

IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT - DIVISION THREE

WANDA OGILVIE,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS
BOARD and CITY AND COUNTY OF SAN
FRANCISCO,

Respondents.

First District Case No.: A126344

CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS
BOARD and WANDA OGILVIE,

Respondents.

First District Case No.: A126427

WCAB No. ADJ1177048 (SFO 0487779)
WCJ David Hettick

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

IN SUPPORT OF CITY AND COUNTY OF SAN FRANCISCO

Ellen Sims Langille, Esq. (# 154329)
FINNEGAN, MARKS, THEOFEL & DESMOND
A Professional Corporation
1990 Lombard Street, Suite 300
San Francisco, CA 94123
Telephone: (415) 931-9284
Facsimile: (415) 931-6247

Attorneys for *Amicus Curiae*
The California Chamber of Commerce

I. **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

California Rules of Court 8.208

Name of Interested Entity or Person	Nature of Interest
Wanda Ogilvie	Injured worker
Workers' Compensation Appeals Board	Court below
City and County of San Francisco	Employer (permissibly self-insured)
California Chamber of Commerce	<i>Amicus curiae</i> on behalf of Employer
California Workers' Compensation Institute	<i>Amicus curiae</i> on behalf of Employer
American Insurance Association	<i>Amicus curiae</i> on behalf of Employer

Dated: November 30, 2009 Respectfully submitted,

FINNEGAN, MARKS, THEOFEL & DESMOND
A Professional Corporation

Ellen Sims Langille, Esq.
Finnegan, Marks, Theofel & Desmond
1990 Lombard St., Suite 300
San Francisco, CA 94123
Attorneys for *amicus curiae*
California Chamber of Commerce

II. TABLE OF CONTENTS

I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS..... I

II. TABLE OF CONTENTS..... II

III. TABLE OF AUTHORITIES..... IV

IV. APPLICATION FOR AMICUS CURIAE STATUS VII

V. VERIFICATION IX

VI. INTRODUCTION1

VII. LEGAL ARGUMENT.....2

A. THE DECISION BELOW MUST BE OVERTURNED BECAUSE IT IGNORES THE LEGISLATIVE MANDATE FOR UNIFORMITY AND CONSISTENCY BY CREATING AN AD HOC SYSTEM OF INDIVIDUALIZED DFEC FACTORS, CONTRARY TO THE EXPRESS LEGISLATIVE INTENT.....3

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. 3

2. EACH OF THE FOUR ELEMENTS OF THE RATING FORMULA, INCLUDING THE DFEC FACTOR, IS BASED ON OBJECTIVE CRITERIA IN ORDER TO OBTAIN UNIFORM RESULTS BETWEEN SIMILARLY SITUATED EMPLOYEES. 5

3. SECTION 4660 DIRECTS THE CALCULATION OF THE PERMANENT DISABILITY PERCENTAGE IN A MANDATORY FOUR-PART FORMULA..... 7

4. NO SINGLE ELEMENT OF THE FOUR-PART PERMANENT DISABILITY CALCULATION IS REBUTTABLE. 8

B. WHERE SECTION 4660 REQUIRES THE ADMINISTRATIVE DIRECTOR TO ESTABLISH A SCHEDULE AND MANDATES THE USE OF THAT SCHEDULE, THE WCAB MAY NOT SUBVERT THOSE REQUIREMENTS BY THE CREATION OF AN IMPERMISSIBLE, AD HOC, ALTERNATIVE METHODOLOGY.....9

C.	THE ISSUE PRESENTED BY THIS CASE MUST BE DETERMINED IN A MANNER CONSISTENT WITH THE CONTEXTUAL FRAMEWORK IN WHICH SB 899 WAS ENACTED.	14
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.	14
2.	ORDINARY RULES OF STATUTORY INTERPRETATION REQUIRE THAT THIS COURT UPHOLD THE EXPRESSED INTENT OF THE LEGISLATURE	18
3.	THE WORKERS’ COMPENSATION SYSTEM WAS OUT OF BALANCE, AND SB 899 WAS INTENDED TO RESTORE THAT BALANCE BY REDUCING COSTS TO THE EMPLOYER.	19
4.	UNLESS THIS COURT UPHOLDS THE STATED INTENT BEHIND SB 899, CALIFORNIA EMPLOYERS WILL NOT RECEIVE THE PROMISED BENEFITS OF THE NEW LAWS.....	20
VIII.	CONCLUSION	21

III. TABLE OF AUTHORITIES

Cases

<i>Agricultural Labor Relations Bd. v. Superior Court</i>	
(1976) 16 Cal.3d 392, 128 Cal. Rptr. 183	10
<i>Benson v. WCAB</i> (2009) 170 Cal. App.4 th 1535, -- Cal. Rptr.3d --, 74 CCC 113.....	15, 19
<i>Boughner v. CompUSA</i> (2008) 73 Cal. Comp. Cases 854	10, 11, 12
<i>Brodie v. WCAB</i> (2007) 40 Cal.4th 1313, 57 Cal.Rptr.3d 644, 72 CCC 565...vi,	15, 16, 18
<i>Calif. Schools Employees Ass'n v. South Orange Co. Comm. Col. Dist.</i>	
(2004) 124 Cal. App. 4 th 574	9
<i>Cedars of Lebanon Hosp. v. County of L. A.</i> (1950) 35 Cal.2d 729, 221 P.2d 31.....	17
<i>City and County of San Francisco v. Workers' Comp. Appeals Bd.</i>	
(1978) 22 Cal.3d 103, 43 Cal. Comp. Cases 984.....	14
<i>Costa v. Hardy Diagnostic</i> (2006) 71 Cal. Comp. Cases 1797	9, 11, 12
<i>Costco Wholesale Corporation v. Workers' Comp. Appeals Bd. (Chavez)</i>	
(2007) 151 Cal.App.4th 148, 59 Cal. Rptr.3d 611, 72 Cal. Comp. Cases 582.....	14
<i>Dubois v. Workers' Comp. Appeals Bd.</i>	
(1993) 5 Cal.4th 383, 20 Cal. Rptr.2d 523, 58 Cal. Comp. Cases 286	14
<i>Dyna-Med v. Fair Employment & Housing</i> (1987) 43 Cal.3d 1379, 241 Cal. Rptr. 67 ...	17
<i>Fortenberry v. Weber</i> (1971) 18 Cal. App.3d 213, 95 Cal. Rptr. 834.....	17
<i>Granberry v. Islay Investments</i> (1995) 9 Cal.4th 738, 38 Cal. Rptr. 2d 650	18
<i>Green v. Workers' Comp. Appeals Bd.</i>	
(2005) 127 Cal.App.4 th 1426, 26 Cal. Rptr.3d 527, 70 Cal. Comp. Cases 294.....	16
<i>Greener v. Workers' Comp. Appeals Bd.</i>	
(1993) 6 Cal.4th 1028, 25 Cal. Rptr.2d 539, 58 Cal. Comp. Cases 793	11
<i>Longval v. Workers' Comp. Appeals Bd.</i>	
(1996) 51 Cal.App.4th 792, 59 Cal. Rptr.2d 463, 61 Cal. Comp. Cases 1396.....	14
<i>Ogilvie v. City and County of San Francisco</i> (2009) 74 Cal. Comp. Cases 1127 ...2,	11, 12
<i>Ogilvie v. City and County of San Francisco</i> (2009) 74 Cal. Comp. Cases 248.....2,	11, 12
<i>People v. Sciortino</i> (1959) 175 Cal. App.2d Supp. 905, 345 P.2d 594.....	17
<i>People v. Woodhead</i> (1987) 43 Cal.3d 1002, 239 Cal. Rptr. 656.....	18
<i>Rea v. Workers' Comp. Appeals Bd. (Milbauer)</i>	
(2005) 127 Cal. App.4 th 625, 25 Cal. Rptr. 3d 828, 70 Cal. Comp. Cases 312.....	13
<i>Rushing v. Powell</i> (1976) 61 Cal. App.3d 597, 130 Cal. Rptr. 110.....	17

<i>Scheftner v. Workers’ Comp. Appeals Bd.</i>	
(2005) 131 Cal. App.4 th 517, 31 Cal. Rptr.3d 789, 70 CCC 999.....	16
<i>State Farm Mutual Automobile Ins. Co. v. Garamendi</i>	
(2004) 32 Cal.4th 1029, 12 Cal. Rptr.3d 343	10
<i>Tidewater Marine Western, Inc. v. Bradshaw</i>	
(1996) 14 Cal. 4th 557, 59 Cal. Rptr.2d 186	13
<i>TVA v. Hill (1978) 437 U.S. 153</i>	9
<i>Yamaha Corp. of America v. State Bd. of Equalization</i>	
(1998) 19 Cal.4th 1, 78 Cal. Rptr.2d 1	10

Statutes

Gov. Code § 11340.....	13
Lab. Code § 4660	<i>passim</i>
Lab. Code § 4660(a)	5
Lab. Code § 4660(b)(1)	7
Lab. Code § 4660(b)(2)	6, 7, 12
Lab. Code § 4660(c)	5, 8, 9
Lab. Code § 4660(d).....	4, 17
Rule of Court 8.200(c).....	vi, vii, 1
Rule of Court 8.208	i
Stats. 2004, ch. 34, § 49.....	16, 18

Other Authorities

“Response to Request for Information on Cost-Benefits of Potential Workers’ Compensation Reforms,” by Commission on Health and Safety and Workers’ Compensation (4/13/04)	17
2005 Permanent Disability Rating Schedule	11, 12, 13
Garcia & Cohen, “Learning from California: The Macroeconomic Consequences of Structural Changes” (1993) Berkeley Roundtable on the International Economy, § 4.2	15
RAND Institute for Civil Justice, “An Evaluation of California’s Permanent Disability Rating System” (2005)	6, 7, 15
State Legislative Analyst’s Office, “Workers’ Compensation: Recent Decisions Likely to Increase Benefits and Employer Costs,” dated October 16, 2009	19

Constitutional Provisions

Cal. Const. art. 14, § 4	vi, 11, 14
Cal. Const., art. III, § 3	10, 11

IV. APPLICATION FOR AMICUS CURIAE STATUS

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES
OF THE FIRST 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 City and County of San Francisco. 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, has the WCAB erred in sanctioning an impermissible, individualized methodology to calculate DFEC?
- 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.

November 30, 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 5,843 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 30th day of November, 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 employer, City and County of San Francisco. 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 Diminished Future Earning Capacity ("DFEC") – as rebuttable, even though the statute does not permit rebuttal of any of the *elements* that make up the calculation of permanent disability percentage. To the contrary, the statute requires that the DFEC must be based on the Director's Schedule, and that the Schedule must be used. 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.

Contrary to that 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 decision below has thus 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.

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, the Board has created a new individualized adjustment to supersede the statutorily authorized DFEC adjustment.² But the Board’s reasoning rests on incorrect assumptions, is based on a faulty reading of the statute, and impermissibly

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 *Ogilvie v. City and County of San Francisco* (2009) 74 Cal. Comp. Cases 1127 (*Ogilvie II*). The *Ogilvie II* decision references and affirms much of the prior decision in *Ogilvie v. City and County of San Francisco* (2009) 74 Cal. Comp. Cases 248 (*Ogilvie I*).

substitutes the Board’s view of public policy for that of the Legislature. It must be overturned.

A. THE DECISION BELOW MUST BE OVERTURNED BECAUSE IT IGNORES THE LEGISLATIVE MANDATE FOR UNIFORMITY AND CONSISTENCY BY CREATING AN AD HOC SYSTEM OF INDIVIDUALIZED DFEC FACTORS, CONTRARY TO THE EXPRESS LEGISLATIVE INTENT.

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.³ 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.⁴

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.⁵ This reliance on “‘subjective’ criteria and work restrictions”

³ 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.

⁴ *Id.*, at xix; *see also id.*, at pp. 14-15.

⁵ 2005 RAND Study, *supra*, at pp. xxvi – xxvii.

was “the most controversial feature of the [prior] California system”⁶ and one of the main criticisms leveled by a legislative committee.⁷

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.”⁸

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.⁹ 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.

⁶ *Id.* at p. 4.

⁷ *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.

⁸ Lab. Code § 4660(d).

⁹ The occupational and age adjustments are already based on aggregate and averaged 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; and makes the use of those objective definitions *mandatory* in the calculation of the permanent disability percentage.¹⁰ 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.

2. EACH OF THE FOUR ELEMENTS OF THE RATING FORMULA, INCLUDING THE DFEC FACTOR, IS BASED ON OBJECTIVE CRITERIA IN ORDER TO OBTAIN UNIFORM RESULTS BETWEEN SIMILARLY SITUATED EMPLOYEES.

In SB 899, 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.”¹¹ 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

¹⁰ For example, the drafters adopted the “‘objective’ criteria used by the AMA [Guides]” to quantitatively measure the worker’s impairment (2005 RAND Study, *supra*, at p. xxviii) thereby avoiding the inconsistent results inherent in the old, subjective calculation method. Section 4660(b)(1) defines “physical injury or disfigurement” by reference to objective, uniformly-applicable criteria, according to the objective “descriptions and measurements of physical impairments and the corresponding percentages of impairments” in the AMA Guides (5th edition). Similarly, new section 4660 makes the creation of a Schedule mandatory, whereas before it was permissive. The Administrative Director was required to implement these changes with a schedule and corresponding regulations. Lab. Code § 4660(c).

¹¹ Lab. Code § 4660(a).

situated employees.”¹² 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.¹³

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. This adjustment now operates 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.¹⁴

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 *systematically* assign higher ratings to more severely disabled workers both within and between different types of impairments.”¹⁵ The policy goals of section 4660 can only be achieved through the consistent, systematic use of objective, verifiable criteria.

¹² Lab. Code § 4660(b)(2) [emphasis added].

¹³ Lab. Code § 4660(b)(2).

¹⁴ See 2005 Schedule, pp. 1-9 and 1-10.

¹⁵ 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.

3. SECTION 4660 DIRECTS THE CALCULATION OF THE PERMANENT DISABILITY PERCENTAGE IN A MANDATORY FOUR-PART FORMULA.

Section 4660 lists four elements that make up the percentage of permanent disability. Subdivision (a) requires that “account shall be taken of” (1) the nature of the physical injury or disfigurement; (2) the occupation of the injured employee; and (3) his or her age at the time of the injury; (4) with consideration being given to an employee’s diminished future earning capacity.

The statute then proceeds to define these elements by reference to objective factors, spelling out precisely how the calculation of the percentage must be performed. Repeatedly employing the word “shall,” the statute establishes the *mandatory* method for calculating the percentage in a way that leaves no room for any alternative method:

- Subdivision (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.)
- Subdivision (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.” (Emphasis added.) “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.” (Emphasis added.)

- Subdivision (c) says 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.)

As emphasized above, the repeated use of the mandatory “shall” underscores several things: 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 – which was only permissive before SB 899 – now *must* be used.

4. 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.”¹⁶ Only the *percentage rating* is rebuttable, not the individual elements themselves.¹⁷

¹⁶ Lab. Code § 4660(c) [emphasis added].

¹⁷ 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].

The Board has misread the statute to permit a party to rebut any of the *elements* that make up the percentage, *e.g.*, the DFEC.¹⁸ The language of the statute does not support that interpretation.¹⁹ 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. 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 creating an ad hoc system of individualized DFEC factors, it must be overturned.

B. WHERE SECTION 4660 REQUIRES THE ADMINISTRATIVE DIRECTOR TO ESTABLISH A SCHEDULE AND MANDATES THE USE OF THAT SCHEDULE, THE WCAB MAY NOT SUBVERT THOSE REQUIREMENTS BY THE CREATION OF AN IMPERMISSIBLE, AD HOC, ALTERNATIVE METHODOLOGY.

An agency's regulation carries a strong presumption of validity and is accorded the most deferential level of judicial scrutiny.²⁰ Review is limited to a determination that

¹⁸ 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.

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).

²⁰ *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.

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.²¹ In the absence of “an arbitrary and capricious decision,” a judicial body may not superimpose its own policy judgments over those of the agency.²²

In the guise of exercising its judicial role to *implement* section 4660, the Board must not be permitted to *promulgate* its own regulatory scheme in derogation of that required by the Legislature.²³ Its judicial function is to confirm whether regulations violate authorizing statutes. Judicial bodies may not inject their own policy preferences into the regulatory process.²⁴ The Legislature ordered the Administrative Director to promulgate the Schedule. The Schedule is mandatory, it was promulgated pursuant to the Legislature’s direction, and it must be followed.²⁵ The Board simply lacks the constitutional power to create an alternative schedule of its own.²⁶

²¹ *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1040, 12 Cal. Rptr.3d 343.

²² *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411, 128 Cal. Rptr. 183.

²³ 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.”).

²⁴ *See Agricultural Labor Relations Bd., supra*, 16 Cal.3d at 411.

²⁵ *See, e.g., Boughner, supra*, 73 Cal. Comp. Cases at 21; *Costa, supra*, 71 Cal. Comp. Cases at 55-60.

²⁶ 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).

But that, in effect, is precisely what the Board did with the DFEC adjustment in its decision below.²⁷ The Board has relied on subjective factors, contrary to the statutory mandate of section 4660. It looked to each individual applicant's *individual* income loss, and compared that to a custom control group, which itself will be concocted on a case-by-case basis from any one of a variety of independent sources.²⁸ The Board has created a convoluted mathematical nightmare of "guidelines" as to how an individualized DFEC adjustment might be calculated -- over 10 pages of "how-to" instructions.²⁹

Under this decision, the DFEC adjustment in the 2005 Schedule becomes mere surplusage, a nullity, because it will be *automatically rebutted* whenever it reaches a result different from the Board's own DFEC adjustment.³⁰ The 2005 DFEC adjustment would have real effect only in cases where the anticipated difference between the Board's preferred adjustment and the 2005 DFEC adjustment is too marginal to justify the expense of following the Board's instructions.

²⁷ The Board's explanation of the individualized formula is not easily digested. As the Duchess said, "Never imagine yourself not to be otherwise than what it might appear to others that what you were or might have been was not otherwise than what you had been would have appeared to them to be otherwise." "I think I should understand that better," Alice said very slowly and very politely, "if I had it written down; but I can't quite follow it as you say it." *Alice's Adventures in Wonderland* (Lewis Carroll, 1865).

²⁸ See *Ogilvie II* at 22; see also *Ogilvie I* at 22-26.

²⁹ See *Ogilvie II* at 20-30; see also *Ogilvie I*, at 21-35. Like the Doorknob ("Read the directions and directly you will be directed in the right direction") (*Alice's Adventures in Wonderland* (Lewis Carroll, 1865)), the Board pretends that these convoluted instructions are "simple mathematical calculations." *Ogilvie II* at 2.

³⁰ See, e.g., *Ogilvie I*, at pp. 28-29. While *Ogilvie II* paid lip service to the requirement of substantial evidence to overcome the scheduled DFEC (*Ogilvie II*, p. 19-20), the practical reality is that the costs increase whenever contrary evidence is presented.

The 2005 Schedule has already adequately and appropriately fulfilled the Legislature's directive to calculate DFEC according to objective factors.³¹ Subdivision (b)(2) requires that the DFEC adjustment be based on the result of "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."³² Here, again, the emphasis is on fairness *across the board*, among "similarly situated employees," by using aggregate data to equalize the rating for all *similarly-situated* applicants.

The new statute eliminated the inequities inherent in the old regime, 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, or the venue's. It equalized treatment of injured workers across the board.

The use of such 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 occupation adjustment and the age adjustment have operated in exactly that fashion for many years.³³ In the new statute, the Legislature has simply extended the use of objective factors to every element of the PD percentage calculation.

³¹ The Board cannot enforce its own view of fairness in place of the Legislature's. Indeed, on at least two occasions, the en banc Board has upheld the 2005 Schedule as a proper exercise of administrative discretion under the legislative directive of section 4660. *Boughner, supra*, 73 Cal. Comp. Cases at 873; *Costa, supra*, 71 Cal. Comp. Cases at 1816-1817. Notably, no challenge is being made in this case to the validity of the 2005 Schedule.

³² Lab. Code § 4660(b)(2).

In the decision below and contrary to the legislative mandate, the Board has overstepped its bounds by proposing an unworkable, individualized framework of procedures promulgated in violation of the Administrative Procedure Act.³⁴ 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.”³⁵

Because Section 4660 requires the Administrative Director to establish a Schedule and mandates the use of that Schedule, neither the Schedule nor the DFEC may be subverted by the impermissible, ad hoc, alternative methodology advocated by the Board.

³³ See 2005 Schedule, 1-8 to 1-9.

³⁴ Gov. Code §§ 11340, et seq.; see *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-569, 59 Cal. Rptr.2d 186.

³⁵ *Rea v. Workers’ Comp. Appeals Bd. (Milbauer)* (2005) 127 Cal. App.4th 625, 648, 25 Cal. Rptr. 3d 828, 70 Cal. Comp. Cases 312.

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.³⁶ Since workers’ compensation did not exist at common law, the right to any such benefits is wholly statutory.³⁷ 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.³⁸

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.³⁹ The underlying philosophy of how

³⁶ 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”

³⁷ *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.

³⁸ *Longval, supra*, 51 Cal.App.4th at 799.

³⁹ *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.

permanent disability awards are calculated was fundamentally altered, including the 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.⁴⁰

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.⁴¹

- 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."⁴²
- 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.⁴³

⁴⁰ 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).

⁴¹ See, e.g., Garcia & Cohen, "Learning from California: The Macroeconomic Consequences of Structural Changes" (1993) Berkeley Roundtable on the International Economy, § 4.2.

⁴² 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).

⁴³ 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.

- 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.⁴⁴

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.⁴⁵

Understood in its complete context, the essential purpose of SB 899 was to reduce employer costs in order to save the system itself.⁴⁶ 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.⁴⁷ The consequence of the decision below -- *i.e.*, permitting the

⁴⁴ The Assembly passed the bill 77-3, followed by a Senate vote of 33-3. Governor Schwarzenegger signed the bill on 4/19/04.

⁴⁵ Stats. 2004, ch. 34, § 49 [emphasis added].

⁴⁶ See, e.g., *Scheftner 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 (same).

⁴⁷ 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).

rebuttal of a specific element of the permanent disability calculation via the creation of an individualized DFEC factor -- would *increase* costs to the employer virtually across the board, and is flatly irreconcilable with the express legislative intent.⁴⁸

2. ORDINARY RULES OF STATUTORY INTERPRETATION REQUIRE THAT THIS COURT UPHOLD THE EXPRESSED 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.⁴⁹ The larger statutory scheme must be given a reasonable and practical interpretation.⁵⁰ Statutes must be given a fair and reasonable interpretation, with due regard to the language used and the purpose sought to be accomplished.⁵¹ Finally, words of a statute must be given such interpretation as will promote rather than defeat the general purpose and policy of the law.⁵²

In the instant case, we have 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.”⁵³ The only reasonable implementation of this overriding legislative intent is to enforce the standardized DFEC

⁴⁸ 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).

⁴⁹ *Dyna-Med v. Fair Employment & Housing* (1987) 43 Cal. 3d 1379, 1386, 241 Cal. Rptr. 67.

⁵⁰ *Fortenberry v. Weber* (1971) 18 Cal. App.3d 213, 95 Cal. Rptr. 834.

⁵¹ *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.

⁵² *Rushing v. Powell* (1976) 61 Cal. App.3d 597, 603-604, 130 Cal. Rptr. 110.

⁵³ Lab. Code § 4660(d).

factor as authorized by the Schedule, and to disallow the individualized DFEC factors sanctioned by the Board's decision below.

3. 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.⁵⁴

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.⁵⁵

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."⁵⁶

⁵⁴ *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.

⁵⁵ 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.

⁵⁶ Stats. 2004, ch. 34, § 49.

Viewed in this context, the overriding purpose of SB 899 was clearly to reduce costs to California employers. Curiouser and curiouser, by introducing conjecture and uncertainty into the process, the Board’s decision below will have precisely the opposite effect.⁵⁷

4. 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.”⁵⁸

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

⁵⁷ 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.

⁵⁸ *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.

employers will be allowed the cost relief that was promised by the revisions to the permanent disability calculations.

VIII. CONCLUSION

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 individualized DFEC factors to control the determination of impairments.

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.

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: November 30, 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 November 30, 2009, at San Francisco, California.

Judith Peck

SERVICE LIST

First District Court of Appeal - Division 3 350 McAllister St. San Francisco, CA 94102	<i>via hand delivery - original plus four copies plus one copy for endorsed return</i>
Workers' Compensation Appeals Board P.O. Box 429459 San Francisco, CA 94142	<i>two copies</i>
Law Office of Joseph C. Waxman 114 Sansome Street, Ste. 1205 San Francisco, CA 94104	Attorneys for Applicant Wanda Ogilvie
Peter J. Scherr, Esq. Office of the City Attorney 1390 Market Street, 7th Floor San Francisco, CA 94102-5408	Attorneys for City and Counsel of San Francisco
Michael A. Marks, Esq. Law Offices of Saul Allweiss 18321 Ventura Blvd., Suite 500 Tarzana CA 91356	Attorneys for amici curiae CWCI and American Insurance Association

CHAMBER OF COMMERCE/OGILVIE2 (12917/650.789)

PROOF OF SERVICE