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.***	CASE NO: E079076 WCAB CASE NO: ADJ71360597 **RESPONDENT'S REPLY BRIEF ON THE MERITS** **AFTER DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION 2**

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I. ARGUMENT

A. The WCAB has jurisdiction to taken into account the payment of IDL when setting the amount of compensation to be paid.

Section 3207 sets for 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.

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 any of the following: (a) The employer, or his managing representative" (emphasis added). Section 4553 falls within Division 4. Therefore, there can be no logical argument that an increase in benefits under section 4553 is anything other than "compensation" as defined in section 3207. As such, the WCAB has authority to increase the amount of compensation otherwise recoverable under section 4553. That ability remains squarely within the WCAB's power, and it is within the exclusive jurisdiction for the WCAB to do so.

Petitioner incorrectly focuses on the definition of "compensation" as it relates to IDL. The issue is not whether IDL falls within the strict definition of "compensation" under

section 3207. Rather, the issue is whether "compensation otherwise recoverable" under section 4553 can include the payment of salary continuation plans. There is absolutely no need to consider IDL as "compensation" under section 3207 to determine that the WCAB has the absolute discretion to "take into account" the payment of IDL when setting the amount of compensation otherwise recoverable under section 4553.

Support for the ability to contemplate the payment of salary continuation plans, like IDL, for purposes of setting the amount of "compensation" the WCAB may award under section 4553 is found within the Legislature's declaration that "IDL means TD as defined within Division 4." *See* Gov. Code section 19870. This is further evidenced by section 4650 including salary continuation plans in the timing of payments that are due and payable within Division 4—a payment of a salary continuation plan is essentially deemed a payment of Division 4 benefits. This interpretation then gives meaning to the phrase "compensation otherwise recoverable" within section 4553.

Further, the Legislature creates the pathway to consider the payment of salary continuation plans as "compensation" by the existence of section 4909, which clearly states: "Any payment, allowance, or benefit received by the injured employee during the period of his incapacity, . . . 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, . . . may be taken into account by the appeals board in fixing the amount of the compensation to be paid." IDL is not "due and payable" by the

terms of Division 4. However, it is compensation the injured employee receives during a period of incapacity. As the WCAB has the absolute right to take into account benefits payable outside the confines of Division 4, the WCAB has the absolute right to contemplate the payment of IDL. When setting the amount of "compensation" under section 4553, the WCAB, therefore, has the absolute right to consider IDL in the amount it awards under section 4553. Any contrary argument is nothing less than a distraction from how the workers' compensation system functions.

Respondent's position does not request the Court to ignore a single thing. Respondent simply requests the Court to focus on how the system as whole does not limit its function to a strict definition of Division 4 benefits. Payment of benefits outside of Division 4 unequivocally impact the award of benefits within Division 4. Not all do so, but those that do, as IDL certainly does, shall be properly included within the WCAB's ability to set compensation awarded under section 4553. To find to the contrary would be to upend that very system.

B. Petitioner's interpretation of the *Brooks* decision lacks common sense.

Petitioner seeks to create a distinction between "aggregate disability benefits" and "compensation." However, this is a distinction without difference. Section 4656 falls within the statutory scheme discussing Temporary Disability benefits. "Aggregate disability benefits" cannot be interpreted in a

vacuum. That phrase is expressly limited to the payment of TD payments and not to any other benefit that may be awarded within Division 4. TD benefits are statutorily defined and awarded under Division 4 and, as such, are a form of "compensation" pursuant to section 3207. To say anything other would defeat the very purpose of the statutes themselves. Therefore, "aggregate disability benefits" *are* a form of "compensation" pursuant to section 3207.

However, Petitioner offers no explanation for the conundrum it creates by seeking to draw distinction between "aggregate disability benefits" and "compensation." If "aggregate disability benefits" include IDL but IDL is not "compensation," then how is IDL included within the amount of "compensation" an injured worker may receive in TD benefits under Division 4? Rather, it makes more sense that IDL, as a salary continuation plan outside of Division 4, is treated *as* compensation for the purposes of calculating the "aggregate disability benefits" that may be awarded under Division 4.

As Petitioner admits, section 4656 contemplates the payment of benefits outside of Division 4 (i.e. IDL) in setting the amount of compensation under Division 4. Petitioner states: "the ***Brooks*** court was not limited by Section 3207's definition of 'compensation' as conferred by Division 4 of the Labor Code, and was free to include the one year of IDL benefits applicant received in the aggregate disability period of 104 weeks for TD." Petitioner's Answer at p. 17. Petitioner offers no reasonable explanation why the same would not be true for setting the

amount of compensation awarded under section 4553. A piece-meal application of when IDL counts against an award of Division 4 benefits is entirely nonsensical. Either IDL counts towards an award of Division 4 benefits, or it does not. Petitioner cannot have it both ways, particularly when considering that it seeks to ignore the inclusion of IDL when setting the amount of compensation due to its own serious and willful misconduct.

C. Petitioner's jurisdictional argument is dubious at best.

Petitioner cannot reasonably challenge the fact that the WCAB has jurisdiction over an award of compensation under section 4553. Any assertion that an award of benefits under section 4553 would usurp the jurisdiction of the DPA is rather insouciant when looking at Petitioner's position that IDL counts towards compensation under section 4656. The inclusion of IDL in "aggregate disability benefits" per ***Brooks*** no more usurps the jurisdiction of the DPA than award of compensation under section 4553 would. Likewise, an award of penalties for a failure to pay IDL per ***Ellison*** would hardly usurp the jurisdiction of the DPA. Petitioner's contention is addressed for the simple purpose of having it quickly dismissed as inapposite and inappropriate.

D. An award of compensation under 4553 is not an award of punitive damages.

Petitioner admits ***Jensen*** finds that an award under section 4553 is not the same as an award of punitive damages. Petitioner,

however, attempts to argue that an award premised on the value of IDL would amount to such. However, an award based on IDL cannot be said to be constitutionally excessive. Further, Respondent contends that question is not properly before the court and the Court need not reach that issue at present in order to resolve the issues at hand. That issue is best left to the WCAB and lower courts to determine, particularly as the distinction in value has not been stipulated to by the Parties.

Furthermore, Petitioner's reliance on ***Ellison*** is also misplaced. Petitioner leaves out a pertinent part of its quotation on page 23 of its Answer. Its citation should begin with "The order is that . . ." Petitioner's quotation leads to the improper inference that the ***Ellison*** court opined that the WCAB's jurisdiction was limited to an award of penalties based on the value of TD benefits rather than IDL. The ***Ellison*** court did no such thing—it was the WCAB that chose to limit the award of the penalty to the value of TD rather than IDL. The question before the court was whether it was improper for the WCAB to award a penalty *at all*. Any inference that the ***Ellison*** opinion limited the award of penalties is a misreading of the opinion itself.

E. Section 4551 is not at issue before the court.

Petitioner raises concern that Respondent's position has the unintended consequence of reducing an award under section 4551 for an employee, who deliberately, intentionally or wantonly injures themselves. That issue is not before the court and does not need to be addressed to resolve the present issues. To the

extent the Court chooses to do so, Respondent is of the firm opinion that nothing prohibits the WCAB to contemplate an injured worker's receipt of benefits outside of Division 4 when setting the amount of compensation to be reduced pursuant to 4551. It stands to reason that an injured worker who intentionally hurts themself should not receive full benefits as a result of their own behavior when it rises to such a level. This is beside the point that the number of those types of cases are very few and far between. On an equitable balance, the benefit should be skewed towards those employees who suffer injury as the result of an intentional harm by the employer.

II. CONCLUSION

The WCAB has authority to set the amount of compensation under section 4553, and it may consider "compensation otherwise recoverable" in order to do so. As a salary continuation plan, IDL is a form of compensation otherwise recoverable outside of Division 4. The Court does not need to include IDL within the section 3207 definition of "compensation" in order to include consideration of IDL in setting the amount of compensation awarded under section 4553. ***Brooks*** and ***Ellison*** support the consideration of IDL in setting the amount of compensation the WCAB may award. Further, section 4909 permits the WCAB express authority to take into account the payment of IDL. As such, the WCAB's inclusion of the value of IDL in setting the compensation awarded under section 4553 is proper.

DATED: March 14, 2024

Respectfully submitted,

BY: _____

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 Reply 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 14th day of March 2024, at Westlake Village, California.

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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 Petition for Review filed on or about March 14, 2024, is in the amount of 1,753 words.

Dated: March 14, 2024

Respectfully submitted,

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S282013**
Lower Court Case Number: **E079076**

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