WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SCOTT BOUGHNER,

Applicant,

vs.

COMP USA, INC.; and ZURICH NORTH AMERICA,

Defendant.

Case No. SFO 0491230

OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)

The Appeals Board granted reconsideration in this matter to allow time to study the record and applicable law. Because of the important legal issues presented regarding the validity of the permanent disability rating schedule (PDRS), adopted January 1, 2005, under Labor Code section 4660,[1] and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision (Lab. Code, § 115).[2]

In *Costa v. Hardy Diagnostic* (2006) 71 Cal.Comp.Cases 1797, after determining that the 2005 PDRS is presumptively valid, the Appeals Board held, en banc, that on the record before us in that case, the applicant had not met his burden of proving the new PDRS invalid. Here, on a different record, the workers' compensation administrative law judge (WCJ) found that the applicant had rebutted the presumptive validity of the 2005 PDRS. For the reasons discussed below, we hold that applicant has not carried his burden of demonstrating that the adoption of the 2005 PDRS by the Administrative Director (AD) was arbitrary and capricious, or inconsistent with section 4660(b)(2), and therefore, he has failed to rebut the presumptive validity of the 2005

[1] Unless otherwise noted, all further statutory references are to the Labor Code.

[2] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges. (Cal. Code Regs., tit. 8, § 10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Gov. Code, § 11425.60(b).)

PDRS. We will amend the WCJ's decision accordingly, and return the matter to the trial level for further proceedings, including rating the applicant's permanent disability under the 2005 PDRS.

PROCEDURAL BACKGROUND

In the Findings and Award issued on May 9, 2007, the WCJ found, pursuant to the parties' stipulations, that applicant, while employed as a sales associate during a period through May 6, 2005, sustained industrial injury to his right knee causing the need for further medical treatment. As relevant here, the WCJ also found that: (1) "The [AD] failed to base the adjusted rating schedule on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, as required by [section] 4660(b)(2);" (2) the AD "failed to base the adjusted rating schedule on data from empirical studies, as required by [section] 4660(b)(2);" and (3) "The DFEC [diminished earning capacity factor] Adjustment Factors set forth under the new Permanent Disability Rating Schedule adopted January 1, 2005 at page 1-7, Table A are inconsistent with the authorizing statute, [section] 4660(b)(2) and therefore invalid." Based on these last three findings, the WCJ found that "the applicant has rebutted the presumptive validity of the PDRS adopted January 1, 2005." The WCJ then deferred all remaining issues.

Defendant Zurich North America filed a petition for reconsideration, and in the alternative, a petition for removal, from the WCJ's decision of May 9, 2007. Defendant contended that (1) the WCJ erred by not following relevant, binding precedent set forth in the en banc decision in *Costa*; (2) the WCJ erred in finding that the AD's actions were "arbitrary and capricious;" (3) the WCJ "relied on 'expert' testimony that is unreliable and biased, and improperly concluded that the testimony warranted a departure from binding precedent;" and (4) "the necessity and usefulness of a 'crosswalk study' has been over–promised, and in any event such studies were not available prior to the implementation of the new PDRS."

Applicant filed an answer to the defendant's petition, contending that (1) the WCJ correctly distinguished *Costa* from the instant case; (2) the WCJ did not commit error in finding that the AD's actions were arbitrary and capricious; and (3) "the intent of the Legislature could not be

achieved without a 'crosswalk study' which was unilaterally cancelled by the AD."

Pursuant to WCAB Rule 10860 (Cal. Code Regs., tit. 8, § 10860), the WCJ filed a Report and Recommendation on Petition for Reconsideration (report), in which she recommended that defendant's petition be denied.

On August 3, 2007, the Appeals Board granted reconsideration.

By letter dated September 7, 2007, the Appeals Board invited the AD to file a response within twenty days to the WCJ's decision and the pleadings submitted thus far. On September 27, 2007, the AD submitted her "Memorandum of Points and Authorities in Support of Defendants' Petition for Reconsideration," in which she contended that (1) the validity of the 2005 PDRS has already been decided by the WCAB in the unanimous en banc decision in *Costa*; (2) "the evidentiary record in the reviewing court when evaluating the validity of a regulation is limited to the rulemaking record; extra-record evidence should not be admitted;" and (3) there is nothing in the record that would distinguish this matter from the *Costa* precedent which upholds the validity of the PDRS. The AD also requested that we take judicial notice of (1) an Excerpt of the Rulemaking File: The Rand Paper "Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity In Compliance with SB 899" [the RAND 2004 Data Paper] and (2) "Official Documents and Reports of the Division of Workers' Compensation [DWC]."[3]

On October 16, 2007, the Appeals Board granted the applicant's request to respond to the AD's Points and Authorities. Applicant filed his response on October 19, 2007, contending that (1) the WCJ correctly distinguished the en banc decision in *Costa* from the instant case; (2) "the WCJ properly admitted the expert opinion of Mr. Gerlach, whose opinion resolved a factual

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[3] We will grant the AD's request to take judicial notice of an excerpt from its PDRS Rulemaking File, the RAND 2004 Data Paper. The declaration of Maureen Gray, coordinator for the AD's rulemaking actions and custodian of records for the AD's rulemaking files, states that the excerpt in question was a "document relied upon" in the PDRS rulemaking file. This rulemaking file, including excerpts of the file, may be judicially noted as an official act of an executive agency of the State of California under Evidence Code section 452(c). (See *As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 439 [Court took judicial notice of an Initial Statement of Reasons and notice of proposed rulemaking under Evid. Code §452(c)]; see also *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 186 [Court took judicial notice of the agency's responses to comments in the rulemaking file].) We will also take judicial notice of the submitted DWC official documents and reports, as they were prepared to examine return to work and wage loss of workers who have permanent disabilities due to work-related injuries in compliance with title 8, California Code of Regulations, section 9805.1.

dispute, namely that there is no empirical basis for the 2005 PDRS and therefore fails to meet the statutory mandate [of] § 4660;" (3) the WCJ properly concluded that there was no support in the rulemaking file for the DFEC factors in the 2005 PDRS;[4] and (4) the case herein is readily distinguishable from the *Costa* case.

On November 5, 2007, defendant submitted its proposed response to the AD's Memorandum of Points and Authorities. Applicant had previously objected to defendant's request to file a responsive pleading on the basis that defendant had already filed a petition for reconsideration "and [it was] required to raise any and all issues for appeal at that time," and also noted that "the AD's response was in support of defendant's petition for reconsideration."

On January 10, 2008, defendant renewed its request "to file a responsive pleading to the [AD's] filing." Pursuant to WCAB Rule 10848 (Cal. Code Regs., tit. 8, § 10848), and given that applicant was allowed the opportunity to respond to the AD, we have accepted and considered defendant's supplemental petition, which contends that (1) the 2005 PDRS is valid because the AD utilized all suitable evidence available to her at the time in drafting it and the resulting methodology was based on substantial empirical evidence; (2) the Appeals Board is bound by the en banc decision in *Costa*; and (3) the AD "recognizes the fundamental evidentiary problems presented by the admission of the deposition testimony from a witness in another case."

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[4] Under Government Code section 11347.3(b), an agency's rulemaking file consists of a variety of documents, including: (1) the agency's initial statement of reasons for adopting the proposed regulation(s) (§ 11347.3(b)(2)); (2) the agency's final statement of reasons for adopting the proposed regulation(s) (§ 11347.3(b)(2)); (3) all data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the proposed regulation(s) (§ 11347.3(b)(6)); and (4) a transcript of the public hearing(s) (§ 11347.3(b)(8)). Here, the WCJ considered the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, which appears to have been part of the AD's rulemaking file for the promulgation of the 2005 PDRS. (See Lab. Code, § 4660(b)(2).) At trial, however, the rulemaking file as a whole was not offered in evidence and no request was made to take judicial notice of it (see Evid. Code, § 452(c)), even though, by law, "[t]he rulemaking file shall be made available by the agency to the public." (Gov. Code, § 11347.3(d)(6).) Therefore, although the WCJ considered the testimony of the AD and others before the Senate Labor and Industrial Relations Committee, it is unknown whether this testimony, even though it was given on December 7, 2004, i.e., before the January 1, 2005 effective date of the PDRS, was part of the rulemaking file (the AD's response asserts that it was not). All of the other testimonial and documentary evidence considered by the WCJ was presented or dated after January 1, 2005; therefore, this evidence necessarily was not part of the rulemaking file.

DISCUSSION

I. The Appeals Board Has Exclusive Original Jurisdiction to Determine the Validity of the 2005 PDRS

Labor Code section 5300 provides, in relevant part, that "[a]ll the following proceedings shall be instituted before the appeals board and not elsewhere, … (f) [f]or the determination of any other matter, jurisdiction over which is vested by Division 4 in the Division of Workers' Compensation, including the [AD] … ." Because the AD's authority to adopt regulations derives from Labor Code section 5307.3, which is within Division 4 of the Labor Code, the Appeals Board has exclusive original jurisdiction to determine the validity of the AD's regulations.

This provision of Labor Code section 5300(f) is in harmony with the rulemaking provisions of the California Administrative Procedure Act (APA). (Gov. Code, § 11340 et seq.) The APA specifically provides that "Article 8 (commencing with Section 11350) *shall not apply* to the Division of Workers' Compensation." (Gov. Code, § 11351(c) (emphasis added).) Article 8, entitled "Judicial Review," consists solely of Government Code sections 11350 and 11350.3, both of which provide that any interested person may obtain a judicial declaration as to the validity of any regulation or order of repeal "by bringing an action for declaratory relief in the superior court … ." (Gov. Code, §§ 11350(a), 11350.3.) Because these APA provisions for Superior Court review of agency regulations expressly "shall not apply to" DWC, the Superior Courts do not have jurisdiction to review the AD's regulations.

Therefore, the provisions of Labor Code section 5300(f) vesting the Appeals Board with exclusive original jurisdiction to determine any matter arising under Division 4 of the Labor Code (which would include section 5307.3, the source of the AD's regulatory authority)—in conjunction with the provisions of Government Code section 11351(c) excluding DWC regulations from Superior Court review—compels the conclusion that the Appeals Board has sole original jurisdiction to consider the validity of the new PDRS, adopted by the AD through a regulation. (See Cal. Code Regs., tit. 8, § 9805.)

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II. The Standards for Rebutting the Presumptive Validity of an Administrative Regulation

"Of all the activities undertaken by an administrative agency, quasi-legislative acts are accorded the most deferential level of judicial scrutiny." (*Pulaski v. Cal. Occupational Safety and Health Standards Bd*. (1999) 75 Cal.App.4th 1315, 1331.) An agency's regulation carries a "strong presumption" of validity. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11; *Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1014-1015; *Life Care Centers of America v. CalOptima* (2005) 133 Cal.App.4th 1169, 1183.)

In considering a challenge to the validity of a regulation, "our task is to inquire into the legality of the ... regulation, not its wisdom." (*Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1014; accord: *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1040; see also *Tomlinson v. Qualcomm* (2002) 97 Cal.App.4th 934, 941 ("An administrative regulation is presumptively valid, and if there is a reasonable basis for it, a reviewing court will not substitute its judgment for that of the administrative body; the role of the reviewing court is limited to the legality rather than the wisdom of the challenged regulation.").) Thus, our task "is limited to determining whether the regulation (1) is within the scope of the authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute." (*State Farm Mutual Automobile Ins. Co. v. Garamendi*, *supra*, 32 Cal.4th at p. 1040 [quoting from *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411] (internal citations and quotation marks omitted); see also *Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th at p. 11; *Moore v. Cal. State Bd. of Accountancy*, *supra*, 2 Cal.4th at p. 1015.)

Moreover, in considering whether the regulation is "reasonably necessary," we may "not substitute our judgment for that of the agency with respect to such things as the existence and weight to be accorded the facts and policy considerations that support the regulation." (*Western States Petroleum Assn. v. Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1007; *Californians for Safe Prescriptions v. Cal. State Bd. of Pharmacy* (1993) 19 Cal.App.4th 1136, 1150.) That is, we must "defer to the agency's expertise" and we may "not superimpose [our] own policy judgment upon the agency in the absence of an arbitrary and capricious decision." (*Agricultural*

Labor Relations Bd. v. Superior Court, *supra*, 16 Cal.3d at p. 411 [quoting from *Pitts v. Perluss* (1962) 58 Cal.2d 824, 832] (internal quotation marks omitted); accord: *Moore v. Cal. State Bd. of Accountancy*, *supra*, 2 Cal.4th at p. 1015.)

An arbitrary and capricious quasi-legislative action is equivalent to one that is "entirely lacking in evidentiary support" (*Pitts v. Perluss*, *supra*, 58 Cal.2d at p. 833; see also *Reclamation Dist. No. 684 v. Dept. of Industrial Relations* (2005) 125 Cal.App.4th 1000, 1004), one that has no "reasonable or rational basis" (*Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th at p. 11; *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93, fn. 4), or one in which "no reasonable person could have reached the same conclusion on the evidence before it." (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782.)

The party challenging the regulation has the burden of demonstrating its invalidity and, in order to carry this burden, that party must demonstrate that the regulation is arbitrary and capricious. (*Western States Petroleum Assn. v. Dept. of Health Services*, *supra*, 99 Cal.App.4th at p. 1007; see also *Credit Ins. General Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657 ("the burden of proof is on the party challenging the regulation. The agency's action comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating invalidity upon the assailant. Thus, in this case the [plaintiff] has the burden of demonstrating that the evidence on which the [agency] relied does not reasonably support the regulation in light of the purposes of the statute" [internal citations and quotation marks omitted]; accord: *Tomlinson v. Qualcomm*, *supra*, 97 Cal.App.4th at p. 941.)

III. The Evidentiary Record Here Should Have Been Limited to the Rulemaking Record

We first note that the AD's response raises an issue that was not raised in *Costa*, *supra*, 71 Cal.Comp.Cases 1797, and was not previously raised by the parties here, that "the evidentiary record in the reviewing court when evaluating the validity of a regulation is limited to the rulemaking record; extra-record evidence should not be admitted." As set forth below, case law supports the AD's position.

In *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 564, the California Supreme Court held that "courts generally may not consider evidence not contained in the administrative record when reviewing the substantiality of the evidence supporting a quasi-legislative administrative decision … ." *Western States* also held that "extra-record evidence is generally not admissible to show that an agency 'has not proceeded in a manner required by law' in making a quasi-legislative decision" (*Id.*), and that "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (9 Cal.4th at p. 579.)

Furthermore, at 9 Cal. 4th 577-578, *Western States* discussed three possible exceptions to the general rule of non-admissibility: (1) evidence to show that an administrative agency has not considered "all relevant factors" in making its decision; (2) evidence to show that the evidence the agency considered did not support its decision; and (3) evidence that could not be produced at the administrative level "in the exercise of reasonable diligence." *Western States* concluded that in the first and second instances, the extra-record evidence was inadmissible, but, in the third instance, the evidence was admissible "only in those rare instances in which (1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record." (*Id.*; emphases in original.) Finally, at 9 Cal.4th 579, the Court further noted that it did "not foreclose the possibility that extra-record evidence may be admissible in traditional mandamus actions challenging quasi-legislative administrative decisions under unusual circumstances or for very limited purposes not presented in the case now before us." (See also *Ford Dealers Assn. v. Department of Motor Vehicles, supra*, 32 Cal.3d at p. 365, fn. 11 [trial court correctly ruled that judiciary was limited to examination of administrative record in action challenging administrative regulation]; *Pitts v. Perluss, supra*, 58 Cal.2d at p. 833 [as to quasi-legislative acts of administrative agencies, judicial review limited to examination of the proceedings before the officer to determine whether action

arbitrary, capricious or entirely lacking in evidentiary support].)

As stated in *San Joaquin Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159, 167:

> " 'An unbroken line of cases holds that, in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record (extra-record evidence) is not admissible. [Citations.]' (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1269, 4 Cal.Rptr.3d 536.) '[E]xtra-record evidence is generally not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions....' (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, 38 Cal.Rptr.2d 139, 888 P.2d 1268 (*Western States*).)"

Here, in the trial level proceedings, the AD's complete rulemaking file (see Gov. Code, § 11347.3) was not offered in evidence, nor was judicial notice taken of it. Although the WCJ did consider the 2003 RAND Study, the balance of the AD's rulemaking record – including the initial statement of reasons, the final statement of reasons, and public comments (see Gov. Code, § 11347.3) – was not before the WCJ (and it is not now before us, although, on reconsideration, we have additionally taken judicial notice of the 2004 RAND Study.) In general, in the absence of an agency's rulemaking record, the presumption of the validity of a challenged regulation stands unrebutted and is controlling on review. (*Stoneham v. Rushen* (1984) 156 Cal.App.3d 302, 308.) Moreover, although some of the evidence admitted at trial existed before the AD made her decision to adopt the 2005 PDRS, no showing was made that, even with the exercise of reasonable diligence, this evidence could not have been submitted to the AD before her decision was made, so that it could be considered and included in the rulemaking file. Therefore, no basis has been established to consider this extra-record evidence.

Nevertheless, even if we assume that the evidence presented (which was admitted without objection) is properly in the record, we conclude on this record that applicant has failed to meet his burden of overcoming the presumptive validity of the 2005 PDRS.

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IV. *Costa* Held that the Applicant Failed to Meet His Burden of Proving the 2005 PDRS Invalid

In our en banc decision in *Costa*, *supra*, 71 Cal.Comp.Cases 1797, we determined, on the record before us in that case, that the applicant failed to meet his burden of proving the 2005 PDRS invalid; that is, the applicant failed to demonstrate that the actions of the AD in adopting that schedule were arbitrary, capricious or not reasonably necessary to effectuate the purpose of, or were inconsistent with, section 4660.

Section 4660 provides:

> "(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his of her age at the time of injury, consideration being given to an employee's diminished future earning capacity.
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> "(b)(1) For purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).
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> "(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.
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> "(c) 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. This schedule shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.
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> "(d) The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on

> and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.
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> "(e) On or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by the act that added this subdivision."

In *Costa*, it was alleged that the 2005 PDRS was invalid because, contrary to section 4660(b)(2), the AD failed to base the adjusted rating schedule (1) on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice [RAND 2003 Interim Report], and (2) on data from additional empirical studies.

In *Costa*, at 71 Cal.Comp.Cases 1813-1814, we rejected the contention that the AD failed to base the adjusted rating schedule on empirical data and findings from the RAND 2003 Interim Report, as follows:

> "… [T]he AD who adopted the new PDRS, Andrea Hoch, testified repeatedly at the Senate Labor and Industrial Relations hearing of December 7, 2004 (applicant's exhibit 3), that in arriving at the mathematical formula for the adjusted schedule's DFEC factor, she did in fact use the empirical data and findings from the RAND 2003 Interim Report. Moreover . . . Ms. Hoch's testimony in this regard was corroborated by that of Robert Reville, Ph.D., one of the authors of the RAND 2003 Interim Report.
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> "For example, the former AD first testified that the DFEC adjustment was a positive multiplier or an upward adjustment applied to the AMA whole person impairment rating. (Transcript, p. 16, ll. 16-23.) On page 18, line 5 to page 19, line 7 of the transcript from the December 7, 2004 Senate Labor and Industrial Relations hearing, the former AD testified that 22 body injury categories were developed from the empirical data contained in the RAND 2003 Interim Report, and that an adjustment factor of 1.1 to 1.4 was developed to rank the injury categories in terms of proportional wage loss based on the RAND data, those having higher proportional wage loss being at the higher (1.4) end of the scale. [fn. omitted.] The

> former AD further testified that the DFEC was 'based on empirical data and findings that aggregate the average percentage of long term loss of income resulting from each type of injury.' (Transcript, p. 57, ll. 14-17.) Dr. Reville testified that he understood the logic of the AD's use of ratios of .45 through 1.81 and adjustment factors of 1.1 to 1.4, and that they were based on numbers RAND provided (transcript, p. 61, ll. 21-23), more specifically, 'upon the ratio of ratings to wage loss where ratings were based on the old permanent disability rating system.' (Transcript, p. 61, l. 25 to p. 62, l. 3.)"

With respect to the provision in section 4660(b)(2) that the adjusted rating schedule also be based "upon data from additional empirical studies," we stated in *Costa*, at 71 Cal.Comp.Cases 1814-1815:

> ". . . Dr. Reville testified that RAND did a full search for all potential data and that to his knowledge no other empirical data existed which could have been collected. (Transcript, p. 82, l. 21 to p. 83, l. 11.) [fn. omitted.] Dr. Reville also testified that a proposed 'crosswalk' study between the old PDRS and the AMA Guidelines, which was ultimately rejected by the AD, would have provided greater validity, but could not have been completed by the January 1, 2005 statutory deadline. (Transcript, p. 87, ll. 20-23.) A crosswalk or dual rating study would correlate the disability ratings assigned under the former PDRS to those assigned under the new PDRS.
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> "With respect to her determination not to pursue the crosswalk study, the former AD testified as to the lack of time to collect sufficient data (transcript, p. 104, l. 17 to p. 105, l. 5), and her concerns with the validity and usefulness of such a study, i.e., because of the wide range of PD ratings that can result from different physicians and raters looking at the same information (transcript, p. 105, ll. 6-13) and as to correlating the range of ratings under the old system with the AMA whole person impairment rating under the new PDRS. (Transcript, p. 106, ll. 10-15.) In addition to time constraints and these other concerns, the former AD also testified that because the PDRS was an ongoing process [fn. omitted.], she determined that once data was collected under the new PDRS, 'you don't need the crosswalk anymore because you use the information you have on the current system to evaluate whether the PD ratings in the current system—the current system meaning the post 1/1/05 system—and the wage loss and whether there need to be adjustments based on that.' (Transcript, p. 107, l. 22 to p. 108, l. 12.)"

We therefore concluded in *Costa*, at 71 Cal.Comp.Cases 1815-1816, that the applicant had failed to meet his burden of proving the 2005 PDRS invalid:

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> "The RAND 2004 Data Paper details the analysis performed by RAND that enabled the AD to utilize the empirical data and findings from the RAND 2003 Interim Report, which was based on the old PDRS, to calculate the DFEC required by the new PDRS. Consistent with the testimony of the former AD and Dr. Reville, the results of the empirical data analysis, as shown in Table 5, page 13, list 22 impairment categories and set forth the ratio of ratings over losses for each category that was determined under the old PDRS, ranging from .45 to 1.81. These impairment categories and ratios were utilized by the AD in formulating the DFEC in the new PDRS.
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> "The record therefore establishes that the AD incorporated the empirical data and findings from the RAND 2003 Interim Report in formulating the adjusted rating schedule (the DFEC) as mandated by section 4660(b)(2), and that in doing so she used the analysis contained in the RAND 2004 Data Paper. The record further reflects that there were no additional empirical studies available from which to formulate the adjusted schedule by the statutory deadline of January 1, 2005, and that the AD, in her discretion, decided that a crosswalk study should not be undertaken. According to the AD's testimony, this determination was made because of time constraints, her concerns with correlating the ratings under the old and new PDRS, and because of the ongoing review process included in the new PDRS.
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> "Under the totality of these circumstances, applicant has not met his burden of proving that the AD's actions were arbitrary or capricious or inconsistent with section 4660."

Thus, in *Costa*, we did not specifically uphold the validity of the new PDRS, but held, in effect, that applicant did not disprove its validity. Applicant did not seek appellate review of our determination in *Costa* concerning the 2005 PDRS.

V. The WCJ's Decision Purportedly Distinguishes the Analysis in *Costa*, but Ultimately Fails to Demonstrate the Invalidity of the 2005 PDRS

As set forth at the outset, the Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. However, in *Costa*, although we concluded that the applicant had failed in his burden of proving the 2005 PDRS invalid based on the record before us in that case, it was conceivable that this burden might be met in another case. Nevertheless, for the reasons discussed below, any differences in the record between *Costa* and the present matter are without distinction insofar as proving the 2005 PDRS invalid. Therefore, we conclude that the burden of rebutting the validity of the 2005 PDRS has not been met in this case.

A. Contrary to Our Determination in *Costa*, the WCJ Incorrectly Found that the Senate Testimony of AD Hoch and Dr. Reville Indicated that Empirical Data from the RAND 2003 Interim Report Was Not Used in Formulating the DFEC Adjustment Factors of the 2005 PDRS

In her Opinion on Decision, the WCJ stated the following in distinguishing *Costa*:

> "In the *Costa* decision, the WCJ and Board found that in arriving at the mathematical formula for the adjusted schedule's DFEC factor, AD Hoch used empirical data and findings from the RAND report and that her testimony was corroborated by Dr. Reville. Based on the significantly different record in this matter, however, I concluded that the FEC adjustment factors adopted by AD are not justified by *any* empirical data. (emphasis added.)
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> "Contrary to the findings in *Costa*, the testimony of former AD Hoch set forth herein shows that *she did not, in fact, use any additional empirical data*. Moreover, the only data that she used from the RAND 2003 Interim Report, as mandated by statute, was the wholesale importation of the 4:1 relative ratio in table B 'ratio of rating over losses' that appears to have been misapplied to the current system to create a FEC adjustment factor that cannot be explained. Also, from a closer review of the legislative hearing transcript and, contrary to the finding in *Costa*, Dr. Reville did not corroborate her testimony as discussed above." (emphasis in original.)

In attempting to distinguish the AD's policy decision from empirical data, the WCJ stated:

> "The authorizing statute required the AD to use empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice *and data from additional empirical studies.* Based on the testimony of Dr. Reville, the co-author of the RAND report, the FEC adjustment factors are not based on the RAND Interim Report or on other empirical data. (emphasis in original.)
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> "An analysis of AD Hoch's testimony at the legislative hearing confirms that her decision to adopt the FEC adjustment factors was not based on empirical data, but instead amounted to no more than a 'policy decision.' Based on her testimony, she took the 4:1 ratio described by RAND out of context. AD Hoch admitted that she was distrustful of the old PDRS. She used the RAND interim report to extrapolate a 4:1 ratio that had no relationship whatsoever to new impairment findings and wage loss studies, and without any apparent correlation to empirical data. She then misapplied this 'ratio' to develop a DFEC adjustment factor. The AD's ratio is mathematically incorrect (it's not a 4:1 ratio; rather it's a 1.27:1 ratio) and it is not based on empirical data provided to her by RAND. She could not otherwise satisfactorily explain the basis of her DFEC

adjustment factors. Thus, the derivation from the RAND data is specious."

As stated previously, were the record in this case the same as in *Costa,* the WCJ here, and all WCJs, as well as all Appeals Board panels, would be bound by our determination that the presumptive validity of the 2005 PDRS had not been rebutted. In large part, however, the WCJ has found the 2005 PDRS invalid based on her disagreement with our determination in *Costa* that the December 7, 2004 legislative hearing transcript demonstrated that Ms. Hoch incorporated empirical data from the RAND Interim Report in formulating the DFEC factors, and that her testimony in this regard was corroborated by Dr. Reville. More specifically, the WCJ concluded that "[a]n analysis of AD Hoch's testimony at the legislative hearing confirms that her decision to adopt the FEC adjustment factors was not based on empirical data, but instead amounted to no more than a 'policy decision,' " and that "a closer review of the legislative hearing and, contrary to the finding in *Costa*, Dr. Reville did not corroborate [Ms. Hoch's] testimony."

With respect to Ms. Hoch's testimony at the legislative hearing regarding her "policy decision," she stated that it was to increase or upwardly adjust the DFEC component of a permanent disability rating,[5] with 1.1 as a starting point. (Transcript, p. 16, ll. 16-23; p. 21, ll. 18-24.) As also set forth in *Costa*, at 71 Cal.Comp.Cases 814, Ms. Hoch testified that 22 body injury categories were developed from the empirical data contained in the RAND 2003 Interim Report, and that an adjustment factor of 1.1 to 1.4 was developed to rank the injury categories in terms of proportional wage loss based on the RAND data, those having higher proportional wage loss being at the higher (1.4) end of the scale. (Transcript, p. 18, l. 5 to p.19, l. 7.) The AD further testified that the DFEC was "based on empirical data and findings that aggregate the average percentage of long term loss of income resulting from each type of injury." (Transcript, p. 57, ll. 14-17.) With

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[5] In addition to the DFEC, pursuant to Section 4660(a) and (b)(1), to determine a permanent disability rating, "account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of injury, consideration being given to an employee's diminished future earning capacity," and "the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)."

respect to Dr. Reville's legislative hearing testimony, we noted in *Costa*, also at 71 Cal.Comp.Cases 1814, that "Dr. Reville testified that he understood the logic of the AD's use of ratios of .45 through 1.81 and adjustment factors of 1.1 to 1.4, and that they were based on numbers RAND provided (transcript, p. 61, ll. 21-23), more specifically, 'upon the ratio of ratings to wage loss where ratings were based on the old permanent disability rating system.' (Transcript, p. 61, l. 25 to p. 62, l. 3.)"

Thus, we concluded, at 71 Cal.Comp.Cases 1815:

> "The record therefore establishes that the AD incorporated empirical data and findings from the RAND 2003 Interim Report in formulating the adjusted rating schedule (the DFEC) as mandated by section 4660(b)(2), and that in so doing she used the analysis contained in the RAND 2004 Data Paper."

Here, however, and based on her different interpretation of the December 7, 2004 legislative hearing transcript, the WCJ rejected our determination in *Costa* that the AD used empirical data from the RAND Interim Report as required by Section 4660(b)(2) to formulate the DFEC factors, which was corroborated by Dr. Reville, one of the authors of the RAND Interim Report. Moreover, the WCJ also misstated *Costa* by concluding that "[c]ontrary to the findings in *Costa*, the testimony of AD Hoch set forth herein shows that *she did not, in fact, use any additional empirical data*." (emphasis in original.) In *Costa*, however, we emphasized that there was no *additional* empirical data, as of January 1, 2005, the date mandated by the Legislature for the adoption of the new PDRS. We stated at 71 Cal.Comp.Cases 1814-1815:

> "… Dr. Reville testified that RAND did a full search for all potential data and that to his knowledge no other empirical data existed which could have been collected. (Transcript, p. 82, l. 21 to p. 83, l. 11) [fn. omitted.] Dr. Reville also testified that a proposed 'crosswalk' study between the old PDRS and the AMA Guidelines, which was ultimately rejected by the AD, would have provided greater validity, but could not have been completed by the January 1, 2005 statutory deadline. (Transcript, p. 87, ll. 20-23.)
> "…
>
> "… The record further reflects that there were no additional empirical studies available from which to formulate the adjusted schedule by the

> statutory deadline of January 1, 2005, and that the AD, in her discretion, decided that a crosswalk study should not be undertaken. According to the AD's testimony, this determination was made because of time constraints, her concerns with correlating the ratings under the old and new PDRS, and because of the ongoing review process included in the new PDRS."

Accordingly, the Senate hearing testimony of both the AD and of Dr. Reville indicate that empirical data from the 2003 RAND Interim Report, as mandated by section 4660(b)(2), were utilized in formulating the 2005 PDRS, and we reject the WCJ's determination to the contrary.

B. The Record Here Differs From *Costa* As It Includes the Deposition Testimony of Dr. Reville and the Deposition and Trial Testimony of Consultant Mark Gerlach; However, Neither the Testimony of Dr. Reville Nor that of Mr. Gerlach Rebuts the Presumptive Validity of the 2005 PDRS

Here, in addition to the transcript of the December 7, 2004 Senate hearing, the record also contains the depositions of Dr. Reville and consultant Mark Gerlach (applicant's Exhibit 3 and Joint Exhibit Y, respectively), which had been found inadmissible in *Costa*,[6] as well as Mr. Gerlach's trial testimony. The WCJ determined that Dr. Reville's deposition testimony did not corroborate our determination in *Costa* that the AD used empirical data from the 2003 RAND Interim Report. In addition, after reviewing the testimony of Dr. Reville and Mr. Gerlach on additional empirical studies, the WCJ concluded:

> "… that a crosswalk study is necessary in order to translate the disability ratings under the old schedule to impairment ratings under the new schedule for the purpose of improving equity and adequacy of benefits for injured workers and employers. The use of the RAND interim Report without a crosswalk study was meaningless."

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[6] These deposition transcripts were determined to be inadmissible in *Costa* because both came from another unrelated case, thereby depriving the defendant of its fundamental right of cross-examination, and thus, of due process of law. Moreover, the applicant had not demonstrated that Dr. Reville or Mr. Gerlach could not have testified in *Costa* had applicant exercised due diligence. In addition, with respect to Mr. Gerlach's testimony, we were not persuaded that it met "the criteria of section 5703(g) as contended by petitioner, i.e., that it [was] 'expert testimony received by the appeals board upon similar issues of *scientific fact* in other cases…' " [emphasis in original; fn. omitted.] Here, however, Mr. Gerlach was deposed in this case (his deposition admitted without objection as joint Exhibit Y), and while Dr. Reville's deposition suffered from the same defect as in *Costa*, applicant demonstrated that Dr. Reville was not available to be deposed within the time allotted by the WCJ, with the defendant ultimately agreeing to the admission of his entire deposition.

i. Dr. Reville's Deposition Testimony

With respect to Dr. Reville's deposition testimony, we first note that he specifically stated in his March 9, 2005 deposition, contrary to the WCJ's conclusion, that the DFEC formulated by Ms. Hoch "uses data that is in the [RAND] Interim Report." (Deposition transcript, p. 169, ll. 14-18.) In this regard, he further testified that in Table B of the 2005 PDRS, "the ratio of ratings over losses… is based upon RAND data. And so the FEC rank, even though the collapse—the choice of how to collapse those into eight groups was not done by RAND, the fact that category eight is higher than category one is based upon RAND data." (Deposition transcript, p. 184, ll. 6-12.)

Moreover, while it is correct that Dr. Reville did not recommend 1.1 as the starting point for the DFEC, his deposition testimony confirmed that the range of the DFEC adjustments, i.e., the 1 to 4 ratio and the 1.1 to 1.4 adjustment itself, which he termed a "clever solution," was derived from the RAND data. Dr. Reville testified that the 1 to 4 ratio was drawn "from the highest value of ratings over losses, divided by the lowest value of ratings over losses. So I'm guessing that if we look at hands and fingers at 1.8 and divide it by psychiatric at .45, we're going to get four." [7] (Deposition transcript, p. 192, ll. 6-10.)

When asked whether he had given the Division of Workers' Compensation feedback on the 1.1 to 1.4 ratio, Dr. Reville testified at page 200 line 5, to page 201, line 17 as follows:

> "You know I believe that I told them that the 1.1 to 1.4 was a clever solution to the fact that—that, you know, if—had we directly adopted the full variation that comes in four to one, there was building a great deal of more uncertainty in because we don't have the crosswalk, and that was—that—collapsing into smaller categories and reducing the variation was sort of a clever solution at some level. And I did give them that feedback, together with the feedback that I was concerned with the overall level on—impact on the level of benefits.
>
> "…
>
> It was my concern, if we had actually used something that provided a four to one ratio and applied that to the AMA guides, that that would have led to quite significant variation, given that we didn't have any crosswalk to base this relationship on. So you would be quadrupling some ratings, for

[7] 1.8 divided by .45 is, in fact, 4.

> instance. Assuming you wanted to start with a baseline of one. If you were to have the high end be four, you'd be quadrupling some ratings. . . And we did not think there was really sufficient empirical basis to have that kind of an extreme adjustment.
>
> "…
>
> "I understand her explanation for why [Ms. Hoch] picked 1.4 was because it was four times—because .4 is four times .1. That was her stated explanation."

Thus, contrary to the WCJ's determination, the deposition testimony of Dr. Reville is not a basis for distinguishing *Costa* and finding the 2005 PDRS invalid, as Dr. Reville confirms the testimony he gave at the December 7, 2004 legislative hearing that the DFEC adjustment factors are based on data from the RAND Interim Report.

In addition, Dr. Reville did not change his opinion that a crosswalk study could not have been completed by the January 1, 2005 statutory deadline; nor could he say with any degree of certainty that such a study could have been completed even by June 30, 2005, which date marked the end of RAND's contract with the Division of Workers' Compensation. (Deposition, transcript, p. 163, l. 24 to p. 164, l. 22.) While Dr. Reville certainly reiterates his views as to the need for a crosswalk study to provide greater validity, his opinion does not change our determination that the AD's decision *not* to conduct a crosswalk study was neither arbitrary and capricious nor an abuse of her discretion. This is based on the AD's stated contemporaneous reasons for not pursuing such a study, i.e., the statutory deadline—even assuming discretion to go beyond the January 1, 2005 deadline, section 4660(e) states that the AD "shall" adopt regulations on or before that date—her concerns with correlating the ratings under the old and new PDRS, and the ongoing review process included in the new PDRS.[8]

ii. The Testimony of Mark Gerlach

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[8] With respect to the WCJ's concern, as expressed in her report, that there is no evidence to support the claim the current AD is presently involved in activities to revise the PDRS, we note that DWC official documents and reports submitted as part of the AD's response (for which we have taken judicial notice)—reports and studies related to return to work rates, wage loss for injured workers with permanent disabilities, and uncompensated wage loss, variously dated January, March and May 2007 (Exhibits A1-C2 to the AD's Memorandum of Points and Authorities)—confirm that the AD's office is actively collecting and analyzing data to evaluate the effects of the 2005 PDRS.

With respect to Mr. Gerlach's testimony, we first note that both his deposition and trial testimony in part relied on studies that were admitted into evidence in *Costa*, and found lacking on the issue of the validity of the 2005 PDRS. Those included (1) "The Dual Rating Study" by Christopher Brigham of the Workers' Compensation Insurance Rating Bureau (WCIRB), (2) "Differences in Workers' Compensation Disability and Impairment Ratings under Old and New California Law" by Paul Leigh, Ph.D, and (3) the February 23, 2006 report from the Commission on Health and Safety and Workers' Compensation (CHSWC). In *Costa*, at 71 Cal.Comp.Cases 1816-1817, we stated:

> "With respect to the additional evidence, applicant's Exhibit 6, The Dual Rating Study by Christopher Brigham of the WCIRB, and applicant's Exhibit 7, "Differences in Workers' Compensation Disability and Impairment Ratings under Old and New California Law," by Paul Leigh, Ph.D, . . . both studies are dated *after* the January 1, 2005 statutory deadline (May 19, 2005 and March 10, 2005, respectively), and even assuming their validity, there has been no showing that either study is substantially similar in methodology and scope to what would be required for purposes of adjusting the PDRS. In fact, the study by Mr. Brigham, which was done for the purposes of estimating workers' compensation costs in consideration of setting the pure premium rate, was based on a relatively small sample of 250 cases, some of which were not ratable, while the study by Dr. Leigh was not based on a random sample and only one disability evaluator was used to determine ratings under the former PDRS. (emphasis in original.)
>
> "With respect to WCAB Exhibit Y, the CHSWC report of February 23, 2006, although it is arguably more relevant than the two studies just cited, and contains thoughtful public policy considerations and analysis, we are not persuaded that its proposed *future* revisions to the PDRS [fn. omitted] successfully challenge the validity of the PDRS at the time it was adopted by the former AD on January 1, 2005. That is, it fails to demonstrate that the actions of the former AD when she adopted the PDRS were arbitrary or capricious or inconsistent with section 4660. As noted above, we must defer to the administrative agency's expertise and are precluded from superimposing our own policy judgment on the former AD's actions or from reviewing the wisdom of those actions." (emphasis in original.)

In addition, while Mr. Gerlach testified at trial that a crosswalk study could have been completed and utilized in time to meet the January 1, 2005 statutory deadline, this testimony is contradicted by the testimony of both the AD and Dr. Reville, and is unsupported by reference to

any facts or data. Thus, given Mr. Gerlach's reliance on studies found to be lacking in *Costa*, all of which occurred *after* the January 1, 2005 statutory deadline, and the record which indicates, contrary to the determination of the WCJ, that the 2005 PDRS was based on empirical data from the 2003 RAND Interim Report, and that the AD's reasons for not pursuing a crosswalk study were neither arbitrary nor capricious, Mr. Gerlach's testimony is not sufficient to rebut the presumptive validity of the 2005 PDRS. As stated in *Tomlinson v. Qualcomm, supra,* 97 Cal.App.4th at page 940, citing *Ford Dealers Assn. v. Department of Motor Vehicles, supra,* 32 Cal.3d at page 355: "An administrative regulation is presumptively valid, and if there is a reasonable basis for it, a reviewing court will not substitute its judgment for that of the administrative body; the role of the reviewing court is limited to the legality rather than the wisdom of the challenged regulation." In addition, in the absence of an arbitrary and capricious decision, a reviewing court will defer to an administrative agency's expertise and will not superimpose its own policy judgment upon the agency. (*Pitts v. Perluss, supra,* 58 Cal.2d at p. 832; *Agricultural Labor Relations Bd., supra,* 16 Cal.3d at p. 411.)

VI. Conclusion

Therefore, based on the foregoing, we find on the record in this case that applicant has not carried his burden of demonstrating that the AD's adoption of the 2005 PDRS was arbitrary and capricious, or inconsistent with section 4660(b)(2). Accordingly, we will reverse the determination that applicant rebutted the presumptive validity of the 2005 PDRS, and we will return this matter to the trial level for further proceedings and decision on all outstanding issues.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board (en banc) that Findings of Fact Nos. 5, 6, 7, 8 and 9 of the Findings and Award issued on May 9, 2007, are **RESCINDED** and the following Findings of Fact Nos. 5 and 6, as set forth below, are **SUBSTITUTED** therefor, after which this matter is **RETURNED** to the trial level for further proceedings and decision consistent with this opinion.

FINDINGS OF FACT

5. Applicant has not rebutted the presumptive validity of the PDRS adopted January 1, 2005.

6. All remaining issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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

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

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

/s/ Alfonso J. Morest
ALFONSO J. MORESI, Commissioner

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

I CONCUR
(See attached Concurring Opinion)

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

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
6/2/2008

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:
Scott Boughner
Jeffrey Greenberg
Finnegan, Marks & Hampton
Division of Workers' Compensation – Legal Unit

VB/aml

CONCURRING OPINION OF
COMMISSIONER BRASS

In light of the presumptive validity given an administrative regulation and the high standard needed to rebut or overcome that presumptive validity, I concur with my fellow Commissioners that applicant has not met his burden of proving the 2005 PDRS invalid. However, while the Administrative Director (AD) may not have acted arbitrarily or capriciously, or abused her discretion, in formulating the adjusted rating schedule by the January 1, 2005 statutory deadline, I believe she could have and should have used her discretion to fully comply with section 4660(b)(2) by basing the adjusted rating schedule on "data from additional empirical studies."

As suggested in *Costa*, *supra*, at 71 Cal.Comp.Cases at p. 1816, and as discussed by the WCJ here, there is authority for the proposition that the January 1, 2005 statutory deadline was directive and not mandatory. (See, e.g., *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145; *Edwards v. Steele* (1979) 25 Cal.3d 406, 409-410; *Garrison v. Rourke* (1948) 32 Cal.2d 430, 435-436; *Plastic Pipe & Fittings Assn. v. California Building Standards Com.* (2004) 134 Cal.App.4th 1390, 1411.) Because the AD apparently had the discretion to go beyond that deadline and Dr. Reville, one of the authors of the 2003 RAND Interim Report, testified both before the Senate and in his deposition as to the need for a crosswalk study to provide greater validity, the AD should have undertaken such a study before the new Permanent Disability Rating Schedule (PDRS) was adopted. Moreover, even assuming that the January 1, 2005 deadline was mandatory, a crosswalk study should have been completed within a reasonable time after January 1, 2005, followed by the issuance of an amended PDRS as soon as possible thereafter. That section 4660 requires an amended schedule "at least every five years," does not, of course, preclude earlier amendment.

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Given what was and is at stake here, the provision of at least adequate compensation for

thousands of Californians who have sustained permanently disabling workplace injuries, and the ill effects not only to those workers for failing to so provide, but to the worker's compensation system and the State as a whole, the AD should not have relied on incomplete data in formulating the new PDRS. Rather, she could have and should have either delayed implementation of the new PDRS, or amended it as expeditiously as possible, pending utilization of more comprehensive data.

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

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
6/2/2008

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

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VB/aml