Supreme Court Copy

Case No. **S179194**

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JOHN C. DUNCAN, [redacted] as ADMINISTRATOR [redacted], etc.,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD [redacted], and X.S.,

Respondents.

[redacted]

Case No.: **S179194**

(Court of Appeal Case No. H034040)

(WCAB Case No. ADJ1510738 (SJO 0251902))

CRC 8.25(b)

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT, CASE NO. H034040

PETITIONER'S OPENING BRIEF ON THE MERITS

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Case No. **S179194**

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JOHN C. DUNCAN, DIRECTOR OF INDUSTRIAL RELATIONS as ADMINISTRATOR of the SUBSEQUENT INJURIES BENEFITS TRUST FUND of the STATE OF CALIFORNIA, Petitioner, vs. WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, Respondent, XYZZX SJO2, Real Party in Interest.	Case No.: **S179194** (Court of Appeal Case No. H034040) (WCAB Case No. ADJ1510738 (SJO 0251902))

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ISSUE PRESENTED

Whether the legislature intended all annual increases to lifetime-payable workers' compensation benefits for workers injured on or after January 1, 2003, to be calculated retroactively to January 1, 2004, or prospectively only from the date those workers become entitled to such benefits.[1] (Lab. Code, § 4659, subd. (c).[2])

STANDARD OF REVIEW

There are two decisions at issue in this case, the decision of the Court of Appeal and the underlying decision of the Workers' Compensation Appeals Board ("Board").[3] Each incorrectly interprets subdivision (c), a statute governing workers' compensation. This case therefore solely involves questions of law, and review is *de novo* of both the Court of Appeal's decision and the Board's decision. (*Department of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal.4th 1281 ("*Dept. of Rehabilitation*"), *Tanimura & Antle v. Workers' Compensation Appeals Board* (2007) 157 Cal.App.4th 1489, 1494; *Green v. Workers' Compensation Appeals Board* (2005) 127 Cal.App.4th 1426, 1435; *Gangwish v. Workers' Compensation Appeals Board* (2001) 89 Cal.App.4th 1284, 1293.)

The deference often given to the Board is not appropriate here

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[1] Necessarily included in this issue is whether the increased payments be calculated retroactively to the date of a worker's injury, as the Board found.

[2] All further statutory references are to the Labor Code, unless otherwise specified. All references to subdivisions are to subdivisions of section 4659, unless otherwise specified.

[3] The Court of Appeal's slip opinion is found as Exhibit 1 to Petition for Review ("Slip Op."). The Board's Decision is attached as Exhibit 1 to Petioner's Motion for Judicial Notice, filed and served concurrently.

because the Board's decision was clearly erroneous or unauthorized. (*Honeywell v. Workers' Compensation Appeals Board* (2005) 35 Cal.4th 24, 34.) "Fidelity must be to the legislative intent as best shown by the legislature's use of clear and unambiguous statutory language." (*Ibid.*, citing *DuBois v. Workers' Compensation Appeals Board* (1993) 5 Cal.4th 382, 387-388.) As argued fully below, the Board's interpretation of subdivision (c) is entitled to no deference as it shows no fidelity to the legislative intent.

INTRODUCTION

There are three types of disability payments to which an injured worker may be entitled: (1) temporary disability; (2) permanent disability; and (3) life pension. Subdivision (c), enacted as part of Assembly Bill 749, provides for increased payments for only some of the payments of these benefits.[4]

Prior to the enactment of AB 479, permanent and temporary

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[4] Subdivision (c), the section at issue in this matter was enacted in 2002 in AB 749:

> For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" as compared to the prior year. For purposes of this subdivision, "state average weekly wage" means the average weekly wage paid by employers to workers covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred.

(Stats. 2002, ch. 6, § 67 (AB 749).), attached as Exhibit 2 to Petitioner's Motion for Judicial Notice ("AB 749").

disability benefit payments did not increase automatically after the worker's date of injury. AB 749 provided for some indexing of benefit and payments in a careful balance between providing adequate benefits to injured workers and maintaining cost control realized by other changes in the workers' compensation system. Two types of payments were, for the first time, indexed to rise each year with increases in the state's average weekly wage ("SAWW"): total permanent disability and life pensions. Partial permanent disability benefits (after which life pension payments begin) were not indexed. In subdivision (c), the legislature intended to provide workers with increases *once payments begin*, based on changes in the SAWW.

By creating automatic increases in certain payments, the California legislature addressed what many believe was an historical erosion of workers' compensation benefits to seriously injured workers. However, the legislature did not intend to solve completely the problem of erosion of benefit payments.

The specific question presented here is as of what date are payments increased under subdivision (c). Petitioner argues that payments do not begin to increase until the January 1 after a worker is entitled to a total permanent disability or life pension payment. That is, increases occur only for changes in the state wage after payment has begun. The Court of Appeal held that increases in payments begin on January 1, 2004, regardless of when a worker becomes entitled to payment; the Board held that increases in payment begin on the January 1 after the date of an injured worker's injury.

The decisions by the Court of Appeal and the Board are not correct interpretations of AB 749's language or legislative intent. The decisions

fail because they do not correctly interpret the plain meaning of the statute or the legislative history of AB 749. As seen below, the effect of both decisions is to change radically the delivery of benefits, both by creating a double escalator for benefits and by significantly altering the nature of life pensions. This result is not what the legislature intended by its enactment of AB 749. For these reasons, the Court of Appeal decision should be reversed and the Board decision should be annulled.

SUMMARY OF CASE

A. Disability Payments Prior to Assembly Bill 749.

Temporary Disability

Temporary disability payments begin after a worker's injury and continue until the injured worker either returns to work or reaches a medically stable condition, known as permanent and stationary ("P & S"). Temporary disability is paid to compensate an injured worker for lost wages during the finite period of healing and recuperation from an industrial injury. (*Granado v. Workers' Compensation Appeals Board* (1968) 69 Cal.2d 399, 403-404; *Medrano v Workers' Compensation Appeals Board* (2008) 167 Cal.App.4th 56, 64.) Temporary disability benefits are intended to be a wage replacement benefit during the period before an injured worker is P & S. (*Herrera v. Workers' Compensation Appeals Board* (1969) 71 Cal 2d 254; *California Compensation Insurance Co. v. Industrial Accident Com.* (1954) 128 Cal App 2d 797.) One measure of a state workers' compensation program's adequacy is its ability to supply this wage replacement.[5] Temporary disability payments are a large

[5] *Trends In Earning Loss From Disabling Workplace Injuries In California* (Rand Institute for Civil Justrice, 2002), p. 2 ("Rand Study"), attached as Exhibit 3 to Petitioner's Motion For Judicial Notice, and also

fraction of the benefits that the less severely injured workers receive.[6]

Temporary disability benefits are calculated as two-thirds of the worker's average weekly earnings at date of injury, within minimum and maximum amounts set by the legislature ("wage brackets"). (§ 4453, subd. (a). See, § 4454.) Historically, the legislature has set new wage brackets on an irregular basis to keep up with changes in the job market.[7]

Prior to 2002, the legislature was subject to criticism for not keeping up with changes in the state average wage and not being sufficiently responsive to changing employment characteristics.[8] During the period from 1998 to 2003 (the effective date of AB 749), the state's average weekly wage increased approximately 20 percent.[9] As of 2003 (the

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available at <http://www.dir.ca.gov/CHSWC/Reports/TrendsInEarningsLoss-EcoCondition.pdf.> See, also, Shor and Marria, *California Passes Workers' Compensation Reform: Implementation Is Next Challenge,* (July/August 2002) Workers' Compensation Policy Review, pp. 14-15. ("Shor and Marria"), attached as Exhibit 4 to Petitioner's Motion For Judicial Notice.

[6] Rand Study, *supra*, p. 4.

[7] See, for example, Stats 1937 ch. 90, amended Stats 1939 ch 308 2, Stats 1947 ch 1033 3, Stats 1951 ch 606 3, Stats 1955 ch 956 2, Stats 1957 ch 1996 3, Stats 1959 ch 1189 2, Stats 1961 ch 1621 2, Stats 1st Ex Sess 1968 ch 4, operative January 1, 1969, Stats 1971 ch 1330 1, ch 1750 7, operative April 1, 1972, Stats 1973 ch 1023 2, operative April 1, 1974, Stats 1974 ch 226 1, effective May 7, 1974, Stats 1975 ch 1263 11, operative January 1, 1977, Stats 1976 ch 1017 3, and repealed Stats 1977 ch 17 8, effective March 25, 1977, Stats 1977 ch 17 26, effective March 25, 1977, amended Stats 1977 ch 1018 1, Stats 1980 ch 1042 1, Stats 1982 ch 922 7, Stats 1989 ch 892 29, ch 893 3, Stats 1990 ch 1550 29 (AB 2910), amended Stats 1993 ch 121 37 (AB 110), effective July 16, 1993.

[8] Shor and Marria, supra, at p. 15.

[9] Official figures are not readily available before 1998. But compare California's average weekly wage in 1998 ($658.97) with 2003 ($790.50). See, Exhibits 5 and 6 to Petitioner's Motion for Judicial Notice.

effective date of AB 749), the wage brackets (i.e., minimum and maximum earnings) for temporary disability had remained unchanged: $189.00 (minimum) to $735.00 (maximum) per week. (§ 4453, subd. (a) (7)-(8).)[10]

Permanent Disability

The right to permanent disability payments commences when a worker becomes P & S. At that point, the nature and extent of a worker's permanent disability can be determined. (*Dept. of Rehabilitation, supra*, 30 Cal.4th at 1292; *LeBoeuf v. Workers' Compensation Appeals Board* (1983) 34 Cal.3d 234.). Permanent disability and life pension are each paid to compensate an injured worker for the long term, residual effects of an industrial injury once the injured worker has attained maximum medical recovery. (*Dept. of Rehabilitation, supra*, 30 Cal. 4th at 1291.) Permanent disability payments begin on the P & S date.

Total Permanent Disability

Workers who are 100% disabled (total permanent disability) receive permanent disability payments for life, calculated by the total temporary disability indemnity rate in effect on the worker's date of injury. (§ 4659, subd. (b); see, § 4453 ., subd. (a).) Prior to AB 749, the weekly payment amount for total permanent disability had been calculated based on a worker's date of injury and did not increase thereafter. Total permanent disability payments end with the injured

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[10] The only workers whose temporary disability payments rise are those whose payments are delayed. (§ 4661.5.) This increase in temporary disability *payments* does not change the indemnity rate set in section 4453, subdivision (a) and therefore does not affect the initial rate paid for total permanent disability. (*Duncan v. Singer* (1978) 43 Cal. Comp. Cases 467 (en banc).) Section 4661.5 independently was modified to restrict the number of weeks of temporary disability payments, which reduces the effect of this penalty. (See, Slip Op. at pp. 16-17.)

worker's death. (§ 4700.)

Partial Permanent Disability

For permanent disability less than total, benefits are intended to compensate workers for their reduced earning capacity, rather than for actual wage loss. (Rand Study, *supra*, p. 7; *Brodie v. Workers' Compensation Appeals Board* (2007) 40 Cal.4th 1313.) Payments are calculated at two-thirds of a worker's average weekly wage but are subject to wage brackets that are different from the temporary disability wage brackets. (§ 4453, subd. (b).) Partial permanent disability wage brackets have been adjusted by the legislature on an irregular basis. (Footnote 7, *supra*.) The wage brackets for partial permanent disability during the 1996 to 2003 period varied between $105.00 (minimum) and $345.00 (maximum) per week to $150.00 (minimum) and $345.00 (maximum) per week. (§ 4453(b)(7).)[11] Payments for partial permanent disability are always paid for a set number of weeks, as determined by statute; the weekly payment amounts do not change for any reason. (§ 4658.) This means, for example, a worker injured in 2002 who receives an 80 percent disability rate and who earns more than the maximum average weekly wage would receive a weekly partial permanent disability payment of $230 for 516.50 weeks (approximately 9.9 years).

Life Pensions

Life pension payments are a form of supplemental partial permanent disability benefit, which only start to be paid after a seriously injured

[11] Starting with injuries in 1996, permanent disability wage brackets varied depending on the percentage of permanent disability. The figures given here are for permanent disability between 70 percent and 99.75 percent.

worker's payment of partial permanent disability ends. (§ 4659, subd. (a).) Like partial permanent disability payments, the initial payment amount of a life pension is based on a worker's date of injury. Payment of the life pension continues for the remainder of the worker's life. As with all other forms of disability payments, life pension payments traditionally have not increased once a worker became eligible to receive them. As with total permanent disability, life pension payments end with the injured worker's death. (§ 4700.)

Payments of life pensions have historically been extremely modest. (Compare, *United States Fidelity v. Department of Industrial Relations* (1929) 207 Cal. 144, 145 [life pension weekly amount 61% of weekly partial disability payment.]; *Raphael v. Bloomfield* (2003) 113 Cal.App.4th 617, 625 [life pension weekly amount 50% of partial permanent disability payment.].) Because of the restrictive formula, life pension generally cannot be greater than about 60 percent of the average weekly earnings set in subdivision (a).

Life pensions have historically been calculated as one and one-half times the worker's average weekly earnings times the percentage of disability a worker has that exceeds 60 percent. (§ 4659, subd. (a) . See, Stats. 1917, ch. 586, § 9(b)(6).)[12] Average weekly earnings had a maximum of $107.69 until 1993. As of 1996, the maximum weekly earnings rose to $257.69.

B. Changes Made In AB 749.

In 2002, the legislature addressed the issue of long-term economic

[12] Stats 1917, ch. 586 is attached as Exhibit 7 to Petitioner's Motion for Judicial Notice

changes on benefit rates in an effort not to have to revisit benefit indemnity payment rates on a periodic basis.[13] (Footnote 7, *supra.*) AB 749 did three things, as relevant to this case:

- It raised the wage brackets for temporary total disability and created an escalator based on the SAWW escalator to automatically raise the wage brackets for injuries after January 1, 2007;
- It increased the maximum average weekly earning for life pensions to almost twice the rate set in 1996;
- It created an escalator based on changes in the SAWW to automatically increase the weekly payments of total permanent disability and life pension that are made after January 1, 2004, for injuries after January 1, 2003.[14]

Temporary Disability Wage Brackets. Continuing the historical increases in the average weekly wage brackets to set amounts, the legislature enacted increases to the "wage brackets" for injuries in calendar years 2003, 2004, 2005, and 2006, for temporary disability payments in the same manner as prior increases. (§ 4453, subds. (a)(8)-(10).) It also created a new mechanism to increase the wage bracket on an annual basis after 2006, without intervening legislative action, starting for injuries in 2007. (*Ibid.*) After 2006, each succeeding year's wage brackets are increased from the previous year based on the percentage change in the SAWW, starting with changes as of January 1, 2007. (§ 4453, subd. (a).)[15]

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[13] Shor and Marria, *supra,* p. 15.

[14] For a description of the multitude of other changes, see Shor and Marria, *supra*, generally. See also, AB 749, *supra.*

[15] The SAWW is more than a different method of tracking changes in the cost of living and therefore is often incorrectly referred to as a

Thus, the legislature set in place automatic increases in temporary disability payments by raising the wage brackets for total temporary disability that it otherwise would have had to revisit as it did in years past.

The legislature, however, did not implement similar automatic increases in partial permanent disability wage brackets with a SAWW. (See, § 4453(b)(7).) Instead, AB 749 raised the minimum and maximum weekly wage for seriously, but not totally, injured workers to the set amount of $405.00 per week for injuries on or after January 1, 2006.

Life Pension. The legislature left in place the traditional method of calculating life pension payments at one and one-half times a worker's weekly earnings for each percent of disability over 60 percent. The maximum weekly earning for life pension was raised to $515.38 from $257.69 for injuries after January 1, 2006. There is no further increase in the calculation of life pensions.

New Escalator By SAWW For Certain Payments. The legislature enacted a new mechanism, in subdivision (c), to automatically increase the "payment" for total permanent disability and life pension, on an annual basis based on percentage increases in the SAWW from the prior year, starting with payments made on or after January 1, 2004. No method for increasing weekly payment existed previously. Historically, payment for total permanent disability and life pension were based on a worker's earning on the date of the injury, and the payments never changed.

Because subdivision (c) potentially affected injured workers who

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COLA. To the extent that AB 749 was intended to the overcome some of the wage loss associated with the loss of earning capacity, the legislature chose to calculate the loss based on a "closer proxy to the rating schedule." (Rand Study, *supra,* p. 7.)

were eligible for the first time for total permanent disability payments in 2003, the legislature set the first date on which to calculate the percentage change in SAWW as January 1, 2004.

Thus, in AB 749, the legislature created automatic increases for only two situations: to increase temporary disability wage brackets and payments of total permanent disability and life pension. It did not make automatic increases for partial permanent disability. These increases based on the SAWW were brand-new; they represented a new increase in the payments due the most severely injured workers.

When AB 749 was being considered by the legislature, cost estimates were prepared by a number of organizations, the most credible being the Workers' Compensation Insurance Rating Bureau ("WCIRB"). As the final Assembly Committee report shows, the WCIRB submitted its cost estimate on the bill.[16] The WCIRB report shows that these estimates were based on the assumption "that these annual increases [for both total permanent disability and life pension] would commence the year following the year in which permanent total benefit [and life pension] payments began."[17] These costs estimates were then carried forward into the enrolled legislation. As the Assembly Committee Report demonstrates, the cost of the bill was significant to its passage. Two prior bills, SB 71 and AB 1176,

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[16] Assembly Committee on Insurance Report, February 6, 2002 ("Assembly Committee Report"), pp. 14-15, attached as Exhibit 8 to Petitioner's Motion for Judicial Notice.

[17] *To Those Requesting Evaluations Of Assembly Bill 749* (Workers' Compensation Insurance Rating Bureau, February 1, 2002), attached as Exhibit 9 to Petitioner's Motion for Judicial Notice ("WCIRB Letter"), Appendix, fn 1.

were vetoed because of concerns that the changes were too costly.[18]

C. Injured Worker's Claim

Real Party suffered from non-industrially related AIDS when he was injured in his employment. Real Party received $728.00 per week while he was temporarily disabled from January 20, 2004, through December 16, 2004, and from December 31, 2004, through October 19, 2006. He and his employer agreed that he was 69.5% partially permanently disabled from his industrial injury. Real Party's settlement with his employer provided for 422 weeks of permanent disability paid at $200.00 per week, the maximum payment allowed under section 4453, subdivision (b)(6)(B).

After Real Party settled his claim with his employer, he filed an application for Subsequent Injuries Benefit Trust Fund ("SIBTF") benefits pursuant to section 4751. SIBTF is funded and administered by the state to make sure that injured workers with prior disabilities are not unfairly disadvantaged. (Lab. Code, § 4751 et seq.) All of the injuries subject to payment by SIBTF involve injured workers whose combined disability exceeds 70 percent. (§ 4751.) This means that every case for SIBTF benefits includes a claim for life pension or total permanent disability.

On March 25, 2008, SIBTF and Real Party stipulated, *inter alia,* that October 20, 2006 (the P & S date) was the date of Real Party's first payment for permanent disability, and that Real Party had a total permanent disability "caused by the combination of both disabilities." (§ 4751.) The parties agreed that Real Party would receive from SIBTF a payment of $528.00 per week for total permanent disability as of October 20, 2006 ($728.00 less $200.00 paid by the insurance company).

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[18] Assembly Committee Report, *supra*, p. 14.

The dispute here arose after Real Party claimed the initial $728.00 weekly payment to which he had agreed and which started October 20, 2006, had to be increased to reflect annual changes in the SAWW from the date of his injury, January 20, 2004, to the date his permanent disability payments became due, October 20, 2006. The claimed increase was based on calculating a SAWW increase due on January 1, 2005, and then compounding this payment rate by changes in the SAWW as of January 1, 2006. SIBTF maintained that Real Party's initial payment as of October 20, 2006, was set by subdivision (b) [total permanent disability rates] and that increases to this payment amount only occurred for changes in the SAWW from that point forward. The first payment increase would be due on January 1, 2007.

D. Proceedings Below -- Board Decision

The Workers' Compensation Administrative Law Judge ("WCALJ") rejected Real Party's initial interpretation that all increases were to be calculated as of January 1, 2004, as "puzzling" and "improbable." He issued a Findings and Award ("F & A") concluding that the increase commenced as of the first January 1 after the date of injury, or January 1, 2005.[19] On February 13, 2009, the Board issued its Opinion and Decision after Reconsideration essentially affirming the F&A on the basis of its own opinion to award increases to Real Party's total permanent disability indemnity benefit as of date of injury.

The Board's reasoning in part was:

> First, we note that section 4659(c) provides that for injuries on or after January 1, 2003, where an employee becomes entitled to total

[19] Attached as Exhibit 10 to Petitioner's Motion for Judicial Notice.

> permanent disability indemnity or a life pension, that payment shall be increased annually commencing on January 1, 2004. We construe this to mean that each payment of total permanent disability indemnity or life pension that is received on or after January 1 following the date of injury shall be increased, no matter when the first such payment is received. This ensures that severely injured workers are protected from inflation, no matter when they received their first payment. In some cases there may be years of litigation before there is a determination that an employee is entitled to receive a life pension or total permanent disability indemnity award. In the case of a life pension, the first payment will ordinarily be made years after the date of injury. Nonetheless, the injured worker will have been protected against any inflation that may have ensued between the date of injury and the date of first payment of the life pension or total permanent disability indemnity.
>
> This holding is also consistent with the second sentence of section 4659(c). The state average weekly wage which is the basis of the increased payments is determined initially by data in the "calendar year preceeding the year in which the injury occurred," not the year in which the first payment is made. This is further evidence of legislative intent that the increased payments be calculated from the January 1 following the date of injury, not from the date of first payment.

Exhibit 1, *supra*, p. 3.

E. Proceedings Below -- Court of Appeal Decision

Petitioner sought review in the Court of Appeal on the ground that the increase in payment for total permanent disability should not be calculated until the January 1 after an injured worker first becomes entitled to a payment. Real Party argued that unless the increases started to apply immediately after the date of injury, the value of total permanent disability would be eroded by inflation because payment of this benefit sometimes does not start for many years. (Slip Op., p. 12.) The court rejected this argument for calculating the increases from the date of injury because the argument was not based on any statutory language and failed to give significance to the statute's every word, phrase and sentence. (Slip Op., pp.

12-13.)

The court issued a decision that rejected this interpretation as well as the Board's interpretation in favor of what it considered the plain meaning of the statute. As the court stated:

> [W]hen an injured worker's total permanent disability payment, or life pension payment is calculated, that payment is subject to a COLA starting from January 1, 2004, and every January 1, thereafter.

(Slip. Op., pg. 18.)

The court agreed with Petitioner that by using the words in section 4659, subdivision (c) "an employee who becomes entitled to receive a life pension or total permanent disability indemnity" meant "*when the right to total permanent disability compensation or a life pension arises*; and that is not until the worker's condition has become permanent and stationary for total permanent disability indemnity and for a life pension until after the number of weeks that permanent partial disability payments must be paid." (Slip Op., pp. 13-14. [Emphasis in original.])

The court, however, considered that permanent disability payments do not increase over time, as may occur with temporary disability payments. (See, § 4661.5.) The court further postulated that if increases start from the permanent and stationary date for total permanent disability indemnity, then a totally disabled worker whose injury takes years to stabilize suffers erosion in the real value of that benefit during the years of healing before it is paid. (Slip Op., pp. 16-17.)

The court rationalized that the legislature apparently tried to rectify the problem of total permanent disability payments and life pensions not keeping pace with inflation by adding subdivision (c) to Section 4659.

Since the legislature could have written the statute to include the date of injury or the permanent and stationary date or the date when life pension starts to commence but instead wrote "commencing January 1, 2004," then consequently it concluded the legislature must have intended January 1, 2004 as the start date of the first increase for all cases. (Slip Op., p. 17.) The court surmised that the date of January 1, 2004, "makes sense when you consider that the maximum and minimum rates within which the worker's average weekly earnings must fall were set back in 2002." (*Id.*, fn. 9.)[20]

ARGUMENT

I. AB 749'S LANGUAGE AND LEGISLATIVE HISTORY CONTROL THE INTERPRETATION OF SUBDIVISION (c), WHICH MUST BE READ SO AS NOT TO REACH ABSURD RESULTS.

This Court's primary task is to determine the legislature's intent in passing AB 749, if possible, by an analysis of the language in the statute itself, and the legislature's expressed intent:

> The fundamental rule of statutory construction is that a court should ascertain the intent of the legislature so as to effectuate the purpose of the law. In construing a statute, our first task is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms.

(*DuBois supra,* 5 Cal.4th at 387-388 (internal citations omitted); *Brodie,*

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[20] The court is factually incorrect on this point. While the last amendment to increase the minimum and maximum rates was passed in 2002, that amendment enacted a series of increases to take effect to minimum and maximum rates for total permanent disability indemnity and life pension through 2006 and, in the case of total permanent disability indemnity, to continue increasing indefinitely into the future. (See §§ 4453, subds. (a)(8)-(10), and 4659, subds. (a) and (b).)

supra, 40 Cal.4th at 1324.) When examining the language of a statute itself, consideration must be given to the context of the entire statute within which the language is used and the statutory scheme of which it is a part. (*Ibid.*) Of paramount importance is that the court not interpret a statute so as to reach absurd results. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 898.) The court should not presume "that the legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied." (*People v. Superior Court* (2000) 23 Cal.4th 183, 199; *Brodie, supra*, 40 Cal.4th at 1325.)

A statute should be interpreted based both on the meaning of all of its words, and within the context of the entire enactment and existing legislation. (*Moyer v. Workers' Compensation Appeals Board* (1973) 10 Cal.3d 222.) "Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Id.* at 230.) The legislature is presumed to know the context and current interpretation of the statutes it amends. (*Stone Street Capital, LLC v. California State Lottery Com'n* (2008) 165 Cal.App.4th 109, 118.)

> "We are required to give effect to statutes 'according to the usual, ordinary, import of the language employed in framing them.' " "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." "When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.

(*DuBois, supra*, 5 Cal.4th at 388 (internal citations omitted).)

If the meaning of the statute remains unclear after considering the plain language of the statute and its legislative history, "we proceed

cautiously to the third and final step of the interpretative process. We apply reason, practicality, and common sense to the language at hand." (*Ailanto Properties v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 583 (internal quotations and citations omitted).) To the extent that a statute is susceptible to more than one reasonable interpretation, the court "will consider '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 . . . .' " (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 921, quoting *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.) The court in using this "third step" needs to carefully consider the consequences that will flow from a particular interpretation. (*Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379, 1387.) The court's own view of the proper public policy "cannot supplant the intent of the legislature as expressed in a particular statute." (*Fuentes v. Workers' Compensation Appeals Board* (1976) 16 Cal.3d 1, 8.) If the legislature intends to change course and completely restructure a part of the workers' compensation scheme, it would say so. (*Elsner, supra*, 34 Cal.4th at 929.)

The legislature's authority is plenary, ". . . unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, ..." (Cal. Const., art. XIV, § 4.) "The purposes of the [Workers' Compensation] Act are several. It seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his workers'

injuries." (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354.) Thus, it is solely within the legislature's purview to design an adequate system of benefits.

The legislature's intent in AB 749 is best expressed as having four goals:

> AB 749 meets or exceeds the Governor's "four goals" as set forth in his veto messages of SB 71 and AB 1176 of 2001, noted below.
>
> * * *
>
> In identical veto messages, the Governor stated that a comprehensive bill to improve the system should have four goals: "(1) Providing a significant benefit increase for injured workers; (2) Promoting early and sustained return to work within the person's medical and work restrictions; (3) Implementing effective medical cost containment measures while assuring the quality of care provided; and (4) Targeting specific dollars to achieve the best outcomes for injured workers."

(Assembly Committee Report, *supra*, pgs, 14, 18.) Subdivision (c)'s language, when combined with its legislative history, does not support the court's determination that weekly payments are subject to an escalator retroactive to January 1, 2004, or the date of injury. Both interpretations lead to absurd results that change decades of settled law and are contrary to the balanced goals in legislative intent in AB 749 to create specific, targeted escalators.

II. SUBDIVISION (C)'S LANGUAGE COMPELS AN INTERPRETATION THAT INCREASES IN PAYMENTS FOR TOTAL PERMANENT DISABILITY AND LIFE PENSION BEGIN ONLY AFTER PAYMENTS BEGIN; THERE IS NO RETROSPECTIVE PAYMENT INCREASE.

A. The "Usual, Ordinary Import" Of Subdivision (c) Is That Increases To Payments Start In The Year After Payments Begin To Be Paid.

The controlling language here is:

> For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" as compared to the prior year. For purposes of this subdivision, "state average weekly wage" means the average weekly wage paid by employers to workers covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred.

Because three different views (by the Board, Court of Appeal, and Petitioner) of this subdivision have been advanced, the best way to understand what subdivision (c) means is to divide its sentences into the constituent phrases and apply a common sense interpretation. (*DuBois, supra*, 5 Cal.4th at 388.)

"For Injuries Occurring On Or After January 1, 2003": AB 749 was effective January 1, 2003. This phrase simply shows the legislature did not intend any retroactive application or any delayed application of the increases in payment amounts once payments commence.

"An Employee Who Becomes Entitled": The operative question here is when a worker is "entitled" to a total permanent disability or a life pension payment. A worker becomes "entitled" to total permanent disability when they are P & S. (See Slip Op, pp. 6-7, citing *Kopitske v. Workers' Compensation Appeals Board* (1999) 74 Cal.App.4th 623, 631.) For life pensions, entitlement "commence[s] when the employee's [partial] permanent disability payments end." (Slip Op., p. 7.) On this point, Petitioner agrees with the Court Of Appeal.

"To Receive A Life Pension Or Total Permanent Disability Indemnity As Set Forth In Subdivisions (a) and (b)": There is little question that this phrase simply limits SAWW increases to categories of permanent disability payments: total and life pension. Excluded from the SAWW increases are the vast majority of permanent disability payments: partial permanent disability.

"Shall Have That Payment Increased Annually Commencing On January 1, 2004, And Each January 1 Thereafter":

The most reasonable interpretation of subdivision (c), is that January 1, 2004, is the first possible date for any increased *payment* for those already eligible for total permanent disability (or life pension) for injuries after January 1, 2003. Thus, the first calculation for an increased payment is January 1, 2004, for workers already receiving one of the applicable benefits. The increase in the following January (2005) would apply to payments already being made. In this way, the payments once started ("entitled") would then keep up with changes in state average wages. The court and the Board saw this interpretation as a partial solution to the erosion of benefits. However, the question is not whether the interpretation is a partial solution; the question is whether the legislature intended such a

solution. The answer to this question is yes.

"By An Amount Equal To The Percentage Increase In The 'State Average Weekly Wage' As Compared To The Prior Year": No one disputes that once payments begin, the raise in payments each year is based on the increase in the state average weekly wage from the prior calendar year. Since 2004, the Division of Workers' Compensation of the Department of Industrial Relations has announced what the change in the SAWW will be for the coming year.[21]

"For Purposes Of This Subdivision, 'State Average Weekly Wage' Means The Average Weekly Wage Paid By Employers To Workers Covered By Unemployment Insurance As Reported By The United States Department Of Labor For California For The 12 Months Ending March 31 Of The Calendar Year Preceding The Year In Which The Injury Occurred.": This sentence simply defines the phrase "state average weekly wage." It does not mandate how the increased *payments* are calculated, which is covered in the prior sentence (for annual increases in payments after January 1, 2004). Rather, the definition of SAWW (both for temporary disability wage brackets and for later payments) provides a baseline from which to calculate subsequent changes in subsequent years and requires that the baseline be related to the year before the increased wage.[22] This is because the SAWW is expressed by the U.S. Department of

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[21] The SAWWs to date are set forth in column 3 of the chart at footnote 26, *infra*. The SAWW based increases for the temporary disability wage brackets were not calculated until 2007 for the prior year under section 4453, subdivision (a)(10). As noted in the Petition for Review, historically the state average weekly wage has increased by approximately 4% annually.

[22] The reference to the date of injury is likely a legacy provision, as the SAWW is defined first in section 4453, subdivision (a)(10).

Labor in dollar amounts. It does not create an entitlement to the increase for any specific period.

B. Neither The Board Nor The Court Of Appeal Correctly Interpreted Subdivision (c).

Subdivision (c)'s increase was not enacted with the intent to change life pension and total permanent disability rates at the outset of payment of these benefits, but to allow for increases over time to keep the benefit payment apace with wage increases. Interpreting "commencing on January 1, 2004" as the date the increase becomes available generally to the class of workers injured on or after January 1, 2003, is consistent with the plain language and solves the problem of rate stagnation during the period benefits pay out while avoiding absurd results.

1. The Board Erred In Determining Payment Amounts Start To Increase With The Date A Worker Is Injured As No Textual Support Exists For Such A Decision.

The Board's justification (as described by the Court of Appeal) for using the date of injury was that such an interpretation

> ensures that severely injured workers are protected from inflation, no matter when they receive their first payment. In some cases there may be years of litigation before there is a determination that an employee is entitled to receive a life pension or total permanent disability indemnity award. In the case of a life pension, the first payment will ordinarily be made years after the date of injury. Nonetheless, the injured worker will have been protected against any inflation that may have ensued between the date of injury and the date of first payment of the life pension or total permanent disability indemnity.

(Slip Op., pp. 3-4.) The court below easily and correctly disposed of this argument in the same way Petitioner would:

> Accordingly, we conclude that by using the words "an employee who becomes entitled to receive a life pension or total permanent disability indemnity" the Legislature meant *when the right to total permanent disability compensation or a life pension arises*; and that is not until the worker's condition has become permanent and stationary for total permanent disability indemnity and for a life pension until after the number of weeks that permanent partial disability payments must be paid.

(Slip Op., pp. 13-14.) Thus, the Board was incorrect that the increased payments were tied to the date of injury. The only time the date of injury is mentioned in subdivision (c) is for the effective date of subdivision (c) and the method of calculating a baseline average weekly wage. There is otherwise no textual support for the Board's determination that the first increase is calculated retroactively to the date of injury.

The Board incorrectly construed "this to mean that each payment of total permanent disability indemnity or life pension that is received on or after January 1 following the date of injury shall be increased, no matter when the first such payment is received." (Exhibit 1, p. 3.) As the Court of Appeal made clear, there is no textual support for this construction; "entitled" clearly refers to the date on which payment is to begin, whether immediately after the P & S date or immediately after the last partial permanent disability payment.

2. The Court of Appeal's Application Of The Plain Meaning Reaches An Absurd Result, One Not Intended By The Legislature.

The Court of Appeal, however, found that all payments increased with changes in the SAWW after January 1, 2004, through an incorrect interpretation of subdivision (c)'s "plain meaning" in light of the legislature's intent. This is the crux of where Petitioner parts company with the Court of Appeal. The court held:

Thus, as to the worker whose injury leads to total permanent disability that does not become permanent and stable for a number of years, setting the COLAs from the permanent and stationary date causes that worker to see his or her payment exposed to the ravages of inflation over time, eroding the real value of the benefits.

For the permanently disabled worker who is entitled to a life pension, i.e. one whose injury is more than 70 percent, but less than 100 percent, delaying until the first life pension payment the addition of the COLAs is inexorably worse. Taking for example a partially disabled worker who is injured after January 1, 2004, and whose permanent disability is 99 percent, the number of weeks to pay out permanent disability payments before the life pension starts is just over 17 years. (§ 4658, subd. (c).)

By adding subdivision (c) to section 4659 it appears that the Legislature has tried to rectify the problem of total permanent disability payments and life pensions not keeping pace with inflation. . . . .

We presume that the Legislature could have written the statute to include the date of injury, or the permanent and stationary date, or the date when the life pension starts to commence the COLAs, but the Legislature did not. Rather, the Legislature chose January 1, 2004, as the start date of the first COLA.[23] " ' "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." [Citations.]' " (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 639-640.) As a reviewing court we " '[have] no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.' [Citations.]" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.)

Thus, keeping in mind that workers' compensation statutes are to be liberally construed in favor of the injured worker (*Smith v. Workers' Comp. Appeals Bd* (2009) 46 Cal.4th 272, 277), we hold that when an injured worker's total permanent disability payment, or life pension payment is calculated, that payment is subject to a COLA starting from January 1, 2004, and every January 1, thereafter. Here, there is nothing in the language of section 4659, subdivision (c) that requires that COLAs start from the January 1

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[23] "This date makes sense when you consider that the maximum and minimum rates within which the worker's average weekly earnings must fall were set back in 2002."

following the date of injury.

(Slip Op., pp. 17-18.) In reality, the Court of Appeal did not interpret the subdivision's language; the Court of Appeal substituted its judgment of what it believed the legislative intent should have been in AB 749.[24] Increasing benefits was not the only goal of the legislature, and the Court of Appeal's tortured "plain meaning" of the January 1, 2004, date as a hard and fast date creates increases in the benefit payments not found in the legislative intent.

As the Assembly Committee Report demonstrates, the legislature had four goals in adopting AB 749, only one of which was to bring benefits more in line with increases in the change in wages. The Assembly Committee Report shows the sensitivity to the need to balance savings in the workers' compensation system with the offsetting benefit increase, and the legislature found a solution that met both demands. Nowhere does the legislature indicate that it intended to raise *all* benefits to keep up with the SAWW. The various increases for temporary disability wage brackets, and the total disability and life pension payments were not intended to raise *all* benefit payments for seriously injured workers in lock step with changes in the SAWW.

The increased cost acceptable to all parties included increased temporary disability brackets that eventually became indexed automatically, increased permanent disability brackets that do not become automatically adjusted, increases in maximum weekly earnings for life

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[24] Both the Board and the Court of Appeal also ignored this Court's reminder that the purpose of workers' compensation "is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability. . .." (*Dept. of Rehabilitation, supra*, 30 Cal.4th at 1289.)

pension, and a SAWW increase applied to specific benefit payments. The WCIRB evaluation, which the legislature had before it when it passed AB 749, is clear that the cost estimate for the SAWW increases at issue here was based on the fact that "these annual increases [for both total permanent disability and life pension] would commence the year following the year in which permanent total [and life pension] benefit payments began." This history shows that the legislature's intention was to provide for a more limited series of increases, tied to the change in the state average weekly wage from the first year payments began, into succeeding years. It did not intend to create the system envisioned by the Court of Appeal.

III. THE EFFECT OF THE DECISION IS INCONSISTENT WITH "REASON, PRACTICALITY, AND COMMON SENSE."

The error in the Court of Appeal's decision is also seen in its two-fold effects: (1) it created a double escalator where the legislature intended a partial one and (2) it radically altered the nature of life pension disability benefits without regard to the legislature's intent in AB 749. The Court of Appeal did not consider the absurdity of having an adjustment for increasing wages set to a fixed date in a system with rates that shift with the date of injury. Nor did the Court of Appeal consider the absurdity of having an entitlement to an increasing adjustment of a benefit established before the worker became entitled to the disability benefit or even injured.

A. The Court Has Created A Double Escalator For Benefit Payments For Total Disability.

The court failed to keep in mind that the legislature created one escalator for temporary disability benefit *rates* (§ 4453, subd. (a)), and a separate, second escalator for total permanent disability *payments* and life

pension *payments* at issue here (§ 4659, subd.(c)).[25] Since total permanent disability payments are directly linked to now ever increasing temporary disability wage brackets (§ 4659, subd. (b)), if the two escalators overlap, they result in double escalation.[26] To prevent double escalation, the legislature tied the second escalator to entitlement to actual payments of total permanent disability or life pension.

The following examples illustrate the unintended dramatic increases that result from the Decision. A maximum wage earner, such as Real Party, injured in 2004 who is totally and permanently disabled in 2006 is entitled to an initial payment of $728.00 per week ($1092.00 x 2/3 = $728.00). A similar worker injured in 2007 who is totally and permanently disabled in 2009 would be entitled to $881.66 per week (($1260.00 + 4.9% SAWW) x 2/3 = $881.66). These figures are based on the formula in section 4453,

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[25] See, quotation at footnote 21, *supra*.

[26] The following chart shows the increases in the maximum weekly wage from which both temporary disability and total permanent disability are calculated as well as the simultaneous increases from the SAWW in total disability payments based on the Court's interpretation. These figures are through 2010, the last date for which SAWW increases have been announced.

Year	Escalator 1 (§ 4453.) Increase to Maximum Wage Bracket by set amount through 2005 and then by % increase in SAWW	Escalator 2 (§ 4659, subd. (c).) Increase to Payment by % increase in SAWW
2003	903 (by statute)	N/A
2004	1092 (by statute)	0.0 %
2005	1260 (by statute)	1.91668 %
2006	1260 or 1.5 of 2006 SAWW, whichever is greater	4.00813 %
2007	2006 plus 4.95932 % SAWW	4.95932%
2008	2007 plus 3.93181 % SAWW	3.93181 %
2009	2008 plus 4.54843 % SAWW	4.54843 %
2010	2009 plus 2.9937 % SAWW	2.9937 %

subdivision (a).

Under the terms of section 4659, subdivision (c) these initial payments will increase. The sole issue to be decided is *when* the payments increase. Under Petitioner's interpretation, the initial payment amounts set by statute would continue until the January 1st *after* payments begin and thereafter be adjusted by increases in the SAWW for the prior year.

Under Respondent and Real Party's interpretation, the 2004 worker would have his or her *initial* payment raised for the increased SAWWs in 2005 and 2006 while the 2007 injured worker would have his or her *initial* payment raised for the increased SAWW in 2008 and 2009. In these two examples, the 2004 worker would initially receive $771.69 (instead of $728.00) and the 2007 worker would receive $958.00 (instead of $881.66) each week.

The court's interpretation results in radically different amounts: The 2004 worker would initially receive $771.69 per week in 2006, the same figure as Respondent reaches. However, the 2007 worker's initial weekly payment would be $1,066.23 in 2009 because two escalators are being used: (1) an escalator in the initial disability payment amount set under section 4659, subdivision (b) (which uses the temporary disability rate found in section 4453, subdivision (a), including increases from 2003 to 2006) and (2) the court-imposed escalator that increases payments under the SAWW during the same time period.

The 2007 injured worker's initial payment is 38% higher than the 2004 injured worker's payment using the court's interpretation. The disparity between the 2004 and 2007 workers under Respondent's method of calculating the increased payment is 24%; under Petitioner's

interpretation it is 18% percent.[27] This disparity flows directly from the double escalator the court proscribed, which will continue to drive the disparity well into the future because essentially payments for total permanent disability will increase at twice the SAWW: once based on section 4453, subdivision (a) and once based on the court's interpretation of section 4659, subdivision (c).

The disparity is more dramatically apparent for future injuries. A maximum wage worker, such as Real Party, injured and temporarily disabled in 2012 would be eligible for a temporary disability rate of approximately $1,082.24 (($1,480.35 (max weekly wage in 2010) + 2011 SAWW + 2012 SAWW) x 2/3).[28] If this worker were P & S in 2014, then under Petitioner's view, the worker would continue to receive this rate until January 1, 2015. In January 2015, the payment rate would be adjusted by the 2014 SAWW. Under Respondent's view, the initial payment rate would be increased by the 2013 and 2014 SAWW. However, under the court's view, the initial rate would be $1,621.13 because the temporary disability rate is adjusted based on *all* the SAWWs after 2004; in this example, the difference in the initial payments between the court's interpretation and Petitioner's is 50%.

B. The Effect Of The Court's And The Board's Decisions Radically Changes The Nature Of Life Pensions.

The origins of life pensions in California's workers' compensation system is not generally explained; no decision has done more than describe

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[27] Petitioner's calculations are consistent with the aggregate change in the SAWW from 2003 to 2009, which was 18.6%.

[28] The figure used for the estimated increased SAWW for the future is the 50 year historic average increase, 4.73%.

life pension as a form of permanent disability. (*Nuelle v. Workers' Compensation Appeals Board* (1979) 92 Cal. App. 3d 239, 245-249; *Stoiber v. Workers' Compensation Appeals Board* (1992) 5 Cal. App. 4th 1403, 1409-10; *New Amsterdam Casualty Company v. Industrial Accident Commission* (1951)108 Cal. App. 2d 502, 506-509.) The first life pension provision appeared in 1917. (Stats. 1917, ch.586, § 9(b)(6).) As seen above, life pensions provide a portion, often quite small, of the offset for lost earning capacity for a seriously injured worker as a lifetime guarantee. Both the Board's and the Court of Appeal's decisions commit the error of radically changing the nature of the life pension. This is further evidence that both decisions failed to correctly interpret the legislature's intent in AB 749.

"Permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity." (*Brodie, supra*, 40 Cal.4th at 1320.) In AB 749, the legislature raised the partial permanent disability wage brackets for four succeeding years. The legislature could have implemented a SAWW increase for succeeding years and clearly chose not to do so. The legislature also did not choose to index partial permanent disability payments with an escalator. This means, for example, that a worker injured in 2006, who is permanent and stationary in 2007 with a 99% partial permanent disability rating would not receive more than $270 per week for any of the 897.25 weeks of disability (17.25 years). This shows that the legislature's concern for keeping benefits from eroding was not universal. That is, the legislature's intent to increase benefits had limitations.

The Board's and the Court of Appeal's interpretation of section 4659, subdivision (c) results in a dramatic increase in life pension payments

unwarranted in the partial permanent disability situation.

The worker described above would receive their first life pension payment sometime in 2024. The first life pension payment, calculated using only the formula in subdivision (a) , would be $301.50. Under the Board's analysis (starting the increase with the date of injury), the first payment would be $ 613.27, assuming an annual increase in the SAWW of 4% over the 17 years (103 percent increase). Under the Court of Appeal's formula (using January 1, 2004, two years before the injury), the first payment would be $ 650.45 (116 percent increase). Life pensions under both views have been transformed from a limited supplement for seriously, but not totally disabled workers into a new form of disability benefit payment, one that increases during the period when the injured worker is receiving partial disability payments, which the legislature chose not to increase. Yet, the legislature never signaled in AB 749 an intention to change the nature of life pension from a supplement to a primary, lifetime disability payment. It is not for the Board or the Court of Appeal to interpret the section 4659 with such far reaching consequences in the absence of clear legislative intent. (*Gonzales v. Oregon* (2006) 546 U.S. 243, 246; *Whitman v. American Trucking Association* (2001) 531 U.S. 457, 468; *State Building and Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, 323 ["Courts do not lightly conclude that substantial statutory changes are intended or accomplished by legislative misdirection. At the federal level, the United States Supreme Court has observed that " 'Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions-it does not, one might say, hide elephants in mouseholes.'"]

CONCLUSION

As seen above, this case is most easily resolved by the plain and usual interpretation of the words in the first sentence of subdivision (c). The SAWW escalator for *payments* can only apply to payments made once a worker is entitled to payment and the next January 1 has passed. This escalator is the one intended by the legislature as a balance between benefit and cost. Both the Court of Appeal and the Board substituted their policy judgment for the legislature's and reached absurd results. For these reasons, this Court should rule that the SAWW escalator in subdivision (c) starts only on the January 1 after a worker is entitled to receive the first payment of total permanent disability or life pension.

Dated: 23 April 2010

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT

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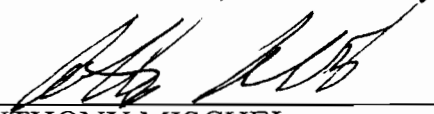

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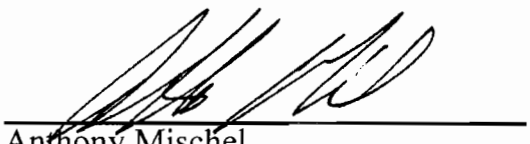
CERTIFICATE OF LENGTH OF BRIEF

The undersigned appellate counsel certifies that this brief, complies with California Rules of Court, Rule 8.204(c). The brief is written in 13-point Times New Roman type and has 9,520 words (exclusive of the cover page, Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance and signature block).



Anthony Mischel

PROOF OF SERVICE

(Code Civ. Proc. §§ 1011, 1013, 1013a, 2015.5)

Case Name: John C. Duncan, Director of Industrial Relations, as Administrator of the Subsequent Injuries Benefits Trust Fund of the State of California vs. Workers' Compensation Appeals Board of the State of California, et al.

Case No.: S179194

Court of Appeal Case Number: H034040
WCAB Case Number: ADJ1510738 (SJO 0251902)

1. At the time of service I was over 18 years of age and not a party to this action.

2. My business address is 320 w. Fourth Street, Suite 600, Los Angeles, CA 90013

3. On **April , 2010** I served the **PETITIONER'S OPENING BRIEF ON THE MERITS** on the persons listed below by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) **By personal service**. I personally delivered the documents to the persons at the addresses listed below. For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office.

(B) **By United States mail**. I enclosed the documents in a sealed envelope or package addressed to the persons at the address below and:

(1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

(a) ☐ and the sealed envelope was prepared for Certified Mail, Return Receipt Requested, with appropriate fees for such service fully prepaid.

(b) ☐ and the sealed envelope was prepared for Registered Mail, with appropriate fees for such service fully prepaid.

(2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

(a) ☐ and the sealed envelope was prepared for Certified Mail, Return Receipt Requested, with appropriate fees for such service fully prepaid.

(b) ☐ and the sealed envelope was prepared for Registered Mail, with appropriate fees for such service fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

(C) **By overnight delivery**:

(1) ☒ I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

(2) ☐ The documents were delivered to an authorized courier or driver authorized to receive documents by an overnight delivery carrier, in an envelope or package designated by the carrier with delivery fees paid or provided for, addressed to the person to whom it is to be served, at the office address as last given by that person on the document filed in the cause and served on the party making service.

(D) **By fax transmission**. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

(E) **By e-mail or electronic transmission**. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after

transmission, any electronic message or other indication that the transmission was unsuccessful.

(F) **By messenger service.** I served the documents by placing then in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service.

TYPE OF SERVICE	ADDRESS/FAX NO. (IF APPLICABLE)	NATURE OF INTEREST
C1	Supreme Court of California Office of the Clerk, First Floor 350 McAllister Street San Francisco, CA 94102) (13 copies plus Original)	Court
C1	Workers' Compensation Appeals Board P.O. Box 429459 San Francisco, CA 94142-9459 Attention: Reconsideration Unit (2 copies)	Respondent
C1	Arthur Johnson, Esq. Butts & Johnson 481 N. First Street San Jose, CA 95112	Attorney for XYZZX SJO2 Real Party In Interest
C1	California Court of Appeal 6th Appellate District 333 W. Santa Clara Street, #1060 San Jose, CA 95113-1717	Lower Court

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: April 23, 2010

Claudia Prado, Declarant