IN THE

SUPREME COURT

STATE OF CALIFORNIA

S282013

STATE OF CALIFORNIA, DEPT. OF CORRECTIONS AND REHABILITATION, legally uninsured, adjusted by STATE COMPENSATION INSURANCE FUND; ***PETITIONER(S);*** ***vs.*** MICHAEL AYALA, and WORKERS' COMPENSATION APPEALS BOARD; ***RESPONDENTS.***	Fourth Dist. Case No.: E079076 WCAB Case No.: ADJ71360597 **RESPONDENT'S OPENING BRIEF ON THE MERITS** **AFTER DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION 2**

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Respondent/Applicant, MICHAEL AYALA, while employed on August 12, 2002, as a Correctional Officer, with Petitioner/Defendant, California Department of Corrections & Rehabilitation, sustained injury due to a vicious assault by prison inmates. While the California Worker's Compensation System is primarily a "no fault system" (***see* Cal. Const. Art. XIV, sec. 4)** and is considered "without regard to negligence," the assault suffered by Respondent occurred only because of the *serious and willful misconduct* of the employer.

To meet the criteria that an employer has engaged serious and willful misconduct under Cal. Labor Code section 4553[1], the employer's conduct must be "an act deliberately done for the express purpose of injuring another, or intentionally performed either with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences" ***Mercer-Fraser Co. v. IAC***, 40 Cal. 2d 102, 120, 251 P.2d 955, 964 (1953). Mere negligence, even gross negligence, is not enough to sustain a finding of willful misconduct. "Rather, the true rule is that serious and willful misconduct is basically the antithesis of negligence." ***Id.***

In the WCAB's Opinion and Decision After Reconsideration dated April 27, 2020, Petitioner's actions were found to meet this

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[1] All further statutory references are to the Cal. Labor Code, unless otherwise specified.

high standard—the full details of which are so sensitive that it is subject to a protective order. Because of Petitioner's quasi-criminal behavior, Respondent was attacked from behind by three inmates and rendered unconscious. He sustained injury to his jaw, back, right shoulder, right knee, and psyche. As a result of Petitioner's actions leading up to that assault, the WCAB increased benefits pursuant to section 4553.

Section 4553 states 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 . . . the employer. . ." (emphasis added). At issue is the "amount of compensation otherwise recoverable" that shall be increased by one-half.

II

QUESTION PRESENTED

The issue presented to the Court is whether the increase in compensation otherwise recoverable under section 4553 includes the payment of the salary continuation plan Industrial Disability Leave (IDL).

III

STANDARD OF REVIEW

"[I]n this case, there are no material facts in dispute; the issue presents a pure question of law. While statutory interpretation claims are reviewable by this court de novo, we accord significant respect to the WCAB's conclusions unless they

are clearly erroneous. (***Department of Rehabilitation v. WCAB (Lauher)*** (2003) 30 Cal.4th 1281, 1290 [135 Cal. Rptr. 2d 665, 70 P.3d 1076].) We are also bound by the rule that '[a]s with other workers' compensation provisions, statutes regarding temporary disability are construed liberally in favor of granting benefits to injured workers. (**§ 3202**; ***Lauher, supra***, 30 Cal.4th at p. 1290.)' (***Brooks v. WCAB*** (2008) 161 Cal.App.4th 1522, 1528 [75 Cal. Rptr. 3d 277])." ***Meeks Building Center v. WCAB***, 207 Cal. App. 4th 219, 224, 142 Cal. Rptr. 3d 920, 922.

IV.

OVERVIEW OF THE WORKERS' COMEPSANTION SYSTEM

"Section 3600 of the Labor Code provides that an employer is liable for injuries to its employees arising out of and in the course of employment, and section 3601 declares that where the conditions of workers' compensation exist, the right to recover such compensation is the exclusive remedy against an employer for injury or death of an employee." ***Johns-Manville Prods. Corp. v. Superior Court***, 27 Cal. 3d 465, 467, 165 Cal. Rptr. 858, 859 (1980).

> [T]he legal theory supporting such exclusive remedy provisions is a presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider

> range of damages potentially available in tort. [citations omitted.] The function of the exclusive remedy provisions is to give efficacy to the theoretical "compensation bargain." ***Shoemaker v. Myers***, 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 311 (1990).

Part of that "bargain," which includes those limitations on tort recovery, necessarily contemplates a system designed to extend benefits to injured workers rather than limit them. This intent is codified in **section 3202**: "Division [4] and Division 5 (commencing with Section 6300) 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." In essence, the system provides a limited recovery, but the benefits that are available are to be liberally provided.

The three main benefits that fall under, and are conferred by, the workers' compensation system are: (1) medical treatment for the injury, (2) compensation in the form of Temporary Disability ("TD") benefits while the injured worker is off work recovering from the injury, and (3) compensation in the form of Permanent Disability ("PD") benefits for any permanent residuals of the injury. There is no question the section 4553 increase applies to these benefits.

However, Respondent did not receive TD benefits. Rather, as a State Correctional Officer, Respondent received compensation via a salary continuation plan known as Industrial Disability Leave ("IDL"), which was "enhanced" ("E-IDL") because of the inmate assault. This benefit is paid in lieu of the

standard TD benefit that non-State employees would otherwise receive while off work during a period of temporary disability.

The difference in value for the relevant TD period is significant. E-IDL is equivalent to the injured employee's net take home salary on the date of occurrence of injury, whereas TD is payable at two-thirds salary with a statutory cap based on date of injury. ***See* Gov. Code section 19871.2 and Labor Code section 4453, respectively.** The statutory cap on TD reduces high-wage earner's TD benefits below two-thirds (e.g. at the statutory cap of $490/wk for a date of injury in 2002, any wage earner making above $735/wk will end up with less than 2/3 wages). In comparison, E-IDL remains at the injured worker's net take home salary. Therefore, the 4553 increase will be affected depending on what benefit is chosen to increase.

V.

ARGUMENT

A. "Compensation" includes the payment of "Aggregate Disability Benefits."

Section 3207 sets forth the definition of "compensation," stating: "'Compensation' means compensation *under this division* 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*" (emphasis added). "This division" refers to Division 4 of the Labor Code.

Within Division 4, sections 4650 through 4657 describe the Temporary Disability (TD) benefit. This establishes the TD benefit as a form of compensation. Specifically, **section 4653** states: "If the injury causes temporary total disability, the disability payment is two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market." The purpose of this TD benefit is to act as "a substitute for lost wages during a period of temporary incapacity from working." ***Brooks v. Workers' Comp. Appeals Bd.***, 161 Cal. App. 4th 1522, 1533, 75 Cal. Rptr. 3d 277, 281 (5th Dist. 2008) (internal quotations and citations omitted).

Section 4650 clarifies the timing and nature of payments made in workers' compensation claims. Relative to the TD benefit, section 4650 provides:

> (a) If an injury causes temporary disability, the first payment of temporary disability indemnity shall be made not later than 14 days after knowledge of the injury and disability, on which date all indemnity then due shall be paid, unless liability for the injury is earlier denied.
>
> . . .
>
> (d) If any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee, *unless the employer continues the employee's wages under a salary continuation plan*, as defined in subdivision (g).
>
> . . .
>
> (g) For purposes of this section, "salary continuation plan" means a plan that meets both of the following requirements:

> (1) The plan is paid for by the employer pursuant to statute, collective bargaining agreement, memorandum of understanding, or established employer policy.
>
> (2) The plan provides the employee on his or her regular payday with salary not less than the employee is entitled to receive pursuant to statute, collective bargaining agreement, memorandum of understanding, or established employer policy and not less than the employee would otherwise receive in indemnity payments.
>
> (emphasis added.)

Section 4650(d) makes clear that salary continuation plans, like IDL, are paid in lieu of the standard TD benefit "conferred by" Division 4, which is why there is no penalty for a failure to pay TD benefits. The obligations under Division 4 are deemed satisfied with a payment of a benefit referenced "under" Division 4 yet that is not "conferred by" Division 4.

Further, the TD benefit is framed in terms of "aggregate disability benefits." **Section 4656** provides for the maximum period an injured worker can collect TD benefits, with all subsections employing the terms "aggregate disability benefits" to describe the payment of TD benefits. Each subsection applies to different time periods, but the pertinent words "aggregate disability benefits" remain consistent throughout. In the present case, subsection (b) applies, and states: "Aggregate disability payments for a single injury occurring on or after January 1, 1979, and prior to April 19, 2004, causing temporary partial disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury."

As a result, it is clear the TD benefit is both "under" and "conferred by" Division 4. Therefore, the TD benefit fits squarely within the definition of "compensation" under section 3207.

Herein lies the wrinkle: as a salary continuation plan, IDL has been held to be included within the meaning of "aggregate disability benefits" under section 4656 pursuant to ***Brooks v. WCAB***, supra. "Aggregate disability benefits" is utilized to define the TD benefit conferred by Division 4, which means that "aggregate disability benefits" are a form of "compensation" pursuant to section 3207. However, IDL is not "conferred by" Division 4, so it does not meet the strict definition of "compensation" under section 3207. Therefore, IDL cannot be said to be included in the meaning of "aggregate disability benefits." This creates conflict between compensation otherwise recoverable via IDL versus "compensation" under section 3207.

If IDL is deemed compensation under Division 4, as ***Brooks*** has declared, then an award of section 4553 benefits based on the IDL benefit is clearly warranted. However, if IDL is not deemed compensation under Division 4 due to IDL not being "conferred by" Division 4, as ***Ayala*** has declared, then the question becomes whether the payment of a salary continuation plan is payment of compensation at all. If it is not compensation, the implication is that there nothing to increase pursuant to section 4553. Such a finding, though, would be catastrophic to the very purpose of section 4553. It essentially lets an employer off the hook for an increase in compensation.

B. Legislative intent makes clear that IDL "means temporary disability as defined in Division 4."

Brooks states that IDL is TD for purposes of compensation. Meanwhile, ***Ayala*** states IDL is not compensation at all. However, neither ***Brooks*** nor ***Ayala*** challenge that IDL is a salary continuation plan pursuant to section 4650(g). In fact, the State of California's Department of Human Resources website admits as much:

> Established by the Berryhill Total Compensation Act of 1975, IDL is a salary continuation program specifically designed as an alternative benefit program to TD. The legal authority for this program is found in Government Code Sections 19869 - 19877.1. To qualify for IDL benefits, an injured employee must be an active member of the California Public Employees' Retirement System (CalPERS) or the California State Teachers' Retirement System (CalSTRS). **CalHR, Workers' Compensation** (updated 12/14/2016, last accessed 2/1/2024) https://www.calhr.ca.gov/state-hr-professionals/Pages/benefits-administration-manual-workers'-compensation.aspx.

The first prong of section 4650(g) is satisfied by the statutory scheme that created the IDL benefit (it also happens to be the subject of a Memorandum of Understanding with Bargaining Unit 6). Further reviewing that scheme, the interchangeability of IDL and TD is seen. **Government Code section 19870** states in relevant part:

> (a) "Industrial disability leave" *means temporary disability as defined in Divisions 4* (commencing with Section 3201) and 4.5 (commencing with Section 6100) of the Labor Code and includes any period in which the disability is

> permanent and stationary and the disabled employee is undergoing vocational rehabilitation.
>
> (b) "Full pay" means the gross base salary earnable by the employee and subject to retirement contribution if he had not vacated his position. (emphasis added.)

The Legislature has declared its intent in this statute—IDL means TD. This intent creates, at best, a direct indication that IDL is compensation under Division 4, or, at worst, a strong inference that it should be treated as if it were compensation under Division 4.

Similar to the TD benefit, **Government Code section 19871** establishes that the IDL benefit is "full pay . . . not to exceed 22 working days of disability. . . . Thereafter, the payment shall be two-thirds of full pay."

In addition, **Government Code section 19871.2** establishes the Enhanced IDL benefit, which is paid:

> When an excluded employee is temporarily disabled for more than 22 consecutive working days by an injury or type of injury designated by the director as qualifying an employee for the benefits of this section, he or she shall receive an enhanced industrial disability leave benefit. The enhanced benefit shall be equivalent to the injured employee's net take home salary on the date of occurrence of injury.

These two sections now satisfy the second prong of section 4650(g). As such, IDL is a salary continuation plan that falls under Division 4.

Further clarifying that IDL is to be treated as TD, **Government Code section 19872(a)** states: "(t)he disabled

employee shall not receive temporary disability indemnity or sick leave or annual leave with pay for any period for which he or she receives industrial disability leave." Overall, there is no ambiguity—for all intents and purposes, IDL *is* TD. This is evidenced by the offsetting of TD benefits by the payment of IDL benefits under section 19872(a). Coupled with the direct mention of salary continuation plans in section 4650 within Division 4, the Legislature has unequivocally declared IDL is a form of compensation under Division 4.

Enter ***Brooks v. WCAB***. It should come as no surprise that ***Brooks*** followed the Legislative declaration that IDL means TD under Division 4 by interpreting "aggregate disability benefits" within section 4656, as including IDL: "the statutory scheme is clear," and that "[b]ecause IDL is statutorily defined as the equivalent of TD, then the two-year limitation under section 4656, subdivision (c)(1), necessarily must apply to both IDL and TD." However, ***Brooks*** made no attempt to reconcile the conundrum that the statutory definition of "compensation" is limited to benefits under, and conferred by, Division 4, which was the singular focus of the ***Ayala*** court. By ***Ayala's*** rationale, IDL is not compensation because it is not a benefit conferred by Division 4. However, the ***Ayala*** court fails to adequately address the degree of interplay between IDL and TD, as well as the workers' compensation system's proclivity to contemplate benefits outside of its system. The mere reference to salary continuation plans within Division 4 makes clear that Division 4 contemplates benefits outside of its division.

C. The WCAB takes into account compensation outside of its system pursuant Labor Code section 4909.

An inherent conflict exists between section 3207's strict definition of "compensation" to include only those benefits conferred by Division 4 and the recognition that salary continuation plans are a form of compensation "under" Division 4. However, there is no question that the workers' compensation system routinely considers benefits that are otherwise recoverable outside of its system as constituting compensation within the system. This is seen in **Labor Code section 4909**, which states:

> Any payment, allowance, or benefit received by the injured employee during the period of his incapacity, or by his dependents in the event of his death, which by the terms of this division was not then due and payable or when there is any dispute or question concerning the right to compensation, shall not, in the absence of any agreement, be an admission of liability for compensation on the part of the employer, *but any such payment, allowance, or benefit may be taken into account by the appeals board in fixing the amount of the compensation to be paid*. The acceptance of any such payment, allowance, or benefit shall not operate as a waiver of any right or claim which the employee or his dependents has against the employer (emphasis added).

The principle is rather basic—a double recovery is to be avoided. If an injured worker receives some sort of compensation outside the workers' compensation system that is intended to be compensation under the system, then the legal obligation to pay compensation under the system is deemed satisfied. ***See: Herrera v. Workers' Comp. Appeals Bd.***, 71 Cal. 2d 254, 455

P.2d 425, 78 Cal. Rptr. 497 (1969) (citing ***Stan v. Cal. Golf Club & Associated Indem. Corp.***, 8 Cal. Comp. Cases 209, 1943 Cal. Wrk. Comp. LEXIS 196 (WCAB 1943) ("We should not now, without anything in evidence to indicate that the payment of wages was intended as a gift or gratuity, contend that such payment was not compensation and that the employer or his representative is entitled to no credit therefor."). It would be patently unreasonable for an employer to voluntarily pay full salary to an injured employee to then only be subsequently found liable to pay an additional benefit under the workers' compensation system. Hence, the compensation paid by the employer is credited as a form of compensation otherwise recovered under the workers' compensation system. Section 4909, itself, does not confer any benefit or payment, but it does act as the vehicle to consider benefits as compensation within the system.

An example of this is seen in ***Appleby v. WCAB***, 27 Cal. App. 4th 184, 32 Cal. Rptr. 2d 375, (2d Dist. 1994), wherein the ***Appleby*** court found Pacific Bell's private benefits plan to be "of the same general character" as workers' compensation benefits that were "voluntarily" paid by the employer. The court relied upon the rationale in ***Ott v. WCAB***, 118 Cal. App. 3d 912, 173 Cal. Rptr. 648, (1981) to support the right to credit. ***See also: Sea-Land Serv. v. WCAB***, 14 Cal. 4th 76, 86, 58 Cal. Rptr. 2d 190, 195 (1996) (holding a credit for LHWCA disability benefits must be calculated on a dollar-for-dollar basis, regardless of

category, against a claim under the Cal. Workers' Compensation Act).

The unstated rationale of ***Appleby*** is that, by granting the credit, the plan satisfies the payment of compensation under, and conferred by, Division 4. The problem is that no formal "compensation" has technically been paid within the meaning of section 3207, as the private benefits plan at issue in ***Appleby*** is certainly not under, or conferred by, Division 4. Unfortunately, ***Appleby*** does not account for this discrepancy. However, the implication is clear. Compensation paid outside of the workers' compensation system is deemed as payment of compensation under the system.

It is also important to note, however, that not *all* compensation paid outside of the system is credited within the system. Section 4909 and supporting case law (supra.) clearly establish the factors necessary to permit or deny a credit. This grants the WCAB the authority to consider benefits outside the system as compensation under the system. This is where the ***Ayala*** decision falters. It fails to account for the permissible credit under section 4909 and offers no reconciliation of that right to credit with the statutory definition of "compensation" under section 3207. However, contemplation of a credit allows the WCAB to get past that strict definition of compensation. If it were limited, the purpose of section 4909 would be defeated.

In essence, the allowance of a credit for a benefit paid outside of Division 4 is constructively deemed compensation paid within Division 4. This also appears consistent with the

rationale in ***Brooks***, finding that the payment of IDL satisfies the obligation to pay TD benefits under section 4650 and counts towards the eligibility of benefits under section 4656. While not strictly falling within the legal definition of "compensation" under section 3207, the injured worker is deemed to have received compensation consistent with the benefits "under" and "conferred by" Division 4 when that injured worker receives payments under a salary continuation plan.

In the present case, the consideration of IDL as compensation is driven by the fundamental right to credit under section 4909 and the Legislative intent that IDL means TD. The important distinction is that the Legislative intent is not to declare IDL *is* compensation but rather that it is deemed *as* compensation within Division 4. This renders IDL as "compensation otherwise recoverable" under Division 4. On this basis, the ***Ayala*** decision cannot be correct.

If, however, the rationale of ***Ayala*** is to be followed, then IDL benefits cannot be deemed compensation under Division 4. This would then allow a double recovery that the system seeks to avoid. It would also create the opportunity for employees to claim benefits beyond the limitations specified in section 4656. This, in turn, leads to challenges of the right to credit employers routinely seek under section 4909.

Interestingly, however, section 4909 is not limited to simply considering credits. Section 4909 clearly states that "*any* such payment, allowance, or benefit may be taken into account by the appeals board in fixing the amount of the *compensation to be*

paid. . ." (emphasis added). As a salary continuation plan, IDL is not strictly "compensation" under section 3207 since it is compensation outside of Division 4. The section 4909 mandate is equally clear, though, that any payment an injured worker receives through a salary continuation plan may be taken into account. Since the one-half increase in benefits under section 4553 falls within Division 4, it is compensation. Therefore, the WCAB has statutory authority under section 4909 to consider the payment of IDL in determining the amount of compensation owed for the serious and willful misconduct of Petitioner. Simply put, if credit is allowed, consideration is given.

D. *Ellison* considers IDL as a form of compensation otherwise recoverable under Division 4.

The interaction between "compensation" under Division 4 and "compensation otherwise recoverable" via a salary continuation plan is clarified in ***Cal. v. WCAB (Ellison)*** 44 Cal. App. 4th 128, 51 Cal. Rptr. 2d 606 (1996). ***Ellison*** stands for the proposition that an unreasonable delay in payment of IDL benefits permits an award of penalties under section 5814. **Section 5814** states in relevant part:

> (a) When payment of *compensation* has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000), whichever is less.
>
> . . .
>
> (d) The payment of any increased award pursuant to subdivision (a) shall be reduced by any

> amount paid under subdivision (d) of Section 4650 on the same unreasonably delayed or refused benefit payment. (emphasis added.)

Simply put, a penalty is warranted when no benefits are paid during a period when benefits are owed under section 4650. ***Ellison*** is premised on a failure to pay TD and recognizes that the employer could satisfy its obligations under section 4650 by properly paying IDL benefits in lieu of TD benefits. ***Ellison*** had no cause to go beyond the strict definition of compensation under section 3207 because no benefits were actually being paid. ***Ellison*** would not even exist without the failure to pay IDL. For this reason, the ***Ellison*** opinion has limited precedential value to the present case. The limited value it does offer is the recognition that benefits otherwise recoverable outside of the workers' compensation system have an unequivocal impact on the compensation that may be awarded under the system.

In addition, the issue presented in ***Ellison*** is narrow: "[t]he sole question in this proceeding is whether the Workers' Compensation Appeals Board (WCAB or Board) has jurisdiction to impose a penalty for unreasonable delay in payment of industrial disability leave (IDL) to which an injured state employee is entitled under Government Code section 19869 et seq." ***Ellison*** at p. 130. The amount of the penalty awarded is never at issue. The sole question is whether any penalty at all could be awarded. The WCAB, not the court of appeals, "narrowly defined its authority to impose the penalty on the state, applying section 5814 only with respect to the amount of TD over which it clearly had jurisdiction." ***Id.*** at p. 145. ***Ellison***

never weighed in on whether a penalty could be premised on the value of IDL. Under the auspices of section 4909 and the consideration of salary continuations plans under section 4650(g), however, an argument can be made that a penalty based on the value of IDL is warranted. That issue, though, is not presented in ***Ellison*** nor is it presented in the matter now before the Court.

Comparing the issues presented in this matter, this is not a case of a failure to pay benefits. Rather, it is a case where benefits were in fact paid, but that were paid outside of Division 4. This necessarily contemplates the fact that no "compensation" was actually paid, since IDL is "unambiguously" not compensation according to ***Ayala***. This leaves the Parties, and the WCAB, in the precarious position to eliminate consideration of TD benefits altogether in the calculation of section 4553 benefits. Recall that section 4553 is an increase in compensation actually received. The problem is that no TD benefits were awarded, or paid, while Respondent received E-IDL. The ***Ayala*** decision is silent on this conundrum and opens the door to an argument that since salary continuation plans are not compensation, then there is nothing to base an award for increased benefits under ***Ayala's*** strict interpretation of section 3207. This, in turn, allows employers who have engaged in quasi-criminal behavior to potentially escape liability for an increase in those benefits that would otherwise be credited within the workers' compensation system. This duality cannot be permitted to exist, and it accentuates the point that ***Ayala*** does not bring harmony, but discord.

If, however, the WCAB's function is to account for compensation otherwise recoverable outside of the system, then it stands to reason that compensation can, and shall, be fully contemplated in award of compensation under section 4553. It is not an issue of the WCAB ordering payment of benefits outside of its jurisdiction. Rather, it is simply allowing the WCAB to consider the nature and extent of compensation an injured worker has otherwise recovered.

E. The award for increased compensation under section 4553 is given an expansive meaning.

There appears to be only a handful of occasions where courts analyze the nature and extent of benefits that can be awarded under section 4553. The most relevant cases are: (1) the Court's opinion in ***Mercer-Fraser Co. v. Industrial Acci. Com.***, 40 Cal. 2d 102, 251 P.2d 955, (1953); (2) the Court's opinion in ***State Dep't of Corrections v. Workers' Comp. Appeals Bd. (Jensen)***, 5 Cal. 3d 885, 489 P.2d 818, 97 Cal. Rptr. 786 (1971), and (3) ***Ferguson v. Workers' Comp. Appeals Bd.***, 33 Cal. App. 4th 1613, 39 Cal. Rptr. 2d 806 (1st Dist. 1995). These cases contemplate the increase of compensation with Division 4. However, none have addressed whether "compensation otherwise recoverable" can be included in the one-half increase in section 4553. Each case, though, takes care to point out the clear purpose of section 4553: "It is manifest from the analysis in ***Horst*** that section 4553 of the Labor Code is designed to provide more nearly full compensation to an injured employee rather

than to penalize an employer." ***Jensen***, 5 Cal. 3d at 889 (relying upon ***E. Clemens Horst Co. v. Industrial Acci. Com.***, 184 Cal. 180, 193 P. 105 (1920)).

When analyzing the historical progression of these cases, it becomes equally clear that courts have approached section 4553 with an expansive view. ***Ferguson*** appears to take the most recent step forward in the inclusion of the types of benefits that can be included. Importantly, while drawing reference to section 3207, ***Ferguson*** approached the term "compensation" as follows: "[f]rom the time our workers' compensation scheme was initially established, this critical term has consistently been given an expansive meaning, described as including 'every benefit or payment' conferred upon employees." ***Ferguson***, 33 Cal.App.4th at 1619. It further noted, "the legislative history of section 4553 and related provisions of section 132a is also consistent with an expansive interpretation of the former statute." ***Id.*** at 1620.

> Consequently, so long as an award for increased compensation under section 4553 calculated on the basis of *all* compensation received by the injured worker, including indemnity as well as nonindemnity benefits, does not provide the injured worker more than is necessary to *fully* compensate the worker for *all* damages he or she sustained as a result of the injury caused, at least in part, by the willful misconduct of the employer, the award does not constitute punitive damages and is therefore not constitutionally excessive. ***Id.*** at 1624 (emphasis in original).

Importantly, ***Ferguson*** is presented with the simple question of whether medical benefits are a form of compensation under Division 4. ***Ferguson*** had no need to reach beyond the definition

of "compensation" in section 3207 to answer that question in the affirmative. Section 4600 delineates the provision for medical care, and it falls within Division 4. Analysis does not need to proceed further. However, it is a mistake to consider ***Ferguson*** as limiting recovery under the strict definition of "compensation" under section 3207. ***Ferguson*** is not presented with the question of whether "compensation otherwise recoverable" in the form of a salary continuation plan should be included.

With the backdrop of giving "compensation" an expansive meaning, the ***Ayala*** decision sits in contrast with its narrow and limiting perspective. It is difficult to resolve the apparent conflict between the expansive nature to award benefits under section 4553 and ***Ayala*** seeking to limit the award of those very benefits. This is rather startling when understanding that the very purpose of section 4553 is to increase benefits due to Petitioner's "positive, active, wanton, reckless and absolute disregard" of Respondent's safety.

The next step in the analysis is the issue before the Court. Employers are permitted to seek credit against their obligations to provide benefits in the workers' compensation system when they provide compensation outside that system. In the present case, Respondent otherwise recovered compensation via a salary continuation plan. Petitioner has the right to seek credit for those payments under section 4909. ***Brooks*** permits this credit via its interpretation that IDL is included within the meaning of aggregate disability benefits within section 4656. Therefore, IDL is the "compensation otherwise recoverable" that section 4553

contemplates and that section 4909 permits consideration of. Simply put, if the employer gets to take credit, then the employer is liable for value of that credit. This remedy will ensure an award closer to "full and complete compensation." ***Id.*** at 1625.

F. "Compensation" is considered "without regard to negligence," while "compensation otherwise recoverable" is antithetical to negligence.

Harmony exists with the fundamental understanding that since the creation of the workers' compensation system, Division 4 has always considered, and given credit for, compensation paid outside of its Division against compensation that can be awarded within its Division. There is no need to disturb any case law or to befuddle the Legislature's declaration that "IDL means TD as defined within Division 4"—as if this declaration alone were not sufficient to render a decision that IDL is necessarily included in the calculation of section 4553 benefits. This is precisely as the ***Brooks*** court has done for purposes of the payment of TD benefits, and just as the ***Ellison*** court has done in contemplation of a penalty.

The issue is resolved when the cases are put in the proper context. Both ***Brooks*** and ***Ellison*** properly fall within the standard realm where compensation is defined "without regard to negligence." The general nature of section 3207 gives proper context to the general applicability of both ***Brooks*** and ***Ellison*** in cases that do not rise to the level of the more specific allegation

of serious and willful misconduct as contemplated within section 4553.

Unlike the penalty provisions under section 5814 with mere reference to "compensation," the provisions in section 4553 consider "compensation otherwise recoverable." It becomes clear that an award of penalties for an unreasonable delay of either IDL or TD does not require a finding of serious and willful misconduct. Essentially, section 5814 is limited to those benefits within Division 4 by that statute merely stating "compensation." This is precisely why ***Ellison*** did not award penalties on the value of IDL, since IDL is technically a form of compensation outside of Division 4. The point being that ***Ellison*** had no cause to go beyond the statutory definition of "compensation". It never even considered the significance of the added language in section 4553 of "compensation otherwise recoverable" since that language does not exist for a 5814 penalty. As ***Ellison*** did not deal with a case involving serious and willful misconduct, its precedential value is limited to the very clear proposition that IDL is in fact contemplated within Division 4 for the purposes of furnishing benefits. This basic principle is similarly memorialized in ***Brooks*** when it found that furnishing IDL acts as a credit against an injured worker's entitlement to benefits under Division 4. These cases simply act as the foundation to show the inherent interaction between IDL and TD, indicating that IDL is treated within the aggregate disability benefits found within Division 4. This allows analysis to shift to section 4553, keeping in mind the liberal construction mandate under section 3202.

Section 4553 includes the additional language "otherwise recoverable," giving the opportunity to recognize the special nature and applicability of its provisions that are clearly intended to go beyond the standard realm of a no-fault system. Had the Legislature so intended, there would be no need to include the phrase "otherwise recoverable." Mere reference to "compensation" would be sufficient to make it clear that section 4553 is limited by the definition found in section 3207. However, the Legislature did not so state. The Legislature included the phrase "otherwise recoverable," which is clearly meant to augment the term "compensation." Those words must be given meaning. When considering the statutory scheme and the strong public policy to award increased compensation when an injury arises above the standard no-fault system, it cannot be said the WCAB's opinion is clearly erroneous as the ***Ayala*** court has declared.

Giving specific meaning to the unique terms in section 4553 allows reconciliation with existing case law. In the unique circumstances of cases involving serious and willful misconduct, a unique award of benefits shall likewise be granted. The very generality of section 3207 and its recognition that it applies in circumstances "without regard to negligence," allows it to be set aside for the more specific provisions found within section 4553. When an employer's actions are so egregious that it results in a finding of serious and willful misconduct, consideration must be given to the value of compensation otherwise recoverable. Otherwise, under the rationale of ***Ayala***, limiting compensation

to the value of a Division 4 benefit will only result in a legal fiction that benefits an employer that has caused intentional harm to an employee. An employer should not benefit from a decreased award of compensation based on a benefit that was not paid. Rather, an employer should be held to account for the compensation actually paid when considering the harm it intentionally inflicted. Calculating IDL in the one-half increase in compensation otherwise recoverable accomplishes this goal.

VI.
CONCLUSION

In the setting of an employer's quasi-criminal behavior, section 4553 creates an exception to the general rule where compensation is provided without regard to negligence. The purpose of this increase is to come closer to the compensation that can be awarded in a tort action. Section 4553 accomplishes this with inclusion of the phrase "compensation otherwise recoverable." This additional language recognizes the very nature of the workers' compensation system, wherein compensation otherwise recoverable outside of the system is credited against compensation under the system. This is evidenced by section 4909, granting the WCAB authority to take into account the payment of that compensation when fixing the amount of compensation to be paid within the system. Salary continuation plans, like IDL, fit squarely within the type of compensation otherwise recoverable, and unequivocally considered, under Division 4. As such, IDL is properly included

in the one-half increase of compensation otherwise recoverable under section 4553.

WHEREFORE, Respondent/Applicant, Michael Ayala, respectfully requests that the Petition for Review be GRANTED, and that the WCAB's Opinion and Decision dated April 13, 2022, be reinstated as a true statement of existing law.

DATED: February 2, 2024

Respectfully submitted,

BY: Michael T. Bannon, Esq

Michael T. Bannon, Esq.
Ferrone Law Group

VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, **MICHAEL T. BANNON**, am the attorney for **MICHAEL AYALA**, party to this action. Such party is absent from the aforesaid county where such attorney has its offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe, and on that ground allege, that the matters stated in the foregoing **Respondent's Opening Brief on the Merits** are true and correct to my own knowledge, except as to matter stated therein on information and belief. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of February 2024, at Westlake Village, California.

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_____

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CERTIFICATE OF COMPLIANCE

[CAL. RULES OF COURT 14(C)]

I, MICHAEL T. BANNON of FERRONE LAW GROUP, attorney for Respondent, MICHAEL AYALA, do hereby certify in accordance with California Rules of Court 14(c) that the word count of Respondent's Opening Brief on the Merits is in the amount of 6,967 words.

Dated: February 2, 2024

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KATELYN MATEO

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STATE OF CALIFORNIA
Supreme Court of California

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