ORIGINAL

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))

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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ISSUE PRESENTED[1]

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. (Lab. Code, § 4659, subd. (c).[2])

INTRODUCTION

Petitioner argued in his Opening Brief on the Merits that increases in weekly benefit payments for permanent total disabilities and life pensions should only be calculated starting the year after the date of the first payment for the benefit. The Court of Appeal's decision found that all increases were to be calculated as of January 1, 2004. Real Party in Interest's ("Real Party") Answer Brief on the Merits ("Answer Brief"[3]) addresses the single issue of whether the Court of Appeal's decision created a double escalator for payment increases of certain disability payments. Real Party left unaddressed the question of whether the Court of Appeal's decision has so drastically changed one of the two affected benefits that its decision is not a

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[1] Real Party In Interest seeks to change the issues presented to be as stated in its Answer Brief on the Merits. Rule of Court 8.504(c) provides that a real party may add issues in its answer to the petition for review, and Rule 8.516 limits the parties to the issues raised in the petition for review and answer, as well as any issues "fairly included in the petition or answer." (See also Rule 8.520(b)(2)(B).) To the extent, Real Party is seeking to expand the issues before the Court to include issues not fairly included in the Petition, Petitioner objects and requests the Court not consider them.

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

[3] Real Party has denoted its answer brief as a "Reply Brief on the Merits." (See, Rule 8.520(a)(2).) To avoid the obvious confusion with this Reply Brief on the Merits, Petitioner will refer to Real Party's brief in conformity with the Rules of Court.

proper interpretation of the affected sections of the Labor Code.

Real Party's argument that there is no double escalator is a plea that the Court rewrite section 4659 so as to create a seamless increase in benefits, similar to cost of living adjustments for social security benefits, by calculating payment increases under subdivision (c) from the worker's date of injury. However, to reach this result, a court would have to rewrite the Labor Code, not interpret it. The Court of Appeals declined to do so, and this Court should as well.

ARGUMENT

I. THE COURT OF APPEALS DID CREATE A DOUBLE ESCALATOR BY DECREEING THAT PAYMENT INCREASES FOR BENEFITS ARE ALL CALCULATED FROM JANUARY 1, 2004.

Real Party's argument is that the Court of Appeal did not create a double escalator because "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." (Answer Brief, pg. 6.)[4] The argument continues that the increases in the temporary total disability wage brackets after January 1, 2007, based on the SAWW are the same increases as the payments described in subdivision (c). Thus, there is only one series of increases based on the SAWW: first to the temporary disability maximum (to the day of injury) and second to the payment rate for permanent total disability starting with the date of injury. "There is thus a "seamless transition" between the

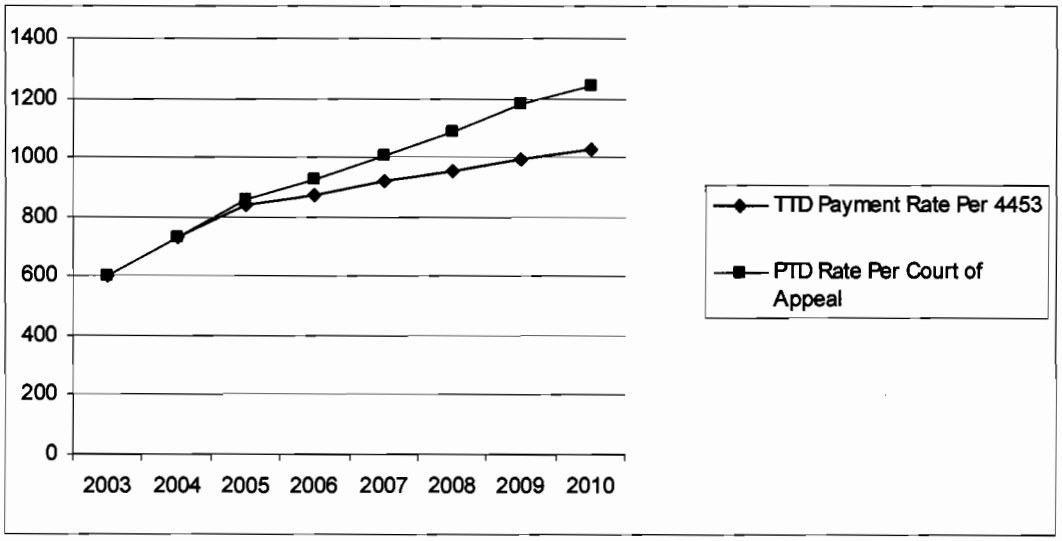
[4] As Real Party uses the terms, "PTD" refers to permanent total disability (§ 4659, subd. (b).); "TTD" refers to temporary total disability (§ 4453, subd. (a); "SAWW" refers to the state average weekly wage (§ 4453, subd (a)(10), § 4659, subd. (c).).

temporary total and the permanent total rate - each annually increases per the SAWW." (*Id.*, at pg. 7.)

This argument is a repackaging of Real Party's argument to the Court of Appeal that increases for payments of permanent total disability are calculated starting with the date of injury, an argument accepted by Respondent Workers' Compensation Appeals Board ("WCAB"). However, the Court of Appeal rejected this argument because subdivision (c) does not set the date of injury as the operative date for calculating increases in payments. If the legislature intended increases in payments to start being calculated as of the date of injury, it would have said so. Petitioner agrees with the Court of Appeal on this point. The Court of Appeal, however, found that the only possible operative date from which to calculate the SAWW was a fixed date of January 1, 2004. The Court of Appeal incorrectly found this "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." (Slip Op., fn. 9.)

The Court of Appeal overlooked another reasonable interpretation of the statutory language and missed the critical fact that starting in 2004, maximum earning rates for temporary total disability rise each year (faster than the SAWW) until January 1, 2007, when temporary total disability rates increase based on the prior year's SAWW. For permanent total disability, the initial rate at which payments are calculated rises each year; when a worker becomes totally permanently disabled, the Court of Appeal held that the initial payment rate is calculated *also* taking into account changes in the SAWW during the same period temporary total disability rates have been increasing. This is a double escalator. The ever increasing rate can be seen in Figure 1, which compares the increase in the temporary

total disability payment rate over time with the increase over time based on the Court of Appeal's application of the SAWW always starting on January 1, 2004.



As the chart shows, the rate of increase of the permanent total disability benefit is higher than the temporary total disability benefit increases, even after January 1, 2007, when both payments are indexed to the same SAWW calculation. Thus, the double escalator caused by a fixed date for all increases to the total permanent disability benefit can be seen. The only way to avoid the effect of the Court of Appeal's decision is to rewrite it to conform to what Real Party wants and to the WCAB's decision, which the Court of Appeal correctly rejected.

II. REAL PARTY'S PLAIN MEANING ARGUMENT IS A STATEMENT OF WHAT IT BELIEVES THE LEGISLATURE SHOULD HAVE DONE.

The argument advanced by Real Party as the "plain meaning" of subdivision (c) is not based on the statute's language but on what Real Party believes the legislature should have done. Real Party sees the most effective method of delivering benefits as a "seamless transition" from

temporary benefits to permanent; indeed, it might be considered good policy to make benefits "similar to Social Security increases [sic] which occur annually, whether one is receiving Social Security or is not yet qualified to receive Social Security benefits. . ." (Answer Brief, pg. 3.) However, as pointed out in Petitioner's Opening Brief, this policy decision is for the legislature, not the courts, to make.

Real Party has not addressed the fact that the legislature adopted subdivision (c) as part of a delicate balance of only increasing some benefits to offset the savings created elsewhere in AB 749. Had the legislature sought to turn total permanent disability into a payment system similar to social security benefits, it would have done so. As the Court of Appeal recognized, however, the legislature did not.

Real Party accuses Petitioner of arguing for a "flat lining" of benefit payments between the date of injury and the January 1st after the first total permanent disability payment, "which may be years after the date of injury." (Answer Brief, pg. 7.) There is nothing before the Court to show that years may pass between a date of injury and a determination that a worker's condition is total permanent disability. Even if that were the case, Real Party's implication that the legislature intended the worker's benefits to keep up with inflation is belied by two undeniable rules in California's workers' compensation system.

First, under all of the analyses presented to the Court, for the two years following an injury while a worker receives temporary total disability, there is no increase in payments. (§ 4661.5.) Second, depending on the date of injury, a worker is limited to specific numbers of weeks of temporary disability payments (currently 104 weeks within five years of an injury). (§ 4656.) Thus, it is settled that temporary total disability benefits

do not rise for at least two years, and in some cases may cease altogether before a determination of total permanent disability. The legislature has not created a system similar to social security benefits, therefore. In fact, the legislature has already created a system in which some "flat lining" occurs.

III. REAL PARTY HAS LEFT THE FUNDAMENTAL CHANGES TO LIFE PENSION CALCULATIONS UNADDRESSED EVEN THOUGH THESE CALCULATIONS DEMONSTRATE THE ABSURD RESULT THE COURT OF APPEALS REACHED.

Left unaddressed is the more serious consequence on life pensions stemming from both Real Party's date of injury argument and the Court of Appeal's date of January 1, 2004. While Real Party's "seamless transition" argument might hold facial appeal for the movement from temporary to total permanent disability, the appeal disappears when the interpretation of the same subdivision is applied to life pensions. As the Opening Brief argued, the Court of Appeal's analysis (and Real Party's) can result in more than doubling the life pension payment before the first pension check is issued. Real Party's "seamless transition" analysis fails to account for the sudden rise in a worker's benefit sometimes decades after the date of injury.

While the case before the Court concerns a worker with total permanent disability, and thus not eligible for life pension following the last payment of partial permanent disability, the interpretation of how to calculate life pension payment increases is the same for both total permanent disability and life pensions. The effects of the different analyses, as previously demonstrated, are more dramatic for life pensions; and the absurdity of Real Party's and the Court of Appeal's analyses are more easily seen when applied to life pensions.

CONCLUSION

This is not a case of deciding what policy is best: should workers' compensation benefits be similar to social security benefits or be flat lined to lower the cost of workers' compensation. This is not a case in which the Court should rewrite legislation to fits its model of a more ideal system. This is a case to determine what the legislature intended to do when it created its first escalator of specific classes of temporary and permanent disability benefits. As argued in Petitioner's Opening Brief, the legislature balanced increases in benefits with cost savings and created a more modest set of targeted increases. If Real Party wishes to see a social security-like system, it needs to address those concerns to the legislature.

Dated: 9 June 2010

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT

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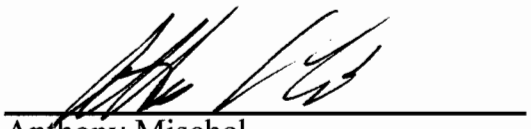
CERTIFICATE OF LENGTH OF BRIEF

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 1,830 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 June 9, **2010** I served the **PETITIONER'S REPLY 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
B2	Workers' Compensation Appeals Board P.O. Box 429459 San Francisco, CA 94142-9459 Attention: Reconsideration Unit (2 copies)	Respondent
B2	Arthur Johnson, Esq. Butts & Johnson 481 N. First Street San Jose, CA 95112	Attorney for XYZZX SJO2 Real Party In Interest
B2	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: June 9, 2010

Claudia Prado, Declarant