

**S282013**

**IN THE SUPREME COURT OF CALIFORNIA**

**CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,  
legally uninsured; adjusted by STATE  
COMPENSATION INSURANCE FUND,**

*Petitioners and Respondents,*

**vs.**

**WORKERS' COMPENSATION APPEALS  
BOARD; MICHAEL AYALA,**

*Respondents and Petitioner.*

**Civ. No. E079076  
(WCAB Case No. ADJ1360597)**

**Supreme No. S282013**

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**APPLICATION OF THE WORKERS' COMPENSATION  
APPEALS BOARD TO FILE AMICUS CURIAE BRIEF IN  
SUPPORT OF RESPONDENT AND PETITIONER HEREIN  
MICHAEL AYALA**

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**APPLICATION TO FILE AMICUS CURIAE BRIEF**  
(Cal. Rules of Court, Rule 8.520)

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF CALIFORNIA**

The Workers’ Compensation Appeals Board (“Appeals Board”)<sup>1</sup> hereby requests leave to file the previously submitted Amicus Letter as Brief of Amicus Curiae in support of applicant and respondent, petitioner herein, Michael Ayala. (Cal. Rules of Court, Rule 8.520(f).) The Appeals Board now requests leave to file the Amicus Letter as a Brief of Amicus Curiae now that the matter has been granted.<sup>2</sup>

Petitioner herein Michael Ayala requests review of the decision issued by the Fourth District on August 14, 2023 in *Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd. (Ayala)* (2023) 94 Cal.App.5th 464 (“*Ayala*”), because it stands in direct conflict with the existing and longstanding precedent in the Fifth District, *Brooks v. Workers’ Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1522, 1528 (“*Brooks*”), and in the Fourth District, *Cal. v. Workers’ Comp. Appeals Bd. (Ellison)* (1996) 44 Cal.App.4th 128 (“*Ellison*”). The Appeals Board agrees with petitioner herein Michael Ayala that the decision in *Ayala* creates an untenable conflict with *Brooks* and *Ellison*, as well as other decisional precedent that requires this Court’s review and resolution to ensure

<sup>1</sup> The Appeals Board is not a party to the writ proceedings, although it may appear in writ proceedings. (Lab. Code, § 5953.) The Appeals Board filed a response to the Order to Show Cause and appeared at oral argument in this matter. (Cal. Rules of Court, Rule 8.520(f)(4).)

<sup>2</sup> Please find the previously submitted Amicus Letter attached to this Application. The attached letter was previously filed with the Court on October 23, 2023 as an Amicus Letter pursuant to California Rules of Court, Rule 8.500, subdivision (g)(1).

uniformity of decision.

The Appeals Board is the judicial arm of the California workers' compensation system. (Cal. Const., Art. XIV § 4; Lab. Code, §§ 111-116, 133-134, 3201.) Pursuant to its constitutional grant of authority, the Appeals Board has exclusive jurisdiction to issue final decisions in workers' compensation proceedings. (*Id.*; Lab. Code, §§ 5300-5302, 5901; see Lab. Code, §§ 5950 et seq.) Thus, review of workers' compensation trial decisions may only be pursued by way of reconsideration to the Appeals Board. (Lab. Code, § 5900 et seq.) Review of final decisions issued by the Appeals Board rests solely with the California District Courts of Appeal or the Supreme Court. (Lab. Code, §§ 5950; *Gumilla v. Industrial Acci. Com.* (1921) 187 Cal. 638, 640; *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1255; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068.)<sup>3</sup>

As a result, "the Board has extensive expertise in interpreting and applying the workers' compensation scheme." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1331.) Great weight is therefore given to the Appeals Board's interpretations of workers' compensation statutes "unless they are clearly erroneous or unauthorized. (citations)" (*Ibid.*; see *Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 158.)

"In reviewing a workers' compensation provision, we give great weight to the WCAB's interpretation unless it contravenes legislative intent as evidenced by clear and unambiguous statutory language. [Citation.] In addition, we

<sup>3</sup> For purposes of clarity, all judicial powers in workers' compensation are vested in the Appeals Board by the Labor Code, and up to seven members (commissioners) are appointed by the Governor to serve on the Appeals Board. (Lab. Code, §§ 111-116, 133-134, 3201, 5300-5302.) Adjudication proceedings are delegated to district offices where decisions are rendered through this delegated authority by more than 190 workers' compensation administrative law judges across the state. (*Id.*)

look to the overall scheme of which a provision is a part and consider the consequences that will flow from a particular construction so as to achieve wise policy rather than mischief or absurdity. [Citation.] We must also consider fairness, reasonableness, and proportionality of an enactment and the purposes sought to be achieved. [Citation.] As 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, supra*, 161 Cal.App.4th at p. 1528, citing *Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 790, 795.)

Thus, the Appeals Board has an inherent interest in the just and consistent application of the workers' compensation laws, and can offer its expertise in the workers' compensation system to the Court in deciding this matter. (Cal. Rules of Court, Rule 8.520(f)(3).)

Dated: March 21, 2024

Respectfully submitted,  
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ALLISON J. FAIRCHILD, Cal. State Bar No. 170095

By /s/  
ALLISON J. FAIRCHILD  
Attorney for Respondent  
Workers' Compensation Appeals Board

IN THE SUPREME COURT OF CALIFORNIA

**CALIFORNIA DEPARTMENT OF  
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**AMICUS CURIAE BRIEF OF THE WORKERS'  
COMPENSATION APPEALS BOARD IN SUPPORT OF  
RESPONDENT AND PETITIONER HEREIN MICHAEL AYALA**

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October 23, 2023

Chief Justice Patricia Guerrero  
and Associate Justices  
Supreme Court of California  
Earl Warren Building  
350 McAllister Street  
San Francisco, CA 94102

**RE: Supreme Court Case No. S282013, California Department of Corrections and Rehabilitation v. Workers' Compensation Appeals Board (Ayala) [WCAB Case No. ADJ1360597]**

Dear Chief Justice Patricia Guerrero and the Associate Justices:

The Workers' Compensation Appeals Board ("Appeals Board") submits this Amicus Letter to support the Petition for Review ("Petition") filed by applicant/respondent and proposed applicant/petitioner Michael Ayala in the above referenced matter. (Cal. Rules of Court, Rule 8.500(g)(1).)<sup>1</sup>

The Appeals Board is the judicial arm of the California workers' compensation system. (Cal. Const., Art. XIV § 4; Lab. Code, §§ 111-116, 133-134, 3201.) Pursuant to its constitutional grant of authority, the Appeals Board has exclusive jurisdiction to issue final decisions in workers' compensation proceedings. (*Id.*; Lab. Code, §§ 5300-5302, 5901; see Lab. Code, §§ 5950 et seq.) Thus, review of workers' compensation trial decisions may only be pursued by way of reconsideration to the Appeals Board. (Lab. Code, § 5900 et seq.) Review of final decisions issued by the Appeals Board rests solely with the California District Courts of Appeal or the Supreme Court. (Lab. Code, §§ 5950; *Gumilla v. Industrial*

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*Acci. Com.* (1921) 187 Cal. 638, 640; *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1255; *Maranian v. Workers' Comp. Appeals Bd.* (2000).)<sup>2</sup>

As a result, “the Board has extensive expertise in interpreting and applying the workers’ compensation scheme.” (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1331.) Great weight is therefore given to the Appeals Board’s interpretations of workers’ compensation statutes “unless they are clearly erroneous or unauthorized. (citations)” (*Ibid.*; see *Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 158.)

“In reviewing a workers’ compensation provision, we give great weight to the WCAB’s interpretation unless it contravenes legislative intent as evidenced by clear and unambiguous statutory language. [Citation.] In addition, we look to the overall scheme of which a provision is a part and consider the consequences that will flow from a particular construction so as to achieve wise policy rather than mischief or absurdity. [Citation.] We must also consider fairness, reasonableness, and proportionality of an enactment and the purposes sought to be achieved. [Citation.] As 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. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1522, 1528 (“*Brooks*”), citing *Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 790, 795.)

The Petition requests review of the decision issued by the Fourth District on August 14, 2023 in *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Ayala)* (2023) 94 Cal.App.5th 464 (“*Ayala*”), because it “stands in direct conflict” with the existing and longstanding precedent in the Fifth District, *Brooks, supra*, and in the Fourth District, *Cal. v. Workers' Comp. Appeals Bd. (Ellison)* (1996) 44 Cal.App.4th 128 (“*Ellison*”).

The Appeals Board supports the Petition in its entirety and agrees with proposed applicant/petitioner that the decision in *Ayala* creates an untenable conflict with

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<sup>2</sup> For purposes of clarity, all judicial powers in workers’ compensation are vested in the Appeals Board by the Labor Code, and up to seven members (Commissioners) are appointed by the Governor to serve on the Appeals Board. (Lab. Code, §§ 111-116, 133-134, 3201, 5300-5302.) Adjudication proceedings are delegated to district offices where decisions are rendered by more than 190 workers’ compensation administrative law judges across the state through this delegated authority. (*Id.*)



*Brooks* and *Ellison*, as well as other decisional precedent that requires this Court’s review and resolution to ensure uniformity of decision. (See Writ, pp. 8-10 [discussing Lab. Code, §§ 4656 (compensable weeks allowed for aggregate disability payments); 4909 (employer credit for voluntary salary continuation or other payments); and Education Code section 44043 (salary continuation benefits)].)

## I. BACKGROUND

In this case, there remains no dispute that proposed applicant/petitioner (“petitioner” or “Mr. Ayala”) sustained injury as a result of his employer’s serious and willful misconduct and is therefore entitled to a 50% increase of “compensation otherwise recoverable” under Labor Code<sup>3</sup> section 4553. (Lab. Code, § 4553.) The only issue remaining upon reconsideration was the measure of the section 4553 50% increase in “compensation otherwise recoverable.”

Mr. Ayala’s employer was the California Department of Corrections and Rehabilitation (“CDCR”), and therefore, as a state employee he received temporary disability indemnity (“TD”) for his industrial injury through industrial leave disability (“IDL”) under Government Code section 19870, subdivision (a). IDL is “temporary disability *as defined in Divisions 4 (commencing with Section 3201) and 4.5 (commencing with Section 6100) of the Labor Code...*” (Gov. Code, § 19870(a), emphasis added.)<sup>4</sup> CDCR argued that IDL was not “compensation” under section 3207 and should not be included in the section 4553 calculation, and petitioner argued that “compensation otherwise recoverable” included all compensation actually received and that IDL is TD and should be included in that calculation.

The Appeals Board issued a decision awarding Mr. Ayala a section 4553 50% increase based on the IDL he actually received. Precedent guiding the Appeals Board in its determination included *Brooks* and *Ellison*, both of which relied “on the Legislature’s definition of IDL as identical with temporary disability indemnity (TD) under the Labor Code...” (*Brooks, supra*, 161 Cal.App.4th at p. 1533, citing *Ellison, supra*, 44 Cal.App.4th at p. 130.) Moreover, the Court in *Brooks* held that

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<sup>3</sup> All further references are to the Labor Code unless otherwise noted.

<sup>4</sup> TD paid at the IDL rate is higher than the two-thirds average weekly earnings or weekly loss in wages paid pursuant to sections 4653 or 4654 and 4453. “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 22 working days of disability subject to Section 19875. Thereafter, the payment shall be two-thirds of full pay.” (Gov. Code, § 19871.)

IDL and temporary disability indemnity are *not* distinct classes of benefits. (*Id.*) It is undisputed that the Appeals Board has jurisdiction to award TD. (Lab. Code, § 5300 [Appeals Board’s jurisdiction extends to all matters “concerning any right or liability arising out of or incidental” to “the recovery of compensation”].)

The Appeals Board also looked to the unique history and purpose of section 4553.<sup>5</sup> As a result of the history of section 4553, its “remedy departs to some extent from the no-fault principle upon which our workers’ compensation system is primarily based.” (*Ferguson v. Workers’ Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1622 (“*Ferguson*”).) What is now section 4553 was “founded” on the theory “that the ordinary schedule of compensation...was not considered to be full and complete compensation for the injuries received.” (*E. Clemens Horst Co. v. Industrial Acci. Com.* (1920) 184 Cal. 180, 193.) Indeed, “the phrase ‘full and complete compensation,’ as that term is employed in *Horst*...refers to the amount of compensatory damages a worker could be awarded in a civil action if entitled to sue in tort.” (*Ferguson, supra*, 33 Cal.App.4th at pp.1625-1626.)

Given that the purpose of an award under section 4553 is to more fully compensate the employee for an injury caused by the employer’s serious and willful misconduct, the Appeals Board determined that the “otherwise recoverable” language in section 4553 would be most fairly interpreted as expansive rather than limiting to best serve the purpose of section 4553, with the potential to contemplate compensation received outside of division 4 of the Labor Code. Certainly, awarding Mr. Ayala a 50% increase based on the actual amount of TD he received was more consistent with a compensatory damages calculation (as it reflects a rate closer to salary replacement), than it would be to base the calculation on a standard TD rate.<sup>6</sup>

Finally, it has long been established that “where provisions of [the workers’ compensation statutes] are susceptible of an interpretation either beneficial or detrimental to injured employees or an ambiguity appears, they must be construed

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<sup>5</sup> Before 1917, “the law allowed an employee a choice of remedies if an injury was caused by an employer’s gross negligence or willful misconduct.” (*Johns-Manville Prods. Corp. v. Superior Court (Rudkin)* (1980) 27 Cal.3d 465, 471 (superseded by statute on other grounds in *Siva v. General Tire & Rubber Co.* (1983) 146 Cal.App.3d 152, 156, fns. 6-7.)) “The clear implication is that the addition in 1917 of the ‘exclusive remedy’ limitation and the provision for a penalty for the willful misconduct of the employer was a substitute for the previous right of an employee to bring an action at law.” (*Id.*, at pp. 471-472.)

<sup>6</sup> This is also consistent with how the section 4553 50% increase is otherwise calculated in that the *actual* amount of medical and cost billing are used, not what should have been paid under the medical treatment utilization schedule, etc.

favorably to the employees.” (*Granado v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 404; Lab. Code, § 3202.) Thus, liberal construction of the Labor Code advocated in favor of calculating the serious and willful award based on applicant’s enhanced IDL benefits as part of compensation otherwise recoverable under section 4553.

## **II. THE DECISION IN *AYALA* IS INCONSISTENT WITH EXISTING PRECEDENT AND LEGISLATIVE INTENT AND REVIEW IS NEEDED TO ENSURE UNIFORMITY OF DECISION**

CDCR sought review of the Appeals Board’s award contending that the only inquiry necessary to interpret what was meant by “compensation otherwise recoverable” in section 4553 was to determine what was meant by the definition of “compensation” in section 3207. This plea essentially asked the Fourth District to disregard the Legislative intent and purpose of section 4553, the Legislative intent of Government Code 19870, the longstanding relevant precedent in *Brooks* and *Ellison*, as well as the expertise of the Appeals Board in interpreting and applying the workers’ compensation scheme.

Despite thoughtful response from both the Appeals Board and petitioner, the Fourth District did just that, and narrowed its inquiry in this matter down to “the scope of the statutory term ‘compensation...’” pursuant to section 3207 (*Ayala, supra*, 94 Cal.App.5th at p. 474; Lab. Code, § 3207 [“‘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.”].) Based on this narrow inquiry, it held that because of the lack of ambiguity in the definition of “compensation” in section 3207, “industrial disability leave benefits are not ‘compensation,’ as such benefits are not provided by division 4 of the Labor Code.” (*Id.*, at p. 470.) The Fourth District held that IDL is an “*alternative* to temporary disability” for “certain state officers and employees...” (*Id.*, at pp. 470-471, emphasis added.) In conclusion, it held that the “‘amount of compensation otherwise recoverable’ under section 4553 does not include industrial disability leave.” (*Id.*, at p. 470.)

The Fourth District disagreed with petitioner and the Appeals Board that the meaning and intent of the phrase “compensation *otherwise recoverable*” in section 4553, the statutory language at issue in this matter, indicated Legislative intent to reflect the unique nature of section 4553 compensation (see § I, *supra*). The Fourth District found instead, and without reference, that the Legislature modified “compensation” with the phrase “otherwise recoverable” to limit its scope. (*Ayala, supra*, 94 Cal.App.5th at p. 475.) Specifically, the Court determined that the Legislature limited the scope of “compensation” in section 4553 “to forestall any claim that the 50 percent increase itself needs to be increased because it is

‘compensation...’” (*Ibid.*) In other words, the Fourth District thought the Legislature anticipated a risk that the Appeals Board would issue a recursive award where a 50% increase would be issued indefinitely. The Appeals Board is not persuaded that this was the intention of the Legislature, especially given the history and purpose of section 4553.

Regardless, as a result of the Fourth District’s holding, Mr. Ayala – and any state employee in Mr. Ayala’s position – is no longer entitled to a section 4553 50% increase award that includes *any* TD in its calculation – even though he did receive TD as compensation for an industrial injury caused by the serious and willful misconduct of his employer. This result is not just surprising and anomalous – it actually *thwarts* the purpose of section 4553 which, as a penalty for employers who injure their employees through serious and willful misconduct, was enacted to provide more full and complete compensation for the injuries Mr. Ayala received. The choice to narrow the inquiry to “the scope of the statutory term ‘compensation’” in this case has therefore resulted in a through-the-looking glass version of the workers’ compensation system, where state employer misconduct is rewarded, and those state employees injured by the misconduct are denied their rightful compensation.

Further, when addressing the section 3202 mandate that workers’ compensation statutes are to be liberally construed to protect injured workers, the Fourth District justifies this result with the fact that although those state employees who are injured as a result of their employers’ serious and willful misconduct will see a *reduction* in their section 4553 50% increase, those state employees who are injured as a result of their own serious and willful misconduct will *not* see a concomitant reduction even though such a reduction is exactly what the Legislature intended should happen under section 4551.<sup>7</sup> (*Ayala, supra*, 94 Cal.App.5th at pp. 475-476.)

The Fourth District then explained that it would not recognize the longstanding precedent decision in *Brooks*:

If the legal slate were blank, we would end our discussion here. However, the Board concluded that section 4553 base compensation includes industrial disability leave, mainly relying on *Brooks, supra*, 161 Cal.App.4th 1522. As we will discuss, although *Brooks* construed a different statute, its reasoning could support a conclusion that base compensation includes industrial disability leave.

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<sup>7</sup> “Where the injury is caused by the serious and willful misconduct of the injured employee, the compensation otherwise recoverable therefor shall be reduced one-half, except...” (Lab. Code, § 4551.)

...

However, to the extent that *Brooks* could be read as support for the proposition that any features of or limitations on temporary disability necessarily must apply to industrial disability leave because of the way industrial disability leave is defined (see *Brooks, supra*, 161 Cal.App.4th at p. 1532), we respectfully disagree.

(*Ayala, supra*, 94 Cal.App.5th at pp. 472-473.)

Therefore, the decision in *Ayala* is anomalous and contrary to existing precedent because it ignores Legislative intent obvious on the face of Government Code section 19870 when it defined IDL as Division 4 temporary disability. In other words, although the Government Code substitutes a different rate of payment for TD for an industrially injured state worker, that difference in the rate of payment does not change the circumstances of payment – the injured worker receives the benefit *as a result of their industrial injury*. Whether the rate of payment for TD is set by sections 4453, 4653 and 4654 or by Government Code section 19870, a payment of TD to an industrially injured worker because of that industrial injury *is payment of TD under Division 4*.

Although the Fourth District claims that its decision in *Ayala* is “broadly consistent” with *Ellison*, the Appeals Board disagrees. (See *Ayala, supra*, 94 Cal.App.5th at p. 474.) First, the Court in *Ellison* held that the Appeals Board had jurisdiction to award a penalty for delayed payment of IDL, based in part on the Legislature’s definition of IDL as “identical with” TD. (*Ellison, supra*, 44 Cal.App.4th at p. 130.)

Our conclusion is based on the Legislature’s definition of IDL as identical with temporary disability indemnity (TD) under the Labor Code (Gov. Code, § 19870, subd. (a)), the Board’s unquestioned jurisdiction of TD which is also available to an injured state employee, the Board’s construction of its authority which is not clearly erroneous, the Legislature’s salutary general purpose in authorizing the penalty in cases of unreasonably delayed payment, and the requirement that statutory enactments pertaining to workers’ compensation are to be construed liberally in favor of the injured worker.

(*Ellison, supra*, 44 Cal.App.4th at p. 130, emphasis added.)

Next, the Fourth District believes that *Ellison* did not involve “the scope of the statutory term ‘compensation,’ as the unreasonable delay penalty at issue in *Ellison* required a 10 percent increase in ‘the full amount of the order, decision or award’

when it applied.” (*Ayala, supra*, 94 Cal.App.5th at p. 474.) However, section 5814 has always authorized penalties *only* for the unreasonable delay or refusal to pay an order, decision or award for “compensation.” (Lab. Code, § 5814, former and current.) Therefore, the *Ellison* Court *could* have narrowed the scope of their inquiry to “the scope of the statutory term ‘compensation,’” as did the Court in *Ayala*. However, the *relevant* inquiry in *Ellison* was not the scope of “compensation,” but rather, whether a state employee receiving IDL for an industrial injury is entitled to the protection of the workers’ compensation laws. The *Ellison* Court answered in the affirmative.

The Board 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. As we have said earlier in this opinion, such a penalty is a part of compensation for “temporary disability as defined in Divisions 4 ... and 4.5 ....” (Gov. Code, § 19870, subd. (a); § 3207.)

The strong policy of helping the employee obtain benefits promptly and compelling the employer to timely provide the benefits (*Adams, supra*, 18 Cal. 3d at p. 229) admits of no exception for one class of employee-employer relationship, that of a state worker to the state, as distinguished from the vast class of other employee-employer relationships that are subject to application of this policy.

...

The initial definition of IDL as meaning TD “as defined in Divisions 4 ... and 4.5” (Gov. Code, § 19870, subd. (a)) evidences an intent to grant state workers the benefits of all of those provisions, including the penalty provision in question which is contained in division 4. The WCAB unquestionably has jurisdiction over these provisions.

(*Ellison, supra*, 44 Cal.App.4th at pp. 145-146.)

The Fourth District’s decision will not only affect the calculation of the section 4553 50% increase in “compensation otherwise recoverable” for state employees, but its rejection of the two separate and longstanding precedent cases in *Brooks* and *Ellison* could also remove payments and/or non-payment of IDL from the jurisdiction of the Appeals Board. Clearly, given the grant of authority in Government Code section 19870, the Legislature never intended that industrially injured state workers be treated differently than other industrially injured workers in how benefits and payments are conferred merely by providing for a more generous rate of payment.

The Appeals Board is also concerned that the criticism of *Brooks* paves the way for industrially injured state employees to seek more weeks of compensable TD than other injured workers are allowed under section 4656, and despite the general policy against double recovery in workers' compensation. (*Ayala, supra*, 94 Cal.App.5th at p. 476 ["And had *Brooks* taken a view of the relevant statutes that was more consistent with our own, the employee there would have been more likely to prevail and receive an additional year of aggregate disability payments."].)

### III. CONCLUSION

The issue presented to the Fourth District was the intended meaning of the phrase "compensation otherwise recoverable" in section 4553 for purposes of calculating a section 4553 50% increase penalty, and whether or not the Appeals Board's interpretation of that phrase as expansive rather than limiting to best serve the purpose of section 4553 was "clearly erroneous." (*Brodie, supra*, 40 Cal.4th at p. 1331.) The issue arose because of the parties' dispute over whether the section 4553 50% increase in this case should include Mr. Ayala's TD payments at the IDL rate, or at an artificially reduced rate commensurate with what he would have received if not a state employee.

In reviewing the Appeals Board's decision, the Fourth District chose to narrowly focus its inquiry on the definition of "compensation" in section 3207 and held that because IDL is not "compensation" as defined by section 3207 and constitutes an "alternative remedy" to TD, neither Mr. Ayala nor state employee in Mr. Ayala's situation may include TD in the calculation of their section 4553 50% increase award if they receive it as IDL. By doing so, the Fourth District ignores the unique Legislative history and purpose of section 4553, the Legislative intent of Government Code 19870, the longstanding and relevant precedent in *Brooks* and *Ellison*, as well as the expertise of the Appeals Board in interpreting and applying the workers' compensation scheme.

The conflict that the decision in *Ayala* creates with Legislative purpose and longstanding precedent was not therefore a measured, reasonable decision. In addition to its failure to consider the "purposes sought to be achieved" by section 4553, the consequences that will flow from the Fourth District's construction will not "achieve wise policy" but rather, "mischief or absurdity." (*Brooks, supra*, 161 Cal.App.4th at p. 1528.)

The Appeals Board therefore must support the Petition in its entirety and agrees with proposed applicant/petitioner that the decision in *Ayala* creates an untenable conflict that requires this Court's review and resolution to ensure uniformity of decision. The Appeals Board is at the Court's disposal should this Court require further information or briefing.

Respectfully submitted,  
ANNE SCHMITZ, Cal. State Bar No. 166664  
ALLISON J. FAIRCHILD, Cal. State Bar No. 170095

By /s/  
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AJF/ara

(See attached Proof of Service)



STATE OF CALIFORNIA )  
 )ss.  
CITY AND COUNTY OF SAN FRANCISCO )

On October 23, 2023 at 4:00 P.M., I electronically served the attached Amicus Letter Brief to Chief Justice Patricia Guerrero and the Associate Justices of the Supreme Court, in the matter of Supreme Court Case No. S282013, California Department of Corrections and Rehabilitation v. Workers' Compensation Appeals Board (Ayala) [WCAB Case No. ADJ1360597], and on the parties registered for electronic service through TrueFiling, and by the U.S. mail on all parties not so registered, as set forth below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on October 23, 2023.

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## SERVICE LIST

Supreme Court Case No. S282013, *California Department of Corrections and Rehabilitation v. Workers' Compensation Appeals Board (Ayala)*  
[WCAB Case No. ADJ1360597]

<p><b><u>Supreme Court (TrueFiling):</u></b> Chief Justice Patricia Guerrero and the Associate Justices Supreme Court of California Earl Warren Building 350 McAllister Street San Francisco, CA 94102</p>	<p><b><u>Counsel for Petitioner (TrueFiling):</u></b> A. Gina Hogtanian, Esq. <a href="mailto:AGHogtanian@scif.com">AGHogtanian@scif.com</a> State Compensation Insurance Fund 655 North Central Avenue, 3rd Floor Glendale, CA 91203</p>
<p><b><u>Counsel for Petitioner (TrueFiling):</u></b> Lisa Stolzy, Esq. <a href="mailto:lastolzy@scif.com">lastolzy@scif.com</a> State Compensation Insurance Fund 6301 Day Street Riverside, CA 92507</p>	<p><b><u>Counsel for Respondent: (TrueFiling):</u></b> Michael T. Bannon, Esq. <a href="mailto:mbannon@ferronelawgroup.com">mbannon@ferronelawgroup.com</a> Ferrone Law Group 4333 Park Terrace Drive, Suite 200 Westlake Village, CA 91361</p>
<p><b><u>Counsel for Respondent (One copy – by mail):</u></b> John Anthony Ferrone, Esq. Adams Ferrone &amp; Ferrone 4333 Park Terrace Drive, Suite 200 Westlake Village, CA 91361</p>	

### **CERTIFICATE OF COMPLIANCE**

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Amicus Curiae Brief of respondent is produced using 13-point Times New Roman type including footnotes and contains approximately 995 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

(Code Civ. Proc., §§ 1013(a)(b), 2009, 2015.5; Lab. Code, § 5954;  
Cal. Rules of Court, Rules 8.25(a), 8.494(b))

STATE OF CALIFORNIA )  
 )ss.  
CITY AND COUNTY OF SAN FRANCISCO )

I am over 18 years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is 455 Golden Gate Avenue, Suite 9328, San Francisco, CA 94102. My electronic name address is AAficial@dir.ca.gov.

On March 21, 2024 at 3:30 P.M., I electronically served through TrueFiling the attached Application Of The Workers' Compensation Appeals Board To File Amicus Curiae Brief In Support Of Respondent and Petitioner Herein Michael Ayala and Amicus Curiae Brief, to Jorge Navarrete, Deputy Clerk, in the matter of Supreme Case No. S282013, *California Department of Corrections and Rehabilitation v. Workers' Compensation Appeals Board and Michael Ayala* [WCAB Case No. ADJ1360597] and on the parties registered for electronic service through TrueFiling, and by the U.S. mail on all parties not so registered, as set forth below.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on March 21, 2024.

/s/ Annie Riza Aficial

## SERVICE LIST

*Supreme Case No. S282013, California Department of Corrections and Rehabilitation v. Workers' Compensation Appeals Board and Michael Ayala [WCAB Case No. ADJ1360597]*

<p><b><u>Court (TrueFiling):</u></b>  Jorge Navarrete, Deputy Clerk  Supreme Court of California  350 McAllister Street  San Francisco, CA 94102-4797</p>	<p><b><u>Counsel for Petitioner (TrueFiling):</u></b>  Agavni Gina Hogtanian, Esq.  <a href="mailto:AGHogtanian@scif.com">AGHogtanian@scif.com</a>  State Comp. Insurance Fund  655 N. Central Avenue, 3rd Flr.  Glendale, CA 91203</p>
<p><b><u>Counsel for Petitioner (TrueFiling):</u></b>  Lisa Stolzy, Esq.  <a href="mailto:lastolzy@scif.com">lastolzy@scif.com</a>  State Compensation Insurance Fund  6301 Day Street  Riverside, CA 92507</p>	<p><b><u>Counsel for Respondent (TrueFiling):</u></b>  Michael T. Bannon, Esq.  <a href="mailto:mbannon@ferronelawgroup.com">mbannon@ferronelawgroup.com</a>  Ferrone Law Group  4333 Park Terrace Drive, Ste. 200  Westlake Village, CA 91361</p>
<p><b><u>Counsel for Respondent (One copy – by mail):</u></b>  John Anthony Ferrone, Esq.  Adams Ferrone &amp; Ferrone  4333 Park Terrace Drive, Ste. 200  Westlake Village, CA 91361</p>	<p><b><u>Counsel for Amicus Curiae (TrueFiling):</u></b>  Ellen Sims Langille, Esq.  <a href="mailto:elangille@cwci.org">elangille@cwci.org</a>  California Workers Comp. Inst.  1999 Harrison Street, Suite 2100  Oakland, CA 94612</p>

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: **AFairchild@dir.ca.gov**
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/21/2024

Date

/s/Annie Aficial

Signature

Fairchild, Allison (170095)

Last Name, First Name (PNum)

WCAB Commissioners

Law Firm