IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN LARKIN,
Plaintiff, Appellant and Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, and THE CITY OF MARYSVILLE,
Defendants and Respondents.

After an Order by the Court of Appeal, Third Appellate District, Case No. S216986, WCAB NO. ADJ7191871

REPLY TO ANSWER TO OPENING BRIEF ON THE MERITS

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John Larkin

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court 8.208

Name of Interested Entity or Person	**Nature of Interest**
PORAC - LDF	Peace Officer Legal Defense Fund
Court of Appeal	Respondent Court
Workers' Compensation Appeals Board	Respondent Court
City of Marysville	Respondent
York Insurance Services Group	Respondent
Lenahan, Lee, Slater & Pearse, LLP	Attorney for Respondent
John Larkin	Injured Worker; Petitioner
Mastagni, Holstedt, Amick, Miller & Johnsen, A.P.C.	Attorney for Petitioner

Dated: June 23, 2014

Respectfully submitted,

MASTAGNI, HOLSTEDT, AMICK, MILLER & JOHNSEN

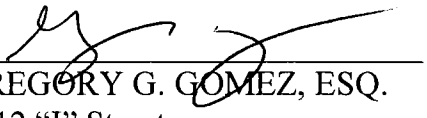

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

///

Statutes

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_____/

CASE NO: S216986

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REPLY TO ANSWER TO OPENING BRIEF ON THE MERITS

INTRODUCTION

This case involves an issue of statewide importance, whether Labor Code section 4458.2 (section 4458.2) should be applied to both volunteer peace officers and to regularly sworn, salaried officers. Petitioner John Larkin maintains that through affirming the Workers' Compensation Appeals Board's (the Board's) decision, the Court of Appeal ignored the intent of the legislature, the plain language of the statute, and the changing needs of California, when it incorrectly determined that the benefits provided under section 4458.2 extend only to volunteer police officers and not to regularly sworn, salaried peace officers.

Respondent, City of Marysville (Marysville), now contends that the legislative history supports the extension of benefits only to volunteer police officers while relying on attached improper cherry-picked exhibits to their answering brief.

The Court must exclude these exhibits from these proceedings as provided under California Rules of Court, rule 8.204(e)(2)(B) (rule 8.204(e)(2)(B)).

But even if the exhibits were considered, the intent of the legislature in 1989 was to meet the changing needs of California by providing maximum benefits to all applicable officers, in line with the liberal provision of benefits required under Labor Code section 3202 (section 3202) and by the California Constitution. And since there are tens-of-thousands of peace officers whose benefits under section 4458.2 are in jeopardy, the Court must swiftly act to implement the legislature's intent. Thus, the Court should correct the Court of Appeal's error and allow maximum benefits to all peace officers keeping in line with this intent.

LEGAL DISCUSSION

I. NO LANGUAGE IN EITHER SECTION 3362 OR SECTION 4458.2 SUPPORTS LIMITING MAXIMUM BENEFITS TO VOLUNTEER PEACE OFFICERS.

Marysville contends that Labor Code section 3362 (section 3362) is contained within Chapter 2, Article 2 of the Labor Code and that "given the statutory scheme and placement" of section 3362, that it exists to grant benefits to volunteers. (Resp. Ans. Brief on Merits at 7-8.) But nowhere in section 3362, or within Section 4458.2, is there a reference to volunteer peace officers that would support this contention. Thus, Marysville's argument is without merit.

Moreover, section 3362 describes those police departments having "official recognition and full or partial support of the government of the county, city, town, or district in which such police

department is located." (Cal. Lab. Code §3362 (2014).) It is undisputed that Mr. Larkin is a member of such a department "as described in [s]ection 3362." (Cal. Lab. Code §4458.2)

Marysville next claims that the combined reading of sections 4458.2 and 3362 provide that maximum benefits should only extend to volunteer peace officers who are "activated" and otherwise eligible. (Resp. Ans. Brief on Merits at 7.) Mr. Larkin does not dispute that volunteer peace officers so "activated" would be eligible to maximum benefits. However, no language exists in either provision that would limit these benefits to these activated employees only. And Marysville's contention that it does is unsupported.

II. MARYSVILLE'S EVIDENCE SUBMITTED WITH ITS ANSWERING BRIEF SHOULD BE EXCLUDED UNDER RULE 8.204(e)(2)(C) BECAUSE IT IS NOT PART OF THE RECORD, LACKS FOUNDATION, IS HEARSAY WITHOUT EXCEPTION, AND OFTEN APPEARS TO HAVE BEEN ALTERED.

In support of their Answering Brief on the Merits, Marysville attaches five sets of documents that appear to have been cherry-picked from an unknown source. But none of these documents are part of the Court's record either on appeal or at trial, and the documents are not authenticated, lack foundation, are hearsay without exception, and many appear to have been altered.

This court has required documents to be authenticated before they are admissible in evidence. (See *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 525.) Generally speaking, documents must be authenticated before they are admissible in evidence. (*Id.*) None of

these documents were authenticated, nor was there a foundation laid prior to their submission as exhibits before this court.

California Evidence Code section 1200 precludes all hearsay evidence as inadmissible, unless an exception applies. (Cal. Evid. Code §1200.) Marysville's submitted documents are hearsay, and it has not identified any exception under which the documents could be admitted.

Many of the attached exhibits appear to be altered from their original form. It is also unknown the circumstances surrounding the creation of the documents, such as who prepared them; what time were they prepared; or were the submitted documents drafts or final versions.

And Marysville did not provide any evidence to prove the content of the documents submitted, as required under the Secondary Evidence Rule. (See Cal. Evid. Code §1521.) Moreover, such Secondary Evidence, even if it was provided, must be excluded. Mr. Larkin has had no opportunity before this juncture to dispute the authenticity of the documents. And were the Court to admit Secondary Evidence in support of the documents into evidence, it would be unfair to Mr. Larkin, as Marysville has made no showing why these documents could not have been produced before the trial court or before the Board. (See Cal. Evid. Code §1521(a)(2).)

Tellingly, Marysville never requests the court to take judicial notice of these documents that were never presented to the trial court, but even if it had, it provides no factual basis why this Court should do so at the final stage of proceedings. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 (noting

that absent exceptional circumstances, courts do not take judicial notice of evidence not presented to the trial court.).)

Rule 8.204(e)(2)(c) allows the Court to disregard the noncompliant portions of Marysville's answering brief, and the Court should do so in this matter. Thus, the Court should exclude these documents and strike all references to them in Marysville's answer.

A. Exhibit A Must Be Excluded.

Marysville's Exhibit A, appears to be a copy of a June 12, 1961 letter and is not part of the Court's record. It has not been authenticated, and no foundation has been laid. Moreover, the document is hearsay without exception. It appears to have been cherry-picked from a compilation given the "2" handwritten at the bottom of the document. Thus, the Court should exclude this document and all references to it in Marysville's answer.

B. Exhibit B. Must Be Excluded.

Marysville's Exhibit B appears to be a copy of a July 5, 1961 document. It has not been authenticated, and no foundation has been laid. Moreover, the document is hearsay without exception and appears to have been altered. It appears to have been cherry-picked from a compilation given the "4" handwritten at the bottom of the document. Thus, the Court should exclude this document and all references to it in Marysville's answer.

C. Exhibit C Must Be Excluded.

Marysville's Exhibit C contains three documents which purport to contain legislative analysis of AB 276. These documents have not been authenticated, and no foundation has been laid for

these documents. Thus, the documents are hearsay without exception and appear to have been cherry-picked from a compilation given the "23", "24", and "12", handwritten at the bottom of the documents. Thus, the Court should exclude these documents, and all references to these documents in Marysville's answer.

D. Exhibit D Must Be Excluded

Marysville's Exhibit D contains what purports to be a "Republican" analysis. This document has not been authenticated, and no foundation has been laid. Moreover, the document is hearsay without exception, and like the others, appears to have been cherry-picked from a compilation given the "19" handwritten at the bottom of the document. The Court should exclude this document, and all references to this document in Marysville's answer.

E. Exhibit E Must Be Excluded.

Marysville's Exhibit E purportedly is a memo. This document has not been authenticated, and no foundation has been laid. Moreover, the document is hearsay without exception, and like the others, appears to have been cherry-picked from a compilation given the "22" at the bottom of the document. The Court should exclude this document, and all references to this document in Marysville's answer.

F. Exhibit F Must Be Excluded.

Marysville's Exhibit F contains three documents, none of which have been authenticated, and no foundation has been laid for any. The documents are hearsay without exception, and appear to have been altered. And the documents have been cherry-picked

from a compilation given the "17" and "18" handwritten at the bottom of the documents.

III. EVEN CONSIDERING MARYSVILLE'S IMPROPER EXHIBITS, THE LEGISLATIVE INTENT SUPPORTS THE EXTENSION OF MAXIMUM BENEFITS TO ALL PEACE OFFICERS.

It is undisputed, and supported by Marysville's Exhibits A and B, that the pre-1989 section 4458.2 read "If a *male* member registered as an active police member of any regularly organized *volunteer* police department as described in section 3362 suffers injury or death while in the performance of his duty as policeman." (emphasis added) (Cal. Lab. Code §4458.2 Amend. 1989.)

However, in 1989, the legislature removed the term "volunteer" and "male" so that these distinctions would no longer matter, and that maximum temporary disability benefits were to be available to all police officers, irrespective of gender or volunteer-status, who met the other guidelines outlined in the statute. (*Williams v. Los Angeles Metropolitan Transit Authority* (1968) 68 Cal.2d 599, 603.) This is supported by Marysville's Exhibit C, where purportedly the 1989 Assembly Finance and Insurance Committee noted in reference to the 1989 amendment that "the bill would also set the peace officer's temporary and permanent disability rates at the maximum rate." (See Resp. Ans. Brief on Merits, Ex. C.) This would be done irrespective of the peace officer's volunteer or reserve status. (*Id.*)

The purported "Republican Analysis" also confirms that the amendment would set all "qualified persons" benefits "at the maximum rate irrespective of salary." (See *id.* at Ex. D.)

The proffered note to Senator Pressley confirms that the amendment would extend Workers' Compensation benefits to paid reserve or auxiliary officers. (See *id.* at Ex. E.)

And Marysville's documents that allegedly show the Senate's Concurrence on the amendment indicate that peace officers include volunteers, partly-paid employees, and fully-paid employees, and that "these persons" were provided benefits at the maximum rate. (See *id.* at Ex. F.)

Thus, no evidence exists to support Marysville's contention that maximum benefits should be limited to volunteer officers only.

IV. MAXIMUM BENEFITS MUST BE EXTENDED TO ALL SWORN SALARIED OFFICERS TO AVOID AN ABSURD RESULT.

In affirming the Board's order, the Court of Appeal contended that "Larkin's interpretation of the statutes would leave volunteer peace officers without any recourse should they be injured during their voluntary public service. They would not be entitled to any workers' compensation benefits, as they would not be deemed employees." (*Larkin*, *supra*, 223 Cal.App.4th at 543.)

But the 1989 legislature removed "volunteer" **and** "male," and intended for all officer's benefits to be governed by section 4458.2. It would indeed be an absurd result, and potentially contrary to state and federal law, if the legislature intended that by removing the word "male," male-gendered officers otherwise eligible under the section for maximum benefits would no longer be post-1989. The result is equally absurd for "volunteer."

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V. MARYSVILLE DOES NOT DENY THAT THE 1989 MODERNIZATION TO ALLOW MAXIMUM BENEFITS TO ALL SWORN SALARIED OFFICERS WAS IN LINE WITH THE LABOR CODE'S LEGISLATIVE PURPOSE TO BE LIBERALLY CONSTRUED.

By modernizing section 4458.2 in 1989, the legislature reinforced the prime directive of the Labor Code. This directive, reflected in section 3202, and not disputed by Marysville, requires section 4458.2 to be liberally construed with the intent to extend the benefits of those persons "injured in the course of their employment." (Lab. Code §3202.) In line with this directive, the California Constitution also requires injured workers to be quickly provided benefits to relieve the effects of industrial injuries. (*Claxton v. Waters* (2004) 34 Cal.4th 367, 373 (citing Cal. Const. art. XIV, § 4).) This court has construed such enactments in light of the legislative design and purpose. (*People v. Grubb* (1965) 63 Cal.2d 614, 620.)

Marysville does not contest that the Court has repeatedly acknowledged the Legislature's command in section 3202 that the Labor Code "be liberally construed . . . with the purpose of extending [its] benefits for the protection of persons injured in the course of their employment." (*Department of Corrections v. Workers' Comp. Appeals Bd.* 23 Cal.3d 197, 206 (1979) (citing *Kerley v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 223, 227 and *Gross v. Workmen's Comp. Appeals Bd.* (1975) 44 Cal.App.3d 397, 402.).) Where a provision, such as section 4458.2, can be construed to provide benefits, as here, to all otherwise eligible peace officers,

that construction should be adopted even if another reasonable construction that denies benefits is possible. (See *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065 (citing *Department of Corrections*, *supra*, Cal.3d at 206.).)

As this Court noted thirty-five years ago in *Department of Corrections*, *supra*, Cal.3d at 206, where a provision may be reasonably construed to provide coverage or payments, that construction should be adopted to give fully recognition to the Legislature's intent in enacting the workers' compensation system. Thus, the Court should recognize that the 1989 modernization extended maximum benefits to all sworn salaried officers.

VI. MARYSVILLE DOES NOT DENY THAT THE 1989 MODERNIZING LEGISLATION WAS ENACTED TO MEET THE CHANGING NEEDS OF CALIFORNIA, IN LINE WITH THIS COURT'S DECISION IN *MEREDITH*.

The Court has recognized that a provision should be liberally interpreted, and when possible, construed to meet "changing conditions and the growing needs of the people." (*Miro v. Superior Court* (1970) 5 Cal.App.3d 87, 98 (citing *Los Angeles Met. Trans. Auth. v. Public Utilities Com'n* (1963) 59 Cal.2d 863, 869 and *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 635.).) Marysville does not contest that the 1989 Legislature's removal of "volunteer" and "male" was done to meet these changing conditions to extend maximum benefits to all sworn salaried officers, without distinction to gender or volunteer status.

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The Court of Appeal's reliance on *Meredith v. Workers'Comp. Appeals Bd.*(1977) 19 Cal.3d 777, only furthers this point. Thirty-six years ago, the Court recognized the importance of volunteer firefighters and recognized the "liberal disability compensation program not only serves to counterbalance any sacrifice of earning power made to engage in firefighting activity, but also provides an incentive to engage in an important public service." (*Larkin, supra*, 223 Cal.App.4th at 542 (citing *Meredith, supra*, 19 Cal.3d at 781–782.).)

Marysville's contention that the Court should look to a 1968 writ denial in *Matteson v. Workers' Comp. Appeals Bd.*, (1968) 33 Cal. Comp. Cases 683 by the Second District Court of Appeal is unavailing. While the 1968 Board found that section 4458.2 then-in-effect did not permit a police matron to receive maximum benefits because section 4458.2 was limited to volunteers, this denial occurred nine years before *Meredith*, and the 1989 amendment removed 'volunteer' from the statute, rendering the basis for the denial nullified.

Marysville's speculation that maximum benefits were provided only to volunteer peace officers, per the 1989 amendment, as a benefit for those officers alone is unsupported by any evidence, and runs contrary to this Court's decision in *Meredith.*

Thus, the 1989 Legislature decisively acted to meet the changing needs of California by extending maximum benefits to all otherwise eligible sworn peace officers, volunteer, or otherwise.

VII. TO PREVENT MANIFEST INJUSTICE TO THOUSANDS OF SWORN OFFICERS, ALL PEACE OFFICERS OTHERWISE ENTITLED MUST HAVE ACCESS TO MAXIMUM BENEFITS.

Since the Court of Appeal erroneously limited maximum benefits under section 4458.2 to volunteer peace officers and not to regularly sworn, salaried peace officers, thousands of regularly sworn, salaried officers have been deprived of access to their maximum benefits. (*Larkin*, *supra*, 223 Cal.App.4th at 540.)

The Court of Appeal erroneously found that benefits under section 4458.2 "extend only to volunteer peace officers and not to regularly sworn, salaried peace officers." (*Id.*) This limitation has deprived many thousands of officers access to their maximum benefits.

Indeed, it is undisputed that the California Employment Development Department estimates that at least 73,100 police and sheriff patrol officers are employed within the state. (See Employment Development Department, *Police and Sheriff Patrol Officers in California*, <http://www.labormarketinfo.edd.ca.gov/OccGuides/Detail.aspx?Soccode=333051&Geography=0601000000> [as of April 2, 2014] ("Estimated current employment of Police and Sheriff patrol officers is 73,100.")[1]

While Marysville now contends that providing maximum benefits to all sworn officers would be a "fiscal catastrophe" due to

[1] Mr. Larkin requests the Court to take judicial notice of this website under California Evidence Code sections 1271 and 1280. (Cal. Evid. Code §§1271, 1280.)

the effects of twenty-five years of inflation, their own evidence proposes that the legislature intended for this result to occur when the 1989 amendment was debated. (See Resp. Ans. Brief on Merits at 13, Ex. A-F.) And whether volunteer officers have access to other benefits under section 4850 or any other provision of the Labor Code is irrelevant to this matter - namely whether the legislature intended to modernize section 4458.2.

Thus, to prevent manifest injustice to the many thousands of presumably male and female, volunteer and salaried, peace officers, the Court should extend maximum benefits to all otherwise eligible sworn salaried peace officers.

CONCLUSION

In affirming the Board's decision, the Court of Appeal ignored the intent of the legislature and common sense by finding that benefits provided under section 4458.2 extend only to volunteer police officers and not to regularly sworn, salaried peace officers. Indeed, the 1989 Legislature's intent to strike 'male' and 'volunteer,' from section 4458.2, so that the maximum benefits could be more broadly applied, fits within the prime directive of section 3202, namely to liberally construe section 4458.2 with the intent to extend maximum benefits to those persons "injured in the course of their employment." It also avoids an absurd result, and meets the changing needs of Californians. And Marysville has not provided any evidence to show otherwise.

Section 3362, at best, describes those departments in which a sworn peace officer must be employed - which it is undisputed that Mr. Larkin is a member of. And since there are tens-of-thousands of

statewide sworn peace officers who would otherwise be entitled to benefits under section 4458.2, this issue must be swiftly decided to allow them access to their due benefits in line with the intent of California's workers' compensation plan.

Dated: June 23, 2014

Respectfully submitted,
MASTAGNI, HOLSTEDT, AMICK, MILLER & JOHNSEN

GREGORY G. GOMEZ, ESQ.
Attorney for Petitioner,
John Larkin

CERTIFICATE OF WORD COUNT

Under Rule 8.204(c)(1) of the California Rules of Court, I certify that Respondent's brief consists of 3,037 words, as counted by the computer program used to generate the document.

Dated: June 23, 2014

Respectfully submitted,

MASTAGNI, HOLSTEDT, AMICK, MILLER & JOHNSEN

GREGORY G. GOMEZ, ESQ.
Attorney for Petitioner,
John Larkin

VERIFICATION

I am the attorney for Petitioner John Larkin, in the instant action or proceeding.

I have read the foregoing **REPLY TO ANSWER TO OPENING BRIEF ON THE MERITS** and know the contents thereof.

I certify that the contents of the foregoing are true and correct of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true.

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

Executed on June 23, 2014 at Sacramento, California.

GREGORY G. GOMEZ, ESQ.
Attorney for Petitioner,
John Larkin

PROOF OF SERVICE BY MAIL

1013a, 2015 C.C.P.

John Larkin v. The City of Marysville

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 1912 I Street, Sacramento, California 95811.

On June 23, 2014 I served the within:

REPLY TO ANSWER TO OPENING BRIEF ON THE MERITS

on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in California, addressed as follows:

Original to:
Supreme Court of the State of California
350 McAllister Street, Room 1295
San Francisco, CA 94102
(original plus 13 copies)

Copies to:
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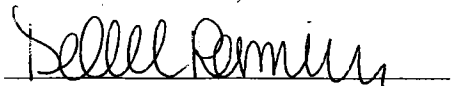
I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 23, 2014 at Sacramento, California.



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