the benefits that it promised. This Court’s ruling in this case will determine whether the employers will be allowed the cost relief that was promised by the revisions to the permanent disability calculations.

⁶⁰ A 10/16/09 report authored by the State Legislative Analyst’s Office, a nonpartisan office that provides fiscal and policy information to legislators, concluded that the decision below will lead to more litigation and increased costs for California employers. To view the complete report, entitled “Workers’ Compensation: Recent Decisions Likely to Increase Benefits and Employer Costs,” visit www.lao.ca.gov/2009/workers_comp/workers_comp_costs_101609.aspx.

⁶¹ *Benson v. WCAB* (2009) 170 Cal. App.4th 1535, 1555, -- Cal. Rptr.3d --, 74 Cal. Comp. Cases 113. For a full discussion of the cost savings promised to California employers by SB 899, see *Benson*, 170 Cal. App.4th at 1555-1558.

VIII. CONCLUSION

As written, section 4660 promotes the stated legislative policy goals of fairness and consistency via use of objective, standardized factors to determine the impairment. The decision below directly thwarts those objectives by authorizing the use of unsanctioned methodologies to determine the nature of each individual impairment.

In crafting the SB 899 reform package, the Legislature considered the cost of the old system to employers, and the economic crisis that threatened the very viability of the system as a whole. It concluded something must be done, and did it.

Contrary to the legislative intent, the Board's decision in this case held that an applicant may rebut any portion of any element of the permanent disability calculation. The WCAB has created an ad hoc approach to the permanent disability calculation, and reintroduced the use of subjective, unquantifiable factors that the Legislature had squarely rejected in the SB 899 reform package.

Section 4660 represents the balance struck by the Legislature as part of its sweeping reforms. It is a policy decision that must be respected and implemented as intended. *Amicus curiae* CalChamber urges this Court to overturn the decision below.

DATED: December 2, 2009

By: _____
Ellen Sims Langille, Esq.
FINNEGAN, MARKS, THEOFEL & DESMOND
Attorneys for Amicus Curiae
CALIFORNIA CHAMBER OF COMMERCE

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Finnegan, Marks, Theofel & Desmond, 1990 Lombard St., Suite 300, San Francisco, CA 94123. On November 30, 2009, I served the within document(s):

APPLICATION FOR AMICUS CURIAE STATUS and PROPOSED AMICUS CURIAE BRIEF BY CALCHAMBER

- MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.
- OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below via Federal Express
- HAND DELIVERY - by placing the document(s) listed above in a sealed envelope for personal hand delivery California addressed as set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 2, 2009, at San Francisco, California.

Judith Peck

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