COPY

S179194

Case No. S_____

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.: S_____. (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

PETITION FOR REVIEW AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

Vanessa L. Holton, Chief Counsel (SB# 111613)
Steven A. McGinty, Asst. Chief Counsel (SB# 170606)
Carol Belcher, Staff Counsel (SB# 136417)
Anthony Mischel, Staff Counsel (SB# 83834)
Jesse N. Rosen, Staff Counsel (SB# 92885)
Department of Industrial Relations
Office of the Director-Legal Unit
320 W. 4th Street, Suite 600
Los Angeles, California 90013

Telephone: (213) 576-7725 Fax: (213) 576-7735

Attorneys for Petitioner Director of Industrial Relations as Administrator of the Subsequent Injuries Benefits Trust Fund

Supreme Court
State of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Case No.: S_____.

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

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.

Please check the applicable box:

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 14.5(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest

Please attach additional sheets with Entity or Person information if necessary.

Anthony Mischel /cb
Signature of Attorney/Party Submitting Form

Printed Name: Anthony Mischel
Address: 320 W. Fourth Street, Los Angeles, CA 90013

State Bar No: 83834
Party Represented: Subsequent Injuries Benefits Trust Fund

IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

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.: S_____. PETITION FOR REVIEW Appellate Decision: H034040 (WCAB Case No. ADJ1510738 (SJO 0251902))

INTRODUCTION

This case concerns a worker's compensation payment escalator the Legislature created in 2002 as part of a larger package of benefit increases designed to reduce the erosion of workers' compensation benefits over time. Review should be granted because the Court of Appeal misconstrued the plain meaning of Labor Code section 4659, subdivision (c) in such a way as to impose two separate escalators during the same period of time, which leads to an absurd result and unintended consequences. The State fund involved here (Subsequent Injuries Benefit Trust Fund) and ratepayers will experience payment increases of over 35 percent in a short period; and benefit payments will quickly exceed the wages upon which they are based. The Court's review is needed now to correct this absurd and costly result.

PETITION

1. *Standing.* Petitioner is the Administrator of the Subsequent Injuries Benefits Trust Fund ("SIBTF"). He has standing to bring this action because the Court of

Appeal's decision is final and because as Administrator of the SIBTF he is liable to pay the award issued below. SIBTF exists to pay additional compensation to seriously injured employees who at the time of their industrial injury had a preexisting permanent partial disability. In order to be eligible for SIBTF benefits, the combination of the permanent disability from the industrial injury and that of the preexisting permanent partial disability must be equal to or greater than 70%. (Lab. Code, § 4751.) As a result, all claims involving SIBTF involve payments of a life pension or total permanent disability indemnity. (Lab. Code, §§ 4659, subd. (a) and subd. (b).)

2. *Venue.* Jurisdiction exists in this Court as the decision challenged is a final decision of a Court of Appeal.

3. *Timeliness.* The decision being challenged was filed on November 25, 2009, and was final on December 25, 2009. This petition is being filed within ten days of finality.

4. *Procedural History.* The history of the underlying workers' compensation case is correctly set forth in the decision being challenged ("Decision") at pages 2 through 4. (Attached to this Petition as exhibit 1.) These facts are not contested and are incorporated here by reference.

5. On March 30, 2009, Petitioner sought a petition for writ of review in the Court of Appeal to challenge the decision by Respondent Workers' Compensation Appeals Board ("WCAB"). The Court of Appeal issued its writ on June 30, 2009. The Court issued the Decision on November 25, 2009. On December 10, 2009, Petitioner sought rehearing in the Court of Appeal on the ground that the Court adopted the position of a non party without giving the parties notice of it intention to do so. Rehearing was denied on December 17, 2009.

6. *Erroneous decision.* The Decision incorrectly holds that Labor Code section 4659, subdivision (c) mandates that payments for total permanent disability are increased before *the first payment* is made by taking into account the percentage changes in the

State Average Weekly Wage from January 1, 2004, regardless of the date when the injured employee first becomes entitled to the payment (Petitioner's position) or the date of the employee's injury (Respondent's and Real Party In Interest's position):

> [W]e 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. (Slip Op., pg 18.)

7. This increased payment is fixed to a specific date rather than to an event such as the employee's payment entitlement date or injury date. The Decision means that total permanent disability payments will increase *before* an employee is injured or determined medically eligible to receive the benefit. Because the temporary disability rates that determine the payments due an employee ultimately found to be totally permanently disabled continue to rise independently from January 1, 2003 onward, the Decision creates a double escalator in benefit payments that the Legislature never intended. The error was caused by the Court's misunderstanding of the plain meaning of the underlying statute and of how workers' compensation benefits are calculated.

8. The Decision not only contradicts the WCAB's decision in the instant case, which Petitioner challenged as also incorrect, but it also contradicts another non-precedential decision of the WCAB's in which the WCAB agreed with Petitioner's legal position. Thus, there are at least three known decisions (two from the WCAB and one from the Court of Appeal) each of which interprets Labor Code section 4659, subdivision (c) differently.[1]

9. *Grounds for review.* Petitioner requests review because the Decision's consequences will dramatically increase the cost of serious injuries borne by the ratepayers and Petitioner and the State; this raises an important issue of law. (Cal. Rules

---

[1] Neither decision of the WCAB is precedential but they do provide an indication of the WCAB's contemporaneous interpretation of the law it administers. (Griffith v. WCAB (1989) 209 Cal.App.3d 1260, 1264 fn. 2.)

of Court, 8.500, subd. (b)(1).) While the precise cost of such an increase is not currently in the record, Petitioner is informed and believes, and upon such information and belief alleges that the Decision's cost will result in an increase in the amount paid for lifetime payments that is more than the Legislature intended. These costs will continue to rise. Waiting for contrary authority from another Court of Appeal will not be effective because money paid to employees under this erroneous decision will not be recouped.

10. In support of this Petition, Petitioner incorporates the allegations made in this Petition, the Memorandum of Points and Authorities, the Decision, and any other evidence filed in this cause.

WHEREFORE, Petitioner prays:

1. The Court grant review of this Petition and after hearing all arguments issue a decision finding that the Court of Appeal misinterpreted Labor Code section 4659, subdivision (c).

2. The Court issue a decision that interprets Labor Code section 4659, subdivision (c) correctly to apply increases in the benefit payment to be calculated starting on the date on which an injured employee is entitled to receive either a life pension or a total permanent disability award.

3. That Petitioner be granted such further and other relief as may be just and appropriate.

Dated: 4 January 2010

Respectfully submitted,
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR – LEGAL UNIT
VANESSA L. HOLTON, Chief Counsel
STEVEN A. MCGINTY, Asst. Chief Counsel
ANTHONY MISCHEL, Staff Counsel
CAROL BELCHER, Staff Counsel
JESSE N. ROSEN Staff Counsel

Anthony Mischel /cb

ANTHONY MISCHEL
Attorneys for Petitioner, John C. Duncan, Director of Industrial Relations as Administrator of the Subsequent Injuries Benefits Trust Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE PRESENTED

Whether the Legislature intended all annual increases to lifetime-payable workers' compensation benefits for employees injured on or after January 1, 2003 to be calculated retroactively to January 1, 2004 or prospectively only from the date those employees become entitled to such benefits.

INTRODUCTION

Labor Code section 4659 subdivision (c) provides that employees injured on or after January 1, 2003, who become entitled to total permanent disability payments "shall have that payment increased annually commencing on January 1, 2004, and each January 1st thereafter, by an amount equal to the percentage increase in the state average weekly wage."[2] The Court concluded that the increased payment is to be calculated retroactively to January 1, 2004, for all injured employees rather than from the date when the injured employee becomes "eligible for [such] benefits" or was injured. By fixing January 1, 2004 as the date when *payment* increases start for all cases, the Court misconstrued the plain meaning of the statute and reached an absurd result. For example, the Court's interpretation will apply increases to an injured employee's permanent disability payments *before* the injury and *before* a determination that an injured employee is medically eligible to receive payments. Review is necessary because the Court's interpretation is absurd and will dramatically raise the cost of providing these benefits contrary to the statute's language and plain meaning.

BACKGROUND

A. Traditional Methods of Setting Disability Payments Prior to Assembly Bill 749.

There are three types of disability payments an injured employee may become

[2] All further statutory references are to the Labor Code. All further references to the state average weekly wage will be to the "SAWW."

entitled to: (1) temporary disability; (2) permanent disability; and (3) life pension. Temporary disability is paid to compensate an injured employee for lost wages during medical recuperation from injury. (*Granado v. WCAB* (1968) 69 Cal.2d 399, 403-404; *Medrano v WCAB* (2008) 167 Cal.App.4th 56, 64.) Permanent disability is paid to compensate an injured employee for the long term, residual effects of his injury once the injured employee has attained maximum medical recovery. (*Department of Rehabilitation v WCAB (Lauher)* (2003) 30 Cal. 4th 1281, at 1291 ("*Dept. of Rehabilitation*").) Life pension is further compensation for injured employees with partial permanent disabilities between 70%-99% after their weekly payments of permanent disability end. (§ 4659, subd. (a).)

Temporary disability payments begin after an injury and continue until the employee either returns to work or reaches a medically stable condition, known as permanent and stationary ("P & S"). (*Granado, supra; Medrano, supra.*) Temporary disability is calculated as two-thirds of the employee's average weekly earnings (§§ 4653 and 4654) at date of injury, within maximum and minimum amounts set by the Legislature ("wage brackets"). (§ 4453, subd. (a).) With minor exception, temporary disability payments once fixed by referral to the employee's date of injury, historically have not increased.

The right to permanent disability payments commences when the employee becomes P & S, when the nature and degree of the employee's permanent disability is determined. (*Dept. of Rehabilitation,sup ra*, 30 Cal.4th at 1292; *LeBoeuf v. WCAB* (1983) 34 Cal.3d 234.) Payments for partial permanent disability are paid for a set number of weeks, as determined by statute; the weekly payments do not change. (§ 4658.) For employees who are 100% disabled (total permanent disability), they are paid the temporary disability payment amount for life. (§ 4659, subd. (b).) Without exception, payments for permanent disability historically were calculated based on an employee's date of injury and not increased thereafter. This includes such life time

payments as total permanent disability.

The life pension payments for life commence when the employee's payment of partial permanent disability ends. It continues for the remainder of the employee's life. (§ 4659, subd. (a).) As with permanent disability payments, life pension payments historically have not increased once an employee became eligible to receive them.

The initial payment rate for temporary disability, partial permanent disability, and life pensions has been calculated based on the injured employee's earnings on the date of injury within minimum and maximum limits. The above described methods for calculating payments have been in place for decades. (*Grossmont Hospital v. WCAB* (1997) 59 Cal.App.4th 1348, 1353-1354; *West v. IAC* (1947) 79 Cal.App.2d 711, 721-724; *Argonaut Ins. Co. v. IAC (Montana)* (1962) 57 Cal.2d 589.)

B. Assembly Bill 749.

In 2002, the Legislature addressed the issue of long-term economic changes on benefit rates in an effort not to have to revisit benefit indemnity on a periodic basis.[3] As the Legislature had done previously, it enacted increases to the "wage brackets" for injuries in calendar years 2003, 2004, 2005, and 2006, respectively. (§ 4453, subds. (a)(8)-(10).)[4] 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. After 2006, each succeeding year's wage brackets are henceforth increased from the previous year based on the percentage change in the SAWW calculated as of January 1,

[3] 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; Stats 2002 ch 6 57 (AB 749), ch 866 9 (AB 486).

[4] "Wage brackets" refers to the minimum and maximum wage limits used to determine benefits.

2007.

(§ 4453, subd. (a).) Thus, the Legislature set in place automatic increases in temporary disability payments that it otherwise would have had to revisit as it has done in years past.

Additionally, the Legislature enacted a new mechanism, in subdivision (c) of Section 4659 to automatically increase the "payment" for total permanent disability on an annual basis based on percentage increases in the SAWW. Such payment increases did not exist previously; payments for total permanent disability and life pension were based on an employee's earnings on the date of their injury and never changed.

Because subdivision (c) potentially affected injured employees who 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. These increases based on the SAWW were brand-new; they represented a new increase in the payments due the most severely injured employees. However, the Real Party in Interest raised a question as to *when* the increase took effect for employees injured after 2003.

The Court of Appeal was presented by the parties with two alternative interpretations for when benefit payment increases authorized by the Legislature began, yet chose a third interpretation. Petitioner argued that the increased benefit payments began on the January 1st after the first payment is due to the injured employee, based on changes in the SAWW in the prior calendar year. For those injured employees eligible for first payment in 2003, the payment increase started on January 1, 2004. Respondent WCAB and Real Party in Interest argued that the increased payment calculation was based on the increased SAWW as of the year following the date of injury.[5]

[5] The Court of Appeal noted that the Workers' Compensation Administrative Law Judge ("WCALJ") found an interpretation that the increase starts on January 1, 2004 "somewhat puzzling" and that it was "highly improbable that the Legislature intended to grant costs of living increases to persons not yet injured." The Court of Appeal reached the identical interpretation that the WCALJ rejected but failed to address the issue he had

Approximately three weeks prior to oral argument, an amicus, California Association of Applicant's Attorneys ("CAAA"), proposed that *all* increases be retroactive to January 1, 2004. No party adopted this interpretation and no party had the opportunity to brief this issue before the matter was submitted. The Court appears to have adopted the amicus' interpretation with no prior notice to the parties. This interpretation was wrong as well as absurd for the reasons described below.

STATEMENT OF THE CASE

The Court's description of the administrative procedures below does not have to be repeated here. In brief, Applicant, who suffered from non-industrially related AIDS, was injured in his employment. Applicant 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. Applicant's settlement with his employer provided for $200.00 per week in permanent disability benefits for 422 weeks.

After the Applicant settled his claim with his employer, he filed an application for SIBTF benefits pursuant to section 4751. On March 25, 2008, SIBTF and Applicant stipulated that Applicant's January 20, 2004, injury resulted in a 69.5% industrial permanent disability, which became P&S on October 20, 2006; that October 20, 2006, was also the date of his first payment for permanent disability; and, that Applicant's previous permanent disability as a result of AIDS combined with his industrial disability resulted in a combined total permanent disability of 100%. Applicant would receive from SIBTF a payment of $528.00 per week in total permanent disability as of October 20, 2006 ($728.00 less $200.00 paid by the insurance company).

The dispute here arose after Applicant claimed the initial $728.00 weekly payment (to which he had agreed) that started October 20, 2006, had to be increased to reflect

---

raised of granting retroactive payment increases to people not yet injured. (*infra.*)

annual changes in the SAWW during his period of temporary disability (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 the increase as of January 1, 2005, and then compounding the rate due on January 1, 2006. SIBTF maintained that Applicant's initial payment as of October 20, 2006, was set by section 4659, subdivision (b) [total permanent disability rates] and increases to this payment amount were to be paid only for changes in the SAWW from that point forward. The first payment increase would be due on January 1, 2007.

On February 13, 2009, the WCAB issued its Opinion and Decision after Reconsideration that the increase commences as of the first January 1 after the date of injury (i.e., January 1, 2005).[6] SIBTF sought review in the Court of Appeal on the ground that the increase in payment was not calculated until the January 1st after the first payment began. After argument, the Court issued a decision that rejected the interpretations by the parties in favor of what it considered the plain meaning of the statute, which interpretation the Workers' Compensation Administrative Law Judge ("WCALJ') who heard the matter found "puzzling" and "improbable:"

> [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.

The damage that the Decision creates is almost incalculable as it dramatically and disproportionately increases employees' benefit payments to the point that payments will rapidly exceed their weekly wages at the time of their injury.

Subdivision (c) of Section 4659 reads:

> For injuries occurring on or after January 1, 2003, an employee who

[6] This determination by the WCAB was the opposite of the one in reached in *Ramon Loya v. Arrowhead Brass Products, State Compensation Insurance Fund* (WCAB No. LAO 0856917) (January 22, 2008 Panel Decision), 2008 Cal.Wrk. Comp. P.D. Lexis 87, in which it was found that payment increases only apply effective the January 1st after the injured employee actually began to receive a life pension.

> 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.

Respondent and 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. (Exhibit 1, pg. 12.) The Court rejected this argument for starting the increases after 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. (Exhibit 1, pgs. 12-13.)

The Court agreed with Petitioner 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 employee'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 [sic] must be paid." (Exhibit 1, pgs. 13-14. [Emphasis in original.])

However, the Court rejected Petitioner's further argument that the Legislature used the word "payment" to mean something other than the rate determined for the respective benefit under other sections and noted that in the dictionary, "payment" is a synonym for "rate." (Exhibit 1., pg. 14.) The Court 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 are set from the permanent and stationary date for total permanent disability indemnity, then a totally disabled employee whose injury takes years to stabilize suffers erosion in the real value of that benefit

during the years of healing before it is paid. (Exhibit 1, pgs. 16-17.)

The Court rationalized that since 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 and since the Legislature could have written the statute to include date of injury or permanent and stationary date or 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. (Exhibit 1, pg. 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 employee's average weekly earnings must fall were set back in 2002." (*Id.*, fn. 9.)[7] The Court completely ignored the fact that the Legislature enacted increases in temporary disability, on which total permanent disability payments are based, starting in 2003 and reaching indefinitely into the future.

ARGUMENT

REVIEW IS NECESSARY BECAUSE THE COURT CREATED A DOUBLE ESCALATION OF PAYMENTS, WHICH WILL RESULT IN DRAMATICALY INCREASED COSTS NOT INTENDED BY THE LEGISLATURE.

Subdivision (c) of section 4659 sets the conditions for increasing weekly payments for two classes of benefits for employees whose injuries occurred on or after January 1, 2003: those who become "entitled to receive a life pension and those who become entitled to total permanent disability indemnity." Increases are calculated based on the SAWW, as defined in subdivision (c). Once an employee is eligible to receive total

[7] The Court is factually incorrect on this point. While the latest 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).)

permanent disability indemnity, subdivision (c) sets the increase based on the change in the SAWW "in the prior year." When the Court determined that all payments for total permanent disability are to be increased based on changes to the SAWW after January 1 2004, it failed to take into account that temporary disability payments are already indexed to changes in the SAWW. As seen below, this decision causes dramatic changes in payment amounts over time.

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 (§ 4659, subd.(c), at issue here. Since total permanent disability payments are directly linked to temporary disability rates (§ 4659, subd. (b)), if the two escalators overlap, they result in double escalation.[8] To prevent double escalation, the Legislature tied the second escalator to entitlement to prospective payments of total permanent disability.

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

[8] 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 %

week (1092.00 x 2/3 = $728.00). A similar employee 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, 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 began and thereafter be adjusted by increases in the SAWW for the prior year.

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

The Court's interpretation results in radically different amounts: The 2004 employee would initially receive $771.69 per week in 2006, the same figure as Respondent reaches. However, the 2007 employee'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 employee's initial payment is 38% higher than the 2004 injured employee's payment using the Court's interpretation. The disparity between the 2004 and 2007 employees under Respondent's method of calculating the increased payment is

24%; under Petitioner's interpretation it is 18% percent.[9] 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 employee 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[10]) x 2/3). If this employee were P & S in 2014, then under Petitioner's view, the employee would continue to receive this rate until January 1, 2015. In January 2015, the payment rate would 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%.

THE COURT MISCONSTRUED THE PLAIN MEANING OF SECTION 4659, SUBDIVISION (C) BECAUSE IT DID NOT FULLY CONSIDER THE STRUCTURE OF PAYMENTS IN THE WORKERS' COMPENSATION SYSTEM.

1. The Court Should Interpret Section 4659, Subdivision (c) Using Settled Principles of Statutory Construction, Including The Obligation Not To Reach Absurd Results.

The Court and Petitioner interpreted most of subdivision (c) of section 4659

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

[10] The figure used for the estimated increased SAWW for the future is the 50 year historic average increase, 4.73%. See, *Loya*, supra at fn. 6.

similarly. The Court found that the phrase "an employee who becomes entitled to receive . . . " refers to the date on which the employee becomes eligible for total permanent disability payments or life pension payments. This is correct. In the workers' compensation system an injured employee becomes entitled to receive total permanent disability payments on their P & S date. (*Dept. of Rehabilitation,sup ra*, 30 Cal.4th at 1292.) An injured employee is entitled to receive life pension payments on the day after the last payment of partial permanent disability has been paid. (§ 4659, subd. (a).)

Where the Court erred in its interpretation was the next part of the sentence ("shall have that payment increased annually commencing on January 1, 2004 and each January thereafter . . ."). The Court erroneously divorced the word "payment" from the entitlement date and irrevocably set all increases to January 1, 2004, regardless of the date payment begins. A more reasonable interpretation would have been to interpret January 1, 2004, as the first date for any increased payment for those already eligible for total permanent disability. In doing so, the Court nullified the plain meaning of the phrase "entitled to receive." Thus, the Court's interpretation must be rejected as absurd because the Decision results in increases before payment is ever due, before an employee is entitled to a payment, and even before the employee is injured.

This Court's primary task requires that it determine the Legislature's intent in passing AB 749 through the language in the statute, the Legislature's expressed intent, and administrative interpretations of the statute:

> 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 v. Workers' Compensation Appeals Board* (1993) 5 Cal.4th 382, 387-388 (internal citations omitted).) 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. (*Id.*) 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.)

A statute should be interpreted based both on giving meaning to all of its words, within the context of the entire enactment. (*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.) Part of this context is the presumption that the Legislature is aware of how the statute is currently interpreted. (*Stone Street Capital, LLC v. California State Lottery Com'n* (2008) 165 Cal.App.4th 109, 118.)

The Court failed to adequately address these principles in reaching its determination that the increases in permanent disability payments are perpetually calculated retroactively to January 1, 2004. It interpreted section 4659, subdivision (c) without regard to increases in the underlying temporary disability rate and thereby created the double escalator described above. In doing so, it reached an absurd result. Instead, the Legislature created an escalator to address the erosion of benefits to some, but not all, permanently disabled employees. The Court failed to take into account the context within which this escalator was created and its decision is contrary to the established payment structures of the workers' compensation system.

2. The Court's Statutory Interpretation of Section 4659, Subdivision (c) Reaches An Absurd Result; the Creation of a Double Escalator Must be Rejected.

The essence of the Court's error is its belief that "shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter. . ." required a fixed date back to which all future increases in payments were to be made. As seen above, this interpretation ignores other increases and results in a doubling effect. The sole basis for such an interpretation is the Court's view that the Legislature could have used more precise language. However, the statute's language is not so imprecise

that it cannot be interpreted without reaching an absurd result.

The Court ignored the fact that indexing payments once they become due is a new type of increase in benefits. Had the Legislature intended as dramatic an increase as the Court found, it would surely have indicated such an intent in the statute. Yet, as the Court itself noted, the legislative history of AB 749 is silent. The Court ignored the Legislature's silence and reached a result never clearly intended.

An interpretation more consistent with all of AB 749 is that the reference to January 1, 2004, was to set the first date on which a SAWW had to be calculated for those payments of total permanent disability that first became due in 2003. Without creating the initial date, all participants would have been at a loss on when to first make or receive an increased payment once total permanent disability began. Thus, January 1, 2004, is simply the first of "each January 1 thereafter." (§ 4659, subd. (c).) In this way, the Legislature created a mechanism in subdivision (c) for increases in payments for total permanent disability calculated on an annual basis as of the January 1st after payments were to begin. This interpretation avoids the double escalator that the Court created.

3. The Court's Interpretation Is Based On A Misunderstanding Of All The Provisions Of AB 749.

The Court's ultimate rational for creating a double escalator was its belief that temporary disability rates were not changed after 2002. (Exhibit 1, pg. 17, n. 9) This matters because temporary disability rates determine total permanent disability payments; they are tied together by statute as total permanent disability payments are initially calculated with reference to them. (§ 4569, subd. (b).) The Court's rationale is wrong, however, because it is factually inaccurate. The Legislature did in fact increase temporary disability rates specifically by statute, and in AB 749 created a new system of annual increases in the rates that does not require legislative action. That is, for the first time, temporary disability rates automatically increased each year, thereby creating its own escalator to offset increases in the state's wage scale. The Court did not take into

account this change in setting temporary disability rates, which sets the amount the initial payment for total permanent disability.

Similarly the Court ignored the administrative law judge's characterization of the interpretation the Court ultimately gave to section 4659, subdivision (c) as "puzzling." If the administrative agency charged with the administration of a statutory scheme found an interpretation puzzling, this is further support that the Court's interpretation leads to an incorrect and absurd result.

CONCLUSION

The inevitable result of the Court's interpretation of mandated increases for total permanent disability payments will result in a doubly compounding increase in benefits that is both financially overwhelming and legally absurd. It makes sense that the Legislature would create a system that allows temporary disability payments to keep up with changes in the wages paid to California employees. It makes sense that the Legislature would ensure that the more severely injured employees' paid-for-life benefits would rise once they became due. However, it makes no sense that the Legislature, having never before created a mechanism to increase these payments, would in the first instance have created a double escalator. Thus, for all the foregoing reasons, the Court

should grant the Petition for Writ of Review and the WCAB's decision should be vacated and annulled.

Dated: 4 January 2010

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT
VANESSA L. HOLTON, Chief Counsel
STEVEN A. MCGINTY, Asst. Chief Counsel
ANTHONY MISCHEL, Staff Counsel
CAROL BELCHER, Staff Counsel
JESSE N. ROSEN, Staff Counsel

Anthony Mischel /CB

ANTHONY MISCHEL
Attorneys for Petitioner

CERTIFICATION OF WORD COUNT

Counsel for Petitioner Director John C. Duncan, California Department of Industrial Relations, certifies that pursuant to California Rules of Court, rule 8.204(C)(1), there are 5,095 words in Petitioner's Memorandum of Points And Authorities In Support of Petition for Review including footnotes, relying on the word count function of Microsoft Word, the computer word processing program used to prepare this brief.

Dated: 4 January 2010

Respectfully submitted,

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR-LEGAL UNIT
VANESSA L. HOLTON, Chief Counsel
STEVEN A. MCGINTY, Asst. Chief Counsel
ANTHONY MISCHEL, Staff Counsel
CAROL BELCHER, Staff Counsel
JESSE N. ROSEN, Staff Counsel

Anthony Mischel /cs

ANTHONY MISCHEL
Attorneys for Petitioner

VERIFICATION

I, Anthony Mischel, I am one of the attorneys for the Department of Industrial Relations, Office of the Director-Legal Unit, a public agency of the State of California in this matter.

I have read the attached **PETITION FOR REVIEW AND POINTS AND AUTHORITIES IN SUPPORT THEREOF**. I am informed and believe that the matters therein asserted are true and based on such information and belief, allege that said **PETITION FOR REVIEW AND POINTS AND AUTHORITIES IN SUPPORT THEREOF** is true.

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

Executed on January 4, 2010, at Los Angeles, California.

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.: S_____.

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 455 Golden Gate Avenue, Suite 9516, San Francisco, CA 94102.

3. On **January 4, 2010** I served the PETITION FOR REVIEW AND POINTS AND AUTHORITIES IN SUPPORT THEREOF 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
A	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: January 4, 2010

Janette Balais, Declarant

COPY

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOHN C. DUNCAN, DIRECTOR OF INDUSTRIAL RELATIONS, AS ADMINISTRATOR, etc., Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and XYZZX SJO2, Respondents.	H034040 (W.C.A.B. No.ADJ1510738) WRIT OF REVIEW

John Duncan, administrator of the Subsequent Injuries Benefit Trust Fund of the State of California[1] (SIBTF) petitions this court for review of a decision of the Workers' Compensation Appeals Board, which construed Labor Code section 4659, subdivision (c) to mean that the cost of living adjustment to total permanent disability payments and life

---

[1] Labor Code section 4751, provides in relevant part: "If an employee who is permanently partially disabled receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the last injury and the previous disability or impairment is a permanent disability equal to 70 percent or more of total, he shall be paid in addition to the compensation due under this code for the permanent partial disability caused by the last injury compensation for the remainder of the combined permanent disability existing after the last injury . . . ." The payment for the combined disability is made by the SIBTF. (*Subsequent Injuries Fund v. Workmen's Comp. App. Bd.* (1970) 2 Cal.3d 56, 59.)

pensions are retroactive to the date of injury, no matter when the first payment is actually received. We granted two requests for leave to file briefs as amici curiae.[2]

In this case of first impression, we hold that the cost of living adjustments pursuant to Labor Code section 4659, subdivision (c), for life pensions and total permanent disability indemnity, are added to those payments, per the words of the statute, starting January 1, 2004, and every January 1 thereafter. Accordingly, we annul the decision of the Workers' Compensation Appeals Board.

Background

On or about June 19, 2007, an injured worker (the Worker) and his employer's insurance company settled the Worker's claim for an industrial injury that occurred on January 20, 2004. The parties stipulated that the Worker's injury became permanent and stationary on October 20, 2006; and that the industrial injuries caused permanent disability of 69.5 percent for which permanent disability indemnity was payable at the rate of $200 per week beginning October 20, 2006, for a period of 437 weeks. The Worker had received temporary disability benefits from 2004 to 2006.[3] However, because the Worker had a pre-existing disability caused by Hepatitis B and his HIV positive status, the Worker submitted a claim to the SIBTF about a month after he settled with his employer.

On or about March 25, 2008, SIBTF and the Worker stipulated that the Worker's January 20, 2004 injury resulted in a 69.5 percent industrial permanent disability, which became permanent and stationary on October 20, 2006; that October 20, 2006, was the date of his first payment for permanent disability; and that the Worker's previous permanent disability combined with his industrial disability resulted in a combined total

---

[2] One amicus brief was filed in support of real party in interest by the California Applicants' Attorneys Association. The other amicus brief was filed in support of the SIBTF by the County of Los Angeles.

[3] The Worker was paid temporary disability from 1/20/04 to 12/16/04 and then 12/31/04 through 10/19/06 at the rate of $728 per week.

permanent disability of 100 percent. Accordingly, the worker would receive $528 weekly payments for total permanent disability as of October 20, 2006 ($728 less $200 paid by the insurance company for Worker's employer), for 422 weeks, and thereafter $728 weekly for life.

Subsequently, it appears that a dispute arose after the Worker claimed the initial $728 weekly rate that started October 20, 2006, had to be increased by annual changes in the state average weekly wage starting from the date of his injury -- January 20, 2004 -- to the date payments became due -- October 20, 2006.

On July 15, 2008, the Workers' Compensation administrative law judge (WCJ) issued a FINDINGS and AWARD against the SIBTF. Specifically, the WCJ found that by failing to implement Labor Code section 4659, subdivision (c) in a timely fashion, the SIBTF delayed payments to the Worker in the sum of $3,585.56; and that increased payments to the Worker should have begun on January 1, 2005. The WCJ based these findings on an interpretation of Labor Code section 4659, the application of which to the facts of the case the WCJ found "somewhat puzzling."

After the SIBTF appealed to the Workers' Compensation Appeals Board (WCAB), the WCAB issued its OPINION AND DECISION. The WCAB held that Labor Code section 4659, subdivision (c) "provides that for injuries on or after January 1, 2003, where an employee becomes entitled to total 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 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."

Following the WCAB's decision, the SIBTF petitioned this court for a writ of review, which this court granted on June 30, 2009.[4]

Appellate Review

All judicial powers under the workers' compensation system are vested in the WCAB, subject only to the review by the appellate courts of this state. (Lab. Code, §§ 111, 5301, 5950.)[5] WCJs hear and decide compensation claims as trial judges, and the WCAB functions as an appellate body. The WCAB has the power to reject the factual findings of a WCJ and to make its own findings of fact, and may affirm, rescind, alter or amend a WCJ's decision or award. (§§ 5906, 5908.5; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281.)

Our review of a decision by the WCAB is limited. "As to findings of fact, we defer to the [WCAB]'s findings if supported by substantial evidence. (§ 5952 [fn. omitted]; [citation].)" (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1290 (*Department of Rehabilitation*).) The WCAB has extensive expertise in interpreting and applying the workers' compensation scheme. Thus, in reviewing a workers' compensation provision, we give great weight to the WCAB's interpretation unless it contravenes legislative intent as evidenced by clear and unambiguous statutory language. (*E & J Gallo Winery v. Workers' Comp. Appeals Bd.* (2005) 134 Cal.App.4th 1536, 1543.) "While we accord ' "significant respect" ' to the [WCAB]'s interpretation of statutes in the area of workers' compensation [citation], we

---

[4] At the same time, this court granted the SIBTF's request for this court to take judicial notice of certain legislative history of Labor Code section 4659.

[5] Unless noted, all statutory references are to the Labor Code.

subject the [WCAB]'s conclusions of law to de novo review [citations]." (*Department of Rehabilitation*, *supra*, 30 Cal.4th at p. 1290.)

Background on Workers' Compensation

As our sister court in the Fourth Appellate District explained, "Workers' compensation is not an area of the law that routinely gives rise to California appellate court decisions." (*Gamble v. Workers' Comp. Appeals Bd.* (2006) 143 Cal.App.4th 71, 78 (*Gamble*).)

As did the *Gamble* court, we believe that a brief synopsis of this state's workers' compensation scheme and its development, an overview of the common terminology, and a discussion of the relevant legal provisions are necessary prerequisites to the resolution of this case.

" 'More than 90 years ago, our Legislature was directed to "create and enforce a liability on the part of all employers to compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party." [Citation.] . . . The Legislature complied with this directive by enacting various provisions of the Labor Code.' [Citation.]" (*Gamble*, *supra*, 143 Cal.App.4th at p. 78.)

" ' "This system attempts to assure employees of an expeditious remedy both adequate and certain, independent of any fault on the part of employees and employers. At the same time, it provides the employer with a liability which is determinable within defined limits. It represents a philosophy that industry, as a cost of doing business, should provide for the care and rehabilitation of workers disabled by work injuries. In this way, society supports the program as a[n] integral element of commerce and industry, rather than through tax-supported plans." [Citation.]' [Citation.]" (*Gamble*, *supra*, at pp. 78-79.)

" 'In creating and maintaining a system of workers' compensation, the people of this state made an important public policy decision and transformed how we address

workplace injuries. It should be remembered, however, that the purpose of an award under the workers' compensation scheme " '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. . . . In short the award transfers a portion of the loss suffered by the disabled employee from him and his dependents to the consuming public. . . . Complete protection is not afforded the employee from disability because this would constitute an invitation to malinger or to be careless on the job as he would then lose nothing in assuming a disabled status.' " [Citation.]' [Citation.]" (*Gamble*, *supra*, at p. 79.)

"The workers' compensation system provides separate classes of indemnity for temporary and permanent disabilities. [Citations.] A disability cannot be both permanent and temporary at the same time. [Citation.]" (*Kopitske v. Workers' Comp. Appeals Board* (1999) 74 Cal.App.4th 623, 630.)

Temporary disability is the immediate incapacity to work due to an industrial injury that is reasonably expected to be cured or materially improved with proper medical treatment. (*Western Growers Ins. Co. v. Workers Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 235.) The class of temporary disability serves only as wage replacement during the injured worker's healing period. It is payable at two-thirds of the worker's average weekly earnings. (§ 4653; *Edgar v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1, 10-11)

When the employee's condition has reached maximum improvement or it has become stationary for a reasonable period of time, and the worker retains some residual disability from the injury, the worker is considered to be permanent and stationary. (*Edgar v. Workers' Comp. Appeals Bd.*, *supra*, 65 Cal.App.4th at pp. 10-11.) Thereafter, the worker is considered to have a permanent disability. (*Id.* at p. 10.) When a worker is deemed permanent and stationary, he or she is entitled to permanent disability and

temporary disability payments cease. (*Kopitske v. Workers' Comp. Appeals Board*, *supra*, 74 Cal.App.4th at p. 631.)

Permanent disability indemnity benefits " are intended as reimbursement for the employee's impaired future earning capacity or decreased ability to compete in the open labor market. [Citation.]" (*Ritchie v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1174, 1179-1180.) Permanent disability is expressed in percentages, and if a disability is deemed less than 100 percent, it is referred to as a permanent partial disability. The amount of compensation payable for a given percentage of permanent disability varies according to the date of injury. (*Gamble*, *supra*, 143 Cal.App.4th at p. 80.) Payments continue for a set number of weeks, as determined by the permanent disability schedule in section 4658.

Injured employees with permanent disabilities of at least 70 percent but less than 100 percent are entitled to life pension payments, which commence when the employee's permanent disability payments end. An injured worker who is 100 percent permanently disabled is entitled to permanent disability payments for life. (§ 4659, subds. (a) & (b).) Relevant here, section 4659, subdivisions (b) and (c) provide, "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. [¶] (c) 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 subdivision[] . . . (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."

In the case of total permanent disability, pertinent to this case, section 4453 provides, "(a) In computing average annual earnings for the purposes of temporary disability indemnity and permanent total disability indemnity only, the average weekly earnings shall be taken at: . . . [¶] (9) Not less than one hundred eighty-nine dollars ($189), nor more than one thousand ninety-two dollars ($1,092), for injuries occurring on or after January 1, 2004." Subdivision (c) of section 4453 provides, "Between the limits specified in subdivision[] (a) . . . , the average weekly earnings, except as provided in Sections 4456 to 4459,[6] shall be arrived at as follows: [¶] (1) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury."

Discussion

The SIBTF argues that the WCAB was incorrect when it determined that the payment amount of permanent disability indemnity that is set once a worker's disability is considered permanent and stationary must be increased by cost of living adjustments starting from the January 1 after the date of injury.

The SIBTF contends that subdivision (c) of section 4659 provides for annual increases in weekly benefit payments only after an injured employee is entitled to such benefits; the subdivision does not provide for increases prior to the entitlement to benefits. Furthermore, a worker does not have a right to receive total disability indemnity until he or she is permanent and stationary.

Real party in interest, the Worker, contends that the cost of living adjustments should take place "per the very words of the statute, on January 1 following date of injury, which is the only interpretation that will allow the injured workers' benefit level to keep pace with inflation over time."

---

[6] Code sections not applicable here.

Accordingly, the resolution of this case depends on this court's interpretation of subdivision (c) of section 4649. The crux of this case is when does the state average weekly wage cost of living adjustment (COLA) begin for a worker who is totally permanently disabled or starts receiving a life pension.

When interpreting a statute, our purpose is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387.) "In construing a statute, our first task is to look to the language of the statute itself. [Citation.] 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. [Citations.]" (*Id.* at pp. 387- 388.) " ' "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." [Citation.] . . . "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." [Citations.] 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. [Citations.]' " (*Id.* at p. 388.) If the statutory language is susceptible to more than one reasonable interpretation, we look to "extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.)

A statute's plain language is a dispositive indicator of its meaning unless a literal reading would lead to absurd consequences the Legislature did not intend. There is a well " ' "settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." ' " (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113.)

Thus, our goal is to divine and give effect to the Legislature's intent. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 927.) Furthermore, "[w]e do 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* (*Zamudio*) (2000) 23 Cal.4th 183, 199.)

With this background in mind we turn to the words of the statute. As noted, subdivision (c) of section 4659 provides that when a worker's permanent disability is total, as in this case, for injuries occurring on or after January 1, 2003, again as in this case, "an employee who becomes entitled to receive a life pension or total permanent disability indemnity . . . 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."[7]

At the outset, we must disagree with the Worker that "the very words of the statute" require that a COLA to the total permanent disability payment should take place on January 1 following the date of injury. The only time that the date of injury is mentioned is with regard to the definition of the state average weekly wage. We agree with the WCJ that for injuries occurring after January 1, 2003, the plain language of the statute requires that total permanent disability payments and life pensions be increased annually commencing January 1, 2004. However, as the WCJ noted, "[w]hile the language is clear enough, such a plain reading would require increases to begin some 19 days prior to the date of injury" in this case.

---

[7] Subdivision (c) of section 4659 was added to the statute by legislation passed in 2002. (See Historical and Statutory Notes, 44B West's Ann. Labor Code (2003 ed.) foll. § 4659, p. 361.)

The SIBTF makes much of the legislative history of Assembly Bill 749, the bill that created section 4659, subdivision (c). (Stats. 2002, ch. 6, pp. 91-95.) However, our reading of the assembly committee's legislative analysis of the bill reveals that the goal of enacting subdivision (c) was to increase benefits for the most seriously injured workers, without increasing them too much. (Assem. Com. on Insurance, Analysis of Assem. Bill No. 749 (2001-2002 Reg. Sess.) Feb. 4, 2002, pp.1, 15-18.) Regarding cost comparisons between Assembly Bill 749 and two bills that then Governor Davis vetoed, there is some mention on page 15 of the analysis concerning a "$7 billion" savings from the "elimination of the retroactive COLA." However, Assembly Bill No. 1176 had provided in subdivision (c) of section 4659, "Any injured employee who is injured on or after January 1, 1998, and who, on or after January 1, 2004, is receiving or becomes entitled to receive a life pension or total permanent disability indemnity . . .shall have that payment increased annually, commencing 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." (Legis. Counsel Dig., Assem. Bill No. 1176 (2001-2002 Reg. Sess.) vetoed by the Governor October 14, 2001.) Similarly, Senate Bill No. 71 had provided in subdivision (c) of section 4659, "Any injured employee who, on or after January 1, 2004, regardless of date of injury, is receiving or becomes entitled to receive a life pension or total permanent disability indemnity . . . shall have that payment increased annually, commencing 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." (Legis. Counsel's Dig., Sen. Bill No. 71 (2001-2001 Reg. Sess.) vetoed by the Governor October 14, 2001.) Both these bills had provided for COLAs to be given to far more injured workers than the current version of section 4659, because the current version applies only to injured workers whose injury occurs after January 1, 2003.

Thus, the legislative history that has been brought to our attention provides little guidance in resolving this issue.

The Legislative Counsel's digest explained that Assembly Bill No. 749 "would provide for increased temporary disability and permanent partial disability and death benefits for injuries or deaths occurring on or after January 1, 2003, with additional increases in benefits phased in over several years." (Legis. Counsel's Dig., Assem. Bill No. 749, 6 Stats. 2002, § 21; see also Legis. Counsel's Dig., Assem. Bill No. 486, 866 Stats. 2002, § 7.) Pertinent to this case, among other changes in 2002, legislation set a $189 minimum and $1,092 maximum-average weekly earnings rates for dates of injury occurring on or after January 1, 2004. (See Historical and Statutory Notes, 44B West's Ann. Labor Code (2003 ed.) foll. § 4653, pp. 163-164.)

The Worker argues that in every single case, the length of time that a disability takes to become permanent and stationary will vary from immediately following the date of injury, to "years or multiple years" after the date of injury. Thus, the argument is that for the person who does not start to receive permanent disability payments until five or 10 years "down the road" the value of the payment will have been eroded by inflation if the COLAs do not start until January 1 following the permanent and stationary date. In essence, the Worker contends that because section 3202 provides that Workers' compensation statutes "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment," we must construe section 4659, subdivision (c) to mean that the COLAs begin the January 1 following the date of injury, "so that there is a consistent stream of income to keep pace with inflation for those that are totally disabled and entitled to the full wage loss benefit."

We believe that we have to return to the words of the statute to resolve this issue and give significance to every word, phrase, and sentence. As we have observed, subdivision (c) of section 4659 states an employee who becomes entitled to receive a total permanent disability indemnity or life pension shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter. In order to

interpret this section we must look to the key words of the statute— "who becomes entitled to receive a life pension or total permanent disability indemnity . . . ."

The word "entitle" means "to give a right or legal title to: qualify one for something." (Webster's Third New English Dictionary (1993) p. 758, col. 1.)

When a worker is injured, an employer must pay temporary disability compensation for the period the employee, while unable to work, is undergoing medical diagnostic procedure and treatment for an industrial injury. (*Granado v. Workmen's Comp.App. Bd.* (1968) 69 Cal.2d 399, 403.) Generally, the employer's obligation to pay temporary disability ceases when either: 1) the injured employee returns to work, 2) the employee is deemed able to return to work, or 3) when the employee's condition becomes permanent and stationary. (*Department of Rehabilitation, supra,* 30 Cal.4th at pp. 1291-1292.)

In those cases in which the worker has sustained a permanent disability, section 4650 provides that an employer must make the first permanent disability payment within "14 days after the date of the last payment of temporary disability indemnity." Accordingly, the California Supreme Court has inferred that the Legislature has anticipated that an employer has no legal obligation to pay permanent disability indemnity until the obligation to pay temporary disability indemnity has ceased. (*Department of Rehabilitation, supra,* 30 Cal.4th at p. 1292.) Previously, in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, the Supreme Court held that "[t]he right to permanent disability compensation does not arise until the injured worker's condition becomes 'permanent and stationary.' [Citations.]" (*Id.* at p. 238, fn. 2.) The Legislature, of course, is deemed to be aware of judicial decisions already in existence, and to have enacted or amended a statute in light thereof. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897; accord *People v. Harrison* (1989) 48 Cal.3d 321, 329.)

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. However, this does not end our inquiry. The next question we must answer is when do the COLAs start?

The statute goes on to say that in the case of a life pension or total permanent disability indemnity, an employee "shall have *that* payment increased annually commencing on January 1, 2004 and each January thereafter . . . ." (§ 4659, subd. (c), italics added.) By the plain words of the statute, once the life pension or total permanent disability payment is set, *that* payment has to be increased by COLAs starting from January 1, 2004.

The SIBTF argues that the reference to "that payment" does not mean the benefit rate that is set. However, this argument ignores the fact that the definition of the word rate means "a charge, *payment* or price fixed according to a ratio, scale, or standard." (Webster's Third New English Dictionary (1993) p. 1884, col. 3.)

Under the current statutory scheme, the disability payment for temporary total disability is two-thirds of the "average weekly earnings" during the disability period. (§ 4653.) Calculation of "average weekly earnings" for temporary disability as well as permanent total disability is subject to the maximum and minimum limits set forth in section 4453, subdivision (a). Within those limits, "average weekly earnings" are calculated as provided in subdivision (c). Subdivision (c)(1), (2) and (3) methods of calculation are based on the actual earnings of the employee and subdivision (c)(4) on earning capacity. Subdivision (d) addresses computation of benefits. (§ 4453.)

As noted, a total permanent disability payment is based upon the average weekly earnings determined under section 4453. Under section 4453, the computation of an injured worker's average weekly earnings is arrived at, within specified boundaries set according to date of injury, by multiplying the number of working days a week that the

injured worker was employed (if 30 hours or more) by the injured workers daily earnings at the time of injury. (§ 4453, subds. (a)(1)-(10) & (c)(1).)

Although section 4453 applies to temporary disability indemnity and total permanent disability indemnity, section 4453 does not set the level of total permanent disability payments an injured employee is entitled to receive; by its own terms, section 4453 only establishes the employee's average weekly earnings used in calculating the employee's permanent disability payment.

Section 4658 establishes the method of setting the permanent disability payments. That section provides as pertinent to this case: "(c) This subdivision shall apply to injuries occurring on or after January 1, 2004. If the injury causes permanent disability, the percentage of disability to total disability shall be determined, and the disability payment computed and allowed as follows:

Column 1--Range of percentage of permanent disability incurred:	Column 2--Number of weeks for which two thirds of average weekly earnings are allowed for each 1 percent of permanent disability within percentage range:
Under 10	4
10-19.75	5
20-24.75	5
25-29.75	6
30-49.75	7
50-69.75	8
70-99.75	9

As this table illustrates, the weekly payments of two-thirds of the average weekly wage for a set number of weeks depending on percentage of disability apply only to permanent disability ratings up to 99.75 percent. Thereafter, for disability ratings of at least 70 percent but less than 100 percent, 1.5 percent of the average weekly earnings for each 1 percent of disability in excess of 60 percent is to be paid during the remainder of life, i.e. a life pension, after payment for the maximum number of weeks specified in section 4658 have been made. (§ 4659, subd. (a).)

For the purposes of subdivision (a) only, "average weekly earnings shall be taken at not more than one hundred seven dollars and sixty-nine cents ($107.69). For injuries occurring on or after July 1, 1994, average weekly wages shall not be taken at more than one hundred fifty-seven dollars and sixty-nine cents ($157.69). For injuries occurring on or after July 1, 1995, average weekly wages shall not be taken at more than two hundred seven dollars and sixty-nine cents ($207.69). For injuries occurring on or after July 1, 1996, average weekly wages shall not be taken at more than two hundred fifty-seven dollars and sixty-nine cents ($257.69). For injuries occurring on or after January 1, 2006, average weekly wages shall not be taken at more than five hundred fifteen dollars and thirty-eight cents ($515.38)." (§ 4659, subd. (a).) Thus, the cap for average weekly earnings under which the life pension payment is calculated is significantly less than the cap for total permanent disability. (§§ 4453, 4659, subd. (a).)

Where the injured worker is totally permanently disabled i.e. has a disability rating of 100 percent, "the indemnity based upon the average weekly earnings determined under section 4453 shall be paid during the remainder of life." (§ 4659, subd. (b).)

As a result, for a totally permanently disabled worker, the calculation of payments starts for a full time employee with looking at the worker's average weekly wage at the time of injury. However, permanent disability indemnity payments are not increased by

operation of law under section 4661.5[8] as are temporary disability indemnity payments. (*Duncan v. The Singer Co.* (1978) 43 Cal. Comp. Cases 467, 468-470.) 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. Although total permanent disability indemnity and temporary disability indemnity start from the same point, i.e. based on the worker's average weekly earnings, they are not the same thing. (*Duncan v. The Singer Co., supra,* 43 Cal. Comp. Cases 467, 468-470.)

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.[9] " ' "If there is no ambiguity in the

---

[8] Section 4661.5 provides for increases in temporary disability indemnity rates when payment is made two years or more from the date of injury. "The increases in the rate of [temporary total disability] over time reflect inflationary conditions to which the worker is entitled under statute. [Citation.]" (*Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902.)

[9] 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.

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 following the date of injury.

Disposition

The COLAs found in section 4659, subdivision (c) should be applied to life pensions or total permanent disability compensation as from January 1, 2004. Accordingly, the Decision of the Worker's Compensation Appeals Board is annulled and the case is remanded to the WCAB for further proceedings.

ELIA, J.

WE CONCUR:

PREMO, Acting P. J.

DUFFY, J.

Duncan, as Director, etc. v. WCAB, et al.

H034040

Trial Court:	Workers' Compensation Appeals Board
Trial Judge:	Alfonso J. Moresi
Attorneys for Petitioner:	Vanessa L. Holton, Chief Counsel, Steven A. McGinty, Assistant Chief Counsel, Carol Belcher, Anthony Mischel and Jesse N. Rosen, Staff Counsel, Dept. of Industrial Relations, Office of the Director
Attorneys for Amicus Curiae In Support of Petitioner:	Robert E. Kalunian, Acting County Counsel of Los Angeles, Leah D. Davis, Assistant County Counsel, Jeffrey L. Scott and Jason E. Waller, Deputy County Counsel
No Appearance for Respondent	
Attorneys for Real Party In Interest:	Butts & Johnson, Arthur L. Johnson and Heather A. Harper
Attorneys for Amicus Curiae In Support of Real Party in Interest:	Marcus & Regalado and Marc G. Marcus

Duncan, as Director, etc. v. WCAB, et al.

H034040