

Case No. S282013  
Civil Case No. E079076

**In The Supreme Court  
State of California**

---

THE WORKERS' COMPENSATION APPEALS BOARD OF THE  
STATE OF CALIFORNIA and MICHAEL AYALA,  
Petitioner,

vs.

STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS  
AND REHABILITATION, Legally Uninsured, and STATE  
COMPENSATION INSURANCE FUND, Adjusting Agency,  
Respondents.

---

WCAB Case No. ADJ71360597  
Civil Case No. E079076  
Hon. Michael J. Raphael;  
In The Court of Appeal of the State of California  
Fourth Appellate District Division Two

---

**ANSWER TO PETITION FOR REVIEW**

---

MARK BEATTY, Deputy Chief Counsel  
MARY R. HUCKABAA, Assistant Chief Counsel  
A. GINA HOGTANIAN, Appellate Counsel (SBN 170364)  
TARIQ ASHRATI, Trial Counsel  
655 N. Central Avenue, 3rd Floor, Glendale, CA 91203  
Telephone: (707)592-9416, E-Mail: aghogtanian@scif.com

Attorneys for Petitioner  
CALIFORNIA DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, by and through its adjusting agent,  
STATE COMPENSATION INSURANCE FUND

## TABLE OF CONTENTS

ANSWER TO PETITION FOR REVIEW .....	1
TABLE OF CONTENTS .....	2
TABLE OF AUTHORITIES .....	3
INTRODUCTION.....	4
BACKGROUND.....	4
THE DECISION OF THE COURT OF APPEAL IS CONSISTENT WITH CALIFORNIA STATUTES AND CASE LAW PRECEDENT. ....	5
IDL V. TD .....	9
SINCE IDL IS NOT CONFERRED BY DIVISION 4 OF THE LABOR CODE, IDL CANNOT BE THE BASIS OF AN AWARD UNDER SECTION 4553. ....	11
CONCLUSION .....	12
VERIFICATION .....	14
WORD COUNT CERTIFICATION.....	15
PROOF OF SERVICE BY MAIL .....	16

## TABLE OF AUTHORITIES

### CASES

<i>Adams v. Workers’ Comp. Appeals Bd.</i> (1976) 18 Cal. 3d 226 -----	8
<i>Blankenship v. Workers’ Comp. Appeals Bd.</i> (1986) 51 Cal. Comp. Cases 38-----	12
<i>Brooks v. Workers’ Comp. Appeals Bd.</i> (2008) 161 Cal. App. 4 <sup>th</sup> 1522--8, 9, -----	11
<i>Dept. of Corrections and Rehabilitation v. Workers’ Comp. Appeals Bd.</i> <i>(Ayala)</i> (2023)-----	5, 6, 7
<i>Ferguson v. Workers’ Comp. Appeals Bd.</i> (1995) 33 Cal.App.4 <sup>th</sup> 1613 --7, 8	
<i>Horst v. Industrial Accident Commission</i> (1920) 184 Cal. 180 -----	6
<i>State Comp. Ins. Fund v. Industrial Accident commission (Hansen)</i> (1942) 20 Cal. 2d 264 -----	6

### STATUTES

Labor Code Section 3201-----	6, 8
Labor Code Section 3207-----	passim
Labor Code Section 4553-----	passim
Labor Code Section 4653-----	10
Labor Code Section 4654-----	10, 11
Labor Code Section 4656(c)(1)-----	9
Labor Code Section 4800 - 4850 -----	9

### OTHER AUTHORITIES

Government Code Section 19870 -----	9
Government Code Section 19871 -----	10
Government Code Sections 19869 – 19877.1 -----	11

## **INTRODUCTION**

The decision of the Court of Appeal in this workers' compensation case is consistent with California statutes and case law precedent. Thus, petitioners' stated ground for review under Cal. Rules of Court, Rule 8.500(b)(1) does not apply here because there is no conflict in the decisional law of the state as to the single legal issue decided, namely: whether "serious and willful" benefits under Labor Code Section 4553 should be based on temporary disability (TD) *or* industrial disability benefits (IDL). Further, the issue was correctly decided in a well-reasoned opinion issued by Division 2 of the Fourth District Court of Appeal.

Accordingly, Respondent respectfully submits that there are no grounds for review by this Honorable Court in this petition for review, and that the sound decision of the Court of Appeal should not be disturbed.

## **BACKGROUND**

This workers' compensation matter arises from a prison riot twenty years ago, during which applicant Michael Ayala, a correctional officer, was injured. (Opn., p. 468, *Dept. of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd. (Ayala)* (2023) 94 Cal. App. 5th 464, 468-469. The Workers' Compensation Appeals Board ("WCAB" or "the Board") found that Mr. Ayala's injuries were caused as a result of "serious

and willful misconduct” on behalf of the Respondent because Respondent had knowledge that a riot was being planned by inmates. *Id.* at 469.

Petitioner then argued that the “serious and willful misconduct” benefits should be calculated based on the IDL amount, and not the TD amount. The workers’ compensation judge held that TD should be the basis of benefits awarded under Labor Code Section 4553. (Ayala Opn., p. 469). Petitioner filed a petition for reconsideration with the WCAB, and the Board reversed, holding that IDL should be the measure of Section 4553 benefits. *Id.* at 469.

The Department of Corrections and Rehabilitation filed a petition for writ of review, and Division Two of the Fourth District Court of Appeal annulled the Board’s decision after reconsideration, holding that IDL is not “compensation” under Division 4 of the Labor Code, and that TD is the proper basis for a “serious and willful misconduct” award under Section 4553. The Court issued a published opinion, reported at *Dept. of Corrections and Rehabilitation v. Workers’ Comp. Appeals Bd. (Ayala)* (2023) 94 Cal. App. 5th 464.

**THE DECISION OF THE COURT OF APPEAL IS  
CONSISTENT WITH CALIFORNIA STATUTES AND  
CASE LAW PRECEDENT.**

The California Supreme Court has repeatedly recognized that the WCAB “is a tribunal of limited jurisdiction, with no

powers beyond those conferred upon it by section 21 of article XX of the state Constitution and the provisions of the Workmen's Compensation, Insurance and Safety Act, now codified in the Labor Code (§3201 et seq.) *State Comp. Ins. Fund v. Industrial Accident commission (Hansen)* (1942) 20 Cal. 2d 264, 266. See also *Horst v. Industrial Accident Commission* (1920) 184 Cal. 180, 192.

In this case, the Court of Appeal followed the plain meaning of Labor Code Sections 4553 and 3207. The Court concluded that IDL is not “compensation otherwise recoverable” within the meaning of Section 4553, because IDL is not conferred by Division 4 of the Labor Code, as required by Section 3207. *Dept. of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd. (Ayala)* (2023) 94 Cal. App. 5th 464, 470-471. The Court provided a detailed analysis of the statutory scheme in arriving at its holding. *Id.* at 470-471.

Labor Code Section 4553 provides, in relevant part:

***The amount of compensation otherwise recoverable*** shall be *increased one-half, together* with costs and expenses not to exceed two hundred fifty dollars (\$250), where the employee is injured by reason of the serious and willful misconduct of any of the following:

(a) The employer, or his managing representative ...

Section 4553 (Emphasis Added.)

Labor Code Section 3207 defines the term “compensation” as follows:

“Compensation” means ***compensation under this division*** [i.e. Division 4, “Workers Compensation Insurance”] and includes every benefit or payment ***conferred by this division*** upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence.

Section 3207 (Emphasis Added.)

“Section 4553 cannot be read without reference to section 3207, which defines ‘compensation.’” *Ferguson v. Workers’ Comp. Appeals Bd.* (1995) 33 Cal.App.4<sup>th</sup> 1613, 1619. In *Ferguson*, the Court of Appeal held that the 50% increase of “compensation otherwise recoverable” for serious and willful misconduct must be based on the entire compensation award as defined in Section 3207 based on all Division 4 categories of “compensation,” provided that the total amount does not exceed the amount necessary to fully compensate the worker. *Id.* at 1616. The Court held that “compensation” included indemnity and non-indemnity compensation (such as medical benefits). *Ferguson*, 33 Cal. App. 4<sup>th</sup> 1613, 1616. See also *Adams v. Workers’ Comp. Appeals Bd.* (1976) 18 Cal. 3d 226, 231 [medical-legal fees are

“compensation” for purposes of calculating Labor Code Sec. 5814 penalties.]

The Court of Appeal has also held that Labor Code Section 5814 penalties for unreasonable delay or refusal to pay benefits cannot be based on IDL benefits because IDL benefits are not “compensation” and are not conferred by the Labor Code. *Cal. v. Workers’ Comp. Appeals Bd. (Ellison)* (1996) 44 Cal. App. 4<sup>th</sup> 128, 136-138. “While the WCAB does not have jurisdiction to award IDL, since jurisdiction to make such an award lies with the state’s Department of Personnel Administration (“DPA”), it does have jurisdiction to award a penalty based on the lesser amount of TD (§ 3201-6002, 6100-6149) that would be due ...” *Ellison*, 44 Cal. App.4<sup>th</sup> at 130-131 (citing and affirming the WCAB’s decision.)

Contrary to Petitioner’s argument, there is no inconsistency or conflict between the Court’s decision in this case and the decision in *Brooks v. Workers’ Comp. Appeals Bd.* (2008) 161 Cal. App. 4<sup>th</sup> 1522. *Brooks* did not involve “serious and willful misconduct” benefits under Labor Code Section 4553. The Court in *Brooks* addressed whether certain class of state employees may get two years of TD benefits in addition to IDL benefits, under Labor Code Section 4656(c)(1). The Court held that the maximum



amount of TD benefits was two years and that the IDL period was subsumed in, and not in addition to, the maximum two-year period. *Brooks*, 161 Cal.App.4<sup>th</sup> at 1526-1527

Accordingly, the decision of the Court of Appeal in this case is not in conflict with *Brooks* or any other case law precedent.

### **IDL v. TD**

Industrial Disability Benefits (“IDL”) and Enhanced Industrial Disability Leave (“EIDL”) benefits are **not conferred by the Labor Code**; they are conferred by the Government Code. See Gov. Code Secs. 19870 et seq. Labor Code Sections 4800 et seq., which provide enhanced payments in lieu of temporary disability for specified law enforcement officers (such as local police and California Highway Patrol officers), do not expressly include correctional officers, such as Respondent here, among the officers specified in the Labor Code. See Labor Code Secs. 4800 – 4850.

Nor is there anything in Labor Code Section 4553, or elsewhere in the Labor Code, that includes EIDL benefits within the definition of the term “compensation” for purposes of the Labor Code.

Government Code Sec. 19871 provides that except in certain situations not applicable here:

... when a state officer or employee is temporarily disabled by illness or injury arising out of and in the course of state employment, he or she shall become entitled, regardless of his or her period of service, to receive industrial disability leave and payments for a period *not exceeding 52 weeks* within two years from the first day of disability. These payments *shall be in the amount of the employees (sic.) full pay less withholding* based on his or her exemptions in effect on the date of his or her disability for federal income taxes, state income taxes, and social security taxes not to exceed 2 working days of disability subject to Section 19875. *Thereafter, the payment shall be two-thirds of full pay. ...*”

Gov. Code Sec. 19871 (Emphasis Added.)

Thus, the amount of EIDL benefits is the amount of the applicant’s net salary after taxes for the statutory period, and two-thirds of full pay thereafter.

By contrast, temporary disability (TD) is two-thirds of applicant’s average weekly earnings subject to maximum TD limits. Labor Code Secs. 4653-4654 and 4553. When the temporary disability is partial (rather than total), and the applicant is able to work a compatible job and/or fewer hours, TD is calculated based on a wage-loss basis, compared to applicant’s regular salary. Secs. 4654 and 4553.

**SINCE IDL IS NOT CONFERRED BY DIVISION 4 OF THE LABOR CODE, IDL CANNOT BE THE BASIS OF AN AWARD UNDER SECTION 4553.**

IDL is a statutorily created alternative to temporary disability indemnity for a select group of state employees pursuant to Government Code Sections 19869 – 19877.1. To qualify for IDL benefits, an employee must be eligible for workers' compensation benefits and be an active member of the California Public Employees' Retirement System (CalPERS) or the California State Teachers' Retirement System (CALTRS).

Nothing in the Labor Code adopts these benefits as a category of "compensation" that the WCAB is permitted to award. Rather, a qualifying employee's first level of administrative remedy for claims involving IDL benefits lies with the employing State Department (or agency). Thereafter, complaints involving IDL or other benefits involving leave administration under the Government Code, must be appealed to the Department of Personnel Administration ("DPA"). *Brooks v. Workers' Comp. Appeals Bd.* (2008) 161 Cal. App. 4<sup>th</sup> 1522, 1529. (Citing to Cal. Code Regs., tit. 2, §599.768.) See also *Cal. v. Workers' Comp. Appeals Bd. (Ellison)* (1996) 44 Cal. App. 4<sup>th</sup> 128, 136-138.

Thus, the WCAB has no jurisdiction to award IDL benefits. See *Cal. v. Workers' Comp. Appeals Bd. (Ellison)* (1996) 44 Cal. App. 4<sup>th</sup> 128, 136-138. This proposition is black letter law, and was conceded by the Board in this case.

Indeed, the Board has previously held in other panel decisions that it does not have the power to award IDL benefits. See e.g. *Blankenship v. Workers' Comp. Appeals Bd.* (1986) 51 Cal. Comp. Cases 38, 39.

### CONCLUSION

In sum, the Court of Appeal decided the single question of law in this case, consistent with existing appellate decisions. There is simply no conflict in the decisional law of this state, so as to warrant Supreme Court review. As such, the requisite grounds for review by the Supreme Court are missing in this case.

Accordingly, Respondent respectfully requests this Honorable Court to deny Mr. Ayala's petition for review.

///

///

///

Dated: October 13, 2023

Respectfully submitted,

/s/ A. Gina Houghtanian

---

A. GINA HOGTANIAN, (SBN 170364)  
STATE COMPENSATION INSURANCE FUND  
655 N. Central Avenue, 3rd Floor, Glendale, CA 91203  
Telephone: (707)592-9416  
E-Mail: aghogtanian@scif.com

Attorney for Respondent  
STATE COMPENSATION INSURANCE FUND

## VERIFICATION

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

- That the contents of the foregoing document are true and correct to my own knowledge, except as to matters stated therein on information and belief;
- That the matters so stated are believed by me to be true and correct; and
- That I make this verification because the facts set forth in said document are within my knowledge and because, as attorney for Real Party in Interest State Compensation Insurance Fund, I am more familiar with such facts than are the officers of State Fund.

Dated: October 13, 2023

Respectfully submitted,

*/s/ A. Gina Houghtanian*

---

A. GINA HOGTANIAN, (SBN 170364)  
STATE COMPENSATION INSURANCE FUND  
655 N. Central Avenue, 3rd Floor, Glendale, CA 91203  
Telephone: (707)592-9416  
E-Mail: aghogtanian@scif.com

Attorney for Respondent  
STATE COMPENSATION INSURANCE FUND

## WORD COUNT CERTIFICATION

I certify that the attached brief contains 2520 words including footnotes, according to the word count of the computer program used to prepare the brief.

Dated: October 13, 2023  
Glendale, California

Respectfully submitted,

/s/ A. Gina Houghtanian

---

A. GINA HOGTANIAN, (SBN 170364)  
STATE COMPENSATION INSURANCE FUND  
655 N. Central Avenue, 3rd Floor, Glendale, CA 91203  
Telephone: (707)592-9416  
E-Mail: aghogtanian@scif.com

Attorney for Respondent  
STATE COMPENSATION INSURANCE FUND

**PROOF OF SERVICE**  
(Code Civ. Proc., §§ 1013a, 2015.5)

I declare that I am a citizen of the United States, employed in Glendale, California. I am over the age of eighteen years old and not a party to the within entitled action. My business address is: 655 North Central Avenue Suite 400, Glendale, California 91790. I am readily familiar with State Compensation Insurance Fund's practice for collection and processing of correspondence for mailing with the United States Postal Service. The attached **ANSWER TO PETITION FOR REVIEW** will be deposited with the United States Postal Service today, October 13, 2023, in the ordinary course of business, as well as served electronically through TrueFiling as indicated below. I inserted a true copy of the document in a sealed envelope and placed it for collection and mailing following ordinary business practices at Salinas, California addressed as follows:

Clerk of the Court of Appeal  
Fourth District Court of  
Appeal Division Two  
3389 Twelfth Street  
Riverside, CA 92501

TrueFiled on 10/13/2023

Workers Comp Appeals Board  
Attn Writ Unit  
PO Box 429459  
San Francisco, CA 94142

Respondent  
Electronically Served  
WCABWritUnit@dir.ca.gov



John A. Ferrone, Esq.  
4333 Park Terrace Dr., Ste.200  
Westlake Village, CA 91361

Attorney for Applicant  
Electronically Served  
jferrone@adamsferrone.com

Michael T. Bannon  
4333 Park Terrace Dr., Ste.200  
Westlake Village, CA 91361

Attorney for Applicant  
Electronically Served  
bannon@ferronelawgroup.com

Allison Fairchild  
[455 Golden Gate Ave., Ste. 9328]  
P.O. Box 429459  
San Francisco, CA 94142-9459

Attorney for Respondent  
Electronically Served  
afairchild@dir.ca.gov

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

Executed on October 13, 2023 in Glendale, California.

*Miguel Scala*

---

Miguel Scala

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **CALIFORNIA DEPARTMENT OF CORRECTIONS AND  
REHABILITATION v. W.C.A.B. (AYALA)**

Case Number: **S282013**

Lower Court Case Number: **E079076**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **AGHogtanian@scif.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ANSWER TO PETITION FOR REVIEW (FEE PREVIOUSLY PAID)	S282013_Answer to PR_StateFund

Service Recipients:

Person Served	Email Address	Type	Date / Time
Allison Fairchild WCAB Commissioners 170095	AFairchild@dir.ca.gov	e-Serve	10/13/2023 9:59:39 AM
Lisa Stolzy State Compensation Insurance Fund 198409	lastolzy@scif.com	e-Serve	10/13/2023 9:59:39 AM
Michael Bannon Ferrone Law Group	mbannon@ferronelawgroup.com	e-Serve	10/13/2023 9:59:39 AM
A. Hogtanian State Compensation Insurance Fund 170364	AGHogtanian@scif.com	e-Serve	10/13/2023 9:59:39 AM
John A. Ferrone 157568	jferrone@adamsferrone.com	e-Serve	10/13/2023 9:59:39 AM
Workers' Compensation Appeals Board	wcabwritunit@dir.ca.gov	e-Serve	10/13/2023 9:59:39 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10/13/2023

Date

/s/Miguel Scala

Signature

Hogtanian , Agavni (170364)

---

Last Name, First Name (PNum)

State Compensation Insurance Fund

---

Law Firm