

SUPREME COURT COPY

Supreme Court No. S179194
WCAB Case No.: ADJ1510738/SJO 0251902
Sixth App. Dist.No. H034040

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,)

v.)

THE WORKERS' COMPENSATION)
APPEALS BOARD OF THE STATE)
OF CALIFORNIA,)

Respondent.)

XYZZX SJO2,)

Real Party in Interest.)
_____)

**SUPREME COURT
FILED**

MAY 20 2010

Frederick K. Onirich Clerk

Deputy

ANSWER

**PETITIONER'S OPENING BRIEF
ON THE MERITS**

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**REPLY TO PETITIONER'S OPENING BRIEF
ON THE MERITS**

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**State of California
Supreme Court
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, rule 14.5**

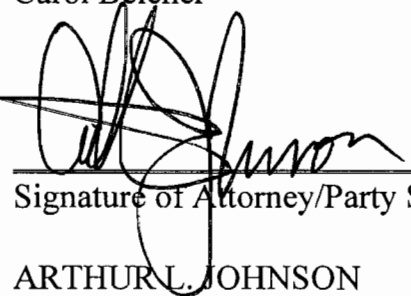
Supreme Court Case Caption:

Case Name: *JOHN C. DUNCAN, DIRECTOR of INDUSTRIAL RELATIONS, as ADMINISTRATOR of the SUBSEQUENT INJURIES BENEFITS TRUST FUND of the STATE OF CALIFORNIA v. WORKERS' COMPENSATION APPEALS BOARD; XYZZX SJ02, real party in interest*

Supreme Court Case Number: S179194

Interested entities or persons are listed below:

XYZZX SJ02	Real Party in Interest
Arthur L. Johnson	Attorney for Real Party in Interest
Subsequent Injuries Benefits Trust Fund ("SIBTF")	Petitioner
Carol Belcher	Attorney for Petitioner



Signature of Attorney/Party Submitting Form

ARTHUR L. JOHNSON
Attorney for Applicant
Butts and Johnson
481 N. First Street
San Jose, CA 95112

State Bar No: 36415

Party Represented: XYZZX SJ02, Real party in interest

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XYZZX SJO2,)Supreme Court No: S179194
Petitioner,)WCAB Case No.: ADJ1510738/
) SJO 0251902
v.)Sixth App. Dist. No. H034040
)
JOHN C. DUNCAN, DIRECTOR of) REPLY TO PETITIONER'S
INDUSTRIAL RELATIONS, as) OPENING BRIEF ON THE
ADMINISTRATOR of the) MERITS
SUBSEQUENT INJURIES BENEFITS)
TRUST FUND and the STATE OF)
CALIFORNIA)
)
Respondents.)
_____)

**TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE
ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME
COURT:**

Real Party in Interest, XYZZX SJO2, hereby replies to the Opening
Brief on the Merits filed by Petitioner/Defendants JOHN C. DUNCAN,
DIRECTOR of INDUSTRIAL RELATIONS, as ADMINISTRATOR of
the SUBSEQUENT INJURIES BENEFITS TRUST FUND of the STATE
OF CALIFORNIA.

SUPREME COURT ISSUE PRESENTED

Case issue presented per Grant of Petition for Review states:

“When do cost-of-living adjustments under Labor Code Section 4659, subdivision (c), for payments for total permanent disability and life pensions begin?”

PRELIMINARY STATEMENT

Petitioner in this matter is the Subsequent Injuries Benefit Trust Fund (hereafter SIBTF).

Respondent (Real Party in Interest) is XYZZX, applicant before the Workers’ Compensation Appeals Board in the case below and the prevailing party at the Court of Appeals on the issues presented herein.

The issues (from the Respondent’s standpoint), for consideration by this Court are:

- 1) Should the plain meaning of the statute (L.C. Section 4659(c)) be followed so that the benefit payment rate (as contrasted to the actual benefit payment) be “increased annually commencing January 1, 2004, and each January thereafter, by an amount equal to the percentage increase in the “State Average Weekly Wage” [hereinafter “SAWW”] as compared to the prior year”.

- 2) Petitioner SIBTF contends (See Opening Brief, page 4) that the DCA Opinion below has created a “double escalator” for permanent total disability benefits. There is no “double escalator” applicable in this case (or any other SAWW case), pursuant to the decision of the Sixth District Court of Appeal below. This is a “fiction” invented by the petitioner SIBTF as will be shown in the statutory “analysis” section herein.
- 3) There is no “retroactive” increase in benefits as complained of by Petitioner SIBTF. Rather, the benefit payment rate for total permanent disability is recalculated annually commencing January 1, 2004 to account for increases in the State Average Weekly Wage. No one is entitled to any payment of benefit before the date of injury for that particular individual. The benefit rate to which such person is entitled is statutorily recalculated annually to keep pace with any increase in the State Average Weekly Wage. That is not a retroactive payment of any benefit. (It is similar to Social Security increases which occur annually, whether one is receiving Social Security or is not yet qualified to receive Social Security benefits). The same is true with SAWW

annualized increases. The annual recalculation of benefit increase is removed from the political considerations of the State Legislature, and transferred to a formula of adjustment annually tied to the State Average Weekly Wage. (See again L.C. Section 4659(c)).

RELEVANT LABOR CODE STATUTES APPLICABLE

- 1) Temporary total disability rate is tied to SAWW increases commencing January 1, 2007. L.C. Section 4453(a)(10) states:

“Commencing on January 1, 2007, and each January 1 thereafter, the limits specified in this paragraph shall be increased by an amount equal to the percentage increase in the state average weekly wage as compared to the prior year.”

- 2) Permanent total disability is paid at the temporary total disability rate. L.C. Section 4659(b) states:

“If the permanent disability is total, the indemnity based upon the average weekly earnings determined under Section 4453 shall be paid during the remainder of life.”

- 3) Permanent total disability is tied to the SAWW the same as temporary total disability. L.C. Section 4659(c) states:

“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 employees 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."

- 4) Permanent total disability payments begin immediately on the ending of temporary total disability. L.C. Section 4650(b) states:

"If the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity. When the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656, and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid."

STATUTORY ANALYSIS

The payment rate for permanent total disability is directly tied to the temporary total payment rate (L.C. Section 4659(b)).

The payment rate for temporary total has an annual SAWW adjustment commencing 1/1/07. (L.C. Section 4453(a)(10))

The payment rate for permanent total has an annual SAWW adjustment commencing 1/1/04. (L.C. Section 4659(c))

For injuries between 2003 and 2007, permanent total SAWW increases occur via L.C. Section 4659(c). (As total temporary SAWW increases only begin 1/1/07)

For injuries 1/1/07 and after, permanent total benefits increase pursuant to the SAWW commencing the January 1st following date of injury, and are annually adjusted thereafter. (This because there has already been an increase annually in the TTD rate commencing 1/1/07 via L.C. Section 4453(a)(10), and thus, the requirement of L.C. Section 4659(c) for a SAWW annual increase has already occurred up to the date of injury.)

There thus is no "double escalator" as the PTD rate is statutorily tied to the TTD rate with a SAWW escalator already in place for the TTD rate until the date of injury.

TTD payment rate is fixed at date of injury. Beginning January 1st after date of injury, the PTD rate takes a SAWW increase per L.C. Section 4659(c).

Thus, the statutory scheme is (commencing 1/1/07) a uniform payment rate for total disability - whether that disability be temporary total or permanent total. The payment rate increases annually for each per the SAWW.

Obviously, for either TTD or PTD, no benefit is payable until 1) the date of injury occurs and 2) the disability is found to be total (either temporary total or permanent total).

The temporary total rate increases per the SAWW each year up to the date of injury. Commencing with the date of injury, the PTD rate increases annually per the SAWW.

There is thus a "seamless transition" between the temporary total and the permanent total rate - each annually increases per the SAWW.

There is no "double escalator" or "double COLA" - as the statutory scheme is uniformly transitional. The temporary total rate increases based on the SAWW prior to the date of injury occurring. The permanent total rate increases after the date of injury based on yearly SAWW adjustments.

What SIBTF contends for is a "flat lining" of permanent total benefits until the P&S date (date of payment of PTD), which may be years after the date of injury (if one is so seriously injured that it takes years to heal).

Likewise, as to life pension rates, SIBTF contends for a “flat lining” of such rates from 2004 to the “date of payment” - which for a partial permanent disability payout, the life pension payment may not begin until 20 or 30 years into the future.

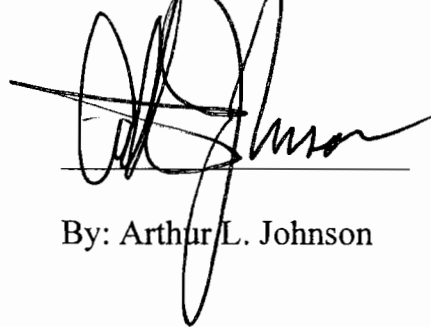
CONCLUSION

Thus, the issue presented thus is not the issue as stated by SIBTF. It is rather, whether permanent total disability benefits should “flatline” to the date of payment, as contended for by SIBTF or whether - as contended by Respondent - total disability payments (TTD or PTD) and life pensions should be indexed per the plain meaning of the statutes to keep pace with inflation.

Dated: May 19, 2010

Respectfully Submitted,

BUTTS & JOHNSON

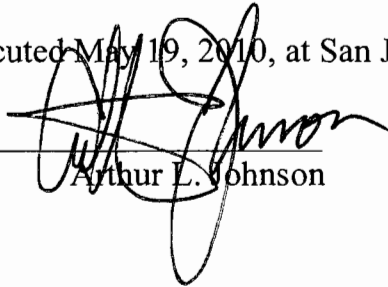
A handwritten signature in black ink, appearing to read 'Arthur L. Johnson', is written over a horizontal line. The signature is stylized and somewhat cursive.

By: Arthur L. Johnson

VERIFICATION

Under penalty of perjury, I declare the truth of the following:

The contents of the foregoing *REPLY TO PETITIONER'S OPENING BRIEF ON THE MERITS*, are true and correct of my own knowledge except as to matters therein stated on information and belief, and as to those matters, I believe them to be true and correct; I make this verification as attorney for XYZZXSJO2, because the facts set forth in the Answer are within my knowledge and because as attorney for XYZZXSJO2 I have greater knowledge of the facts. Executed May 19, 2010, at San Jose, California.

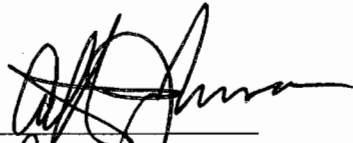


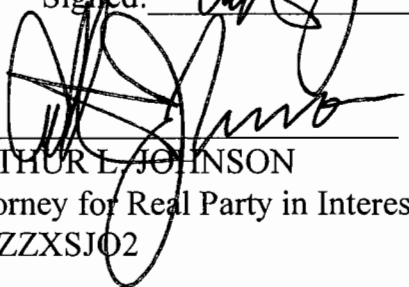
Arthur L. Johnson

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 14(c)(1) or 33(b)(1) of the California Rules of Court, the enclosed *REPLY TO PETITIONER'S OPENING BRIEF ON THE MERITS* is produced using 13-point Roman type and contains approximately 2224 words, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: May 19, 2010

Signed: 



ARTHUR L. JOHNSON
Attorney for Real Party in Interest,
XYZZXSJ02

Re: John C. Duncan, Director of Industrial Relations, as Administrator of the SIBTF of the State of California v. WCAB (XYZZX SJO2)

PROOF OF SERVICE BY MAIL
[C.C.P. 1013a]

I am a citizen of the United States and employed in the City of San Jose, County of Santa Clara.

I am over the age of 18 years and not a party to the within action. My business address is Butts & Johnson, 481 North First Street, San Jose, California 95112.

On May 19, 2010, I delivered the following document(s):

REPLY TO PETITIONER'S OPENING BRIEF ON THE MERITS
Supreme Court No. S179194
WCAB Case No.: ADJ1510738/SJO 0251902
Sixth App. Dist.No. H034040

on the interested parties to said action, by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mailbox at San Jose, California, addressed as follows:

SEE ATTACHMENT

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

Executed on May 19, 2010, at San Jose, California.


Chris Hahn

ATTACHED ADDRESS LIST TO PROOF OF SERVICE

**Supreme Court of California
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**Workers' Compensation Appeals Board
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P.O. Box 429459
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