

CASE NO. D072648

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

COUNTY OF SAN DIEGO

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD of the STATE OF CALIFORNIA,

Respondent,

KYLE PIKE

Real Party In Interest

WORKERS' COMPENSATION APPEALS BOARD
WCAB No. ADJ 7811907

AMICUS CURIAE BRIEF
By CALIFORNIA WORKERS' COMPENSATION INSTITUTE

In Support Of PETITIONER COUNTY OF SAN DIEGO

(submitted concurrently with Amicus Curiae Application)

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CERTIFICATE OF INTERESTED ENTITIES

Court of Appeal
State of California
Fourth Appellate District – Division One

Court of Appeal Case Number: D072648

Case Name: COUNTY OF SAN DIEGO vs. WORKERS' COMPENSATION
APPEALS BOARD of the STATE OF CALIFORNIA, and KYLE PIKE

Please check the appropriate box:

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 14.5(d) (3).

Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest

October 18, 2017



Signature of Attorney/Party Submitting Form

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VERIFICATION AND WORD COUNT

I, Michael A. Marks, swear that I have read the within Amicus Curiae brief and know the contents thereof; that the within Argument & Authorities contains 3,094 words (including footnotes), based on the automated word count of the computer word-processing program; that I am informed and believe that the facts and law stated therein are true and on that ground allege that such matters are true; that I make such verification because the officers of California Workers' Compensation Institute are absent from the County where my office is located and are unable to verify the petition, and because as their attorney I am more familiar with such facts and law than are the officers.

I declare the truth of the foregoing under penalty of perjury of the laws of the State of California, and that this verification was executed this 18th day of October, 2017, at Essex, Vermont.



Michael A. Marks (SBN 071817)

THE DECISION BELOW IS CONTRARY TO BOTH
THE UNAMBIGUOUS LANGUAGE OF LABOR CODE
SECTION 4656(C)(2) AND THE CLEARLY EXPRESSED
LEGISLATIVE INTENT, AND SHOULD BE REVERSED.

The workers' compensation system has undergone a series of substantial systemic reforms over the last 15 years,¹ prompting much contentious appellate litigation unsuccessfully aimed at rolling back or otherwise frustrating those reforms.² This case represents a similarly misguided challenge to the reforms (as enacted in 2004 as part of SB899 and revised in 2007 by AB338), now targeting Labor Code 4656(C)(2) five year window within which the 104 weeks of temporary disability must be accrued, as enacted in 2007 as part of AB338.

Prior to 2004, Labor Code Section 4656 had included language that temporary disability could "not extend for more than 240 compensable weeks within five years from the date of injury." As originally modified by SB899 effective 4/19/04 as urgency legislation, a shorter 104 week temporary disability cap was codified as part of Labor Code Section 4656, which newly stated,

Aggregate disability payments for a single injury occurring on or after the effective date of this subdivision, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years

¹ See gen., AB 749 (Stats. 2002, ch. 6), SB228 (Stats. 2003, ch. 639), SB 899 (Stats. 2004, ch. 34), AB 338 (stats 2007, ch. 595), SB863 (stats 2012, ch 363),

² See, e.g., *Green v. WCAB* (2005) 127 Cal.App.4th 1426; *Marsh v. WCAB*, (2005) 130 Cal. App. 4th 906, *Rio Linda Union School Dist. v. WCAB* (2005) 131 Cal.App.4th 517 (review den.), *Kleemann v. WCAB* (2005) 127 Cal.App.4th 274 (review den.); *Brodie v. WCAB* (2007) 40 Cal.4th 1313; *E.L. Yeager Construction v. WCAB* (2006) 145 Cal.App.4th 922; *State Compensation Insurance Fund v. WCAB (Dorsett)* (2011) 201 Cal. App. 4th 443; *Acme Steel* (2013) 218 Cal. App. 4th 1137; *Stevens v. Outspoken Enterprises* (2015) 241 Cal.App.4th 1074; *State Compensation Insurance Fund v. WCAB (Margaris)* (2016) 248 Cal.App.4th 349; *Ramirez v. WCAB* (2017) 10 Cal. App. 5th 205.

from the date of commencement of temporary disability payments. [Labor Code 4656(c)(1)] (emphasis added)

That statute was again amended in 2007 by AB338, as applied to injuries after 1/1/2008, and was changed to read as follows:

(c) (1) Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.

(2) Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.

The SB899 changes had applied to injuries on/after 4/19/04 and the duration of temporary disability became *104 weeks within two years of the first payment*, whereas the AB338 changes applied to injuries on/after 1/1/08 and the duration of temporary disability became *104 weeks within five years of the date of injury*. Ostensibly relying on the “liberal construction” provisions of Labor Code Section 3202, the Appeals Board below judicially rewrote the statute to ignore the limitation of “104 weeks *within a period of five years from the date of injury*”³ and instead issued an award encompassing a period of time outside that five year limitation.

As a preliminary matter, the decision below relies upon an improper use of Labor Code Section 3202. As noted by our Supreme Court in *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298

the rule of liberal construction stated in section 3202 should not be used to defeat the overall statutory framework and fundamental rules of statutory construction.

³ Exhibits In Support of Petition for Review, Exhibit 1, Opinion and Order Denying Petition Reconsideration, Pg. 3

Those principles of statutory construction include interpretive reliance upon the Legislative Counsel's Digests,⁴ and in this case that digest as relates to AB338,⁵ gives no support to the Appeals Board's interpretation, instead stating that,

Existing law prohibits aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability from extending for more than 104 compensable weeks within a period of 2 years from the date of commencement of temporary disability payment, except if an employee suffers from certain injuries or conditions.

This bill would, for a single injury occurring on or after January 1, 2008, increase to 5 years from the date of injury, the period of time during which an employee can receive aggregate disability payments.
(emphasis added)

Similarly relevant to interpreting the legislative intent are the legislative committee hearings which also reveal no support for the Appeals Board's interpretation.⁶

⁴ The Legislative Counsel's Digest "constitutes the official summary of the legal effect of the bill and is relied upon by the Legislature throughout the legislative process," and thus "is recognized as a primary indication of legislative intent." (*Souvannarath v. Hadden* (2002) 95 Cal.App.4th 1115, 1126, fn. 9)

⁵ Legislative Counsel's digest is available at
[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200720080AB338]

⁶ "In construing a statute, legislative committee reports, bill reports, and other legislative records are appropriate sources from which legislative intent may be ascertained." (*In re John S.* (2001) 88 Cal.App.4th 1140, 1144, fn. 2 ; see *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 889 [13 Cal. Rptr. 3d 433] ["[w]hen construing a statute, we may consider its legislative history, including committee and bill reports, and other legislative records".]) "Relevant material includes: legislative committee reports [citation]; Legislative Analyst's reports [citation]; and testimony or argument to either a house of the Legislature or one of its committees"

Instead, as described in the official legislative history⁷, that 2007 amendment to Labor Code Section 4656 was expressly intended to achieve a clearly articulated limited purpose.. That clearly articulated purpose is found in the Assembly Floor Analysis, which states,

SUMMARY: Extends the "window period" during which an injured workers can receive up to 104 weeks of temporary disability (TD) benefits from two years to five years. Specifically, this bill: 1) Extends the window during which an injured worker can receive TD benefits from two years to five years. 2) Changes the date that starting the window period running from the date TD benefits are first paid to the date of injury. The Senate amendments delete the Assembly version of the bill, and adopt the approach described above.

EXISTING LAW: 1) Caps temporary disability benefit payments at 104 weeks. 2) Provides that an injured worker cannot receive temporary disability benefits for more than two years after the date that temporary disability payments commenced, even if the employee has not used up the maximum 104 weeks of benefits.

COMMENTS: 1) Purpose: According to the sponsor, the current 2-year window during which an injured employee can receive the 104 allowable weeks of temporary disability benefits unfairly penalizes the employee who has returned to work -- the very thing the workers' compensation system is intended to encourage. In fact, there is a consensus among most participants in the workers compensation system that the 2-year window is unfair. According to the Commission on Health and Safety and Workers Compensation (CHSWC), the cost factor of extending the window to 5 years is insignificantly higher than extending it to 3 years, and therefore the 5-year rule would protect the small number of outlying cases without much overall cost impact above a 3-year rule. A typical worker benefited by the bill is a worker who attempts to return to work, but the injury simply does not heal properly, and ultimately requires surgery. If the decision to undergo surgery is made more than 2 years after the injury, the worker gets no TD benefits

⁷ See, 9/12/2007 Assembly Floor Analysis, available at leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200720080AB338

during recovery, even if he or she has not used up all of the allotted 104 weeks. AB 338 cures this defect. (emphasis added)⁸

The Appeals Boards invoking of Section 3202 to defeat the clear terms of the statute and its intent should not be allowed.⁹ Both the express language of the statute and the legislative intent behind the 2007 amendments to Section 4656(c) are unambiguous. *The employee is entitled only to 104 weeks of temporary disability payable within 5 years of the date of injury.* Judicially rewriting the statute to conform to a contrived interpretation, unsupported by the legislative history is abhorrent, should not be condoned.¹⁰ The Appeals Board's decision below, which would extend the temporary disability period beyond the permissible five year time frame, directly violates both the language of the statute and the express legislative intent, and should be reversed.

⁸ An example of the inequity sought to be remedied can be seen in *Morris v. WCAB* 2008 Cal. Wrk. Comp. P.D. LEXIS 925, (writ den. 74 CCC 794)

⁹ As noted in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1558–1559, “3202 is a tool for resolving statutory ambiguity where it is not possible through other means to discern the Legislature's actual intent.” (*Brodie v. Workers' Comp. Appeals Bd.* (2007)] 40 Cal.4th [1313,] 1332 Section 3202 “cannot supplant the intent of the Legislature as expressed in a particular statute.” (*Fuentes v. Workers' Comp. Appeals Bd.* [(1976)] 16 Cal.3d [1,] 8.) If the Legislature's intent appears from the language and context of the relevant statutory provisions, then we must effectuate that intent, “even though the particular statutory language ‘is contrary to the basic policy of the [workers' compensation law].’” [Citation.]” (*Kopping v. Workers' Comp. Appeals Bd.* [(2006)] 142 Cal.App.4th [1099,] 1106 [Where] the Legislature's intent is ascertainable from the language of the [relevant] statutes and the legislative history, we cannot rely on section 3202 to defeat that intent.”

¹⁰ See gen., *California Teachers Assn v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633

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As acknowledged by the Appeals Board, there is no binding precedent on the issue presented herein, and the WCAB has issued various conflicting panel decisions.¹¹ Under this circumstance, this Court should not defer to the Appeals Board's statutory interpretation herein.¹²

In its decision below, the Appeals Board specifically references two non-binding non-precedential WCAB panel decisions.¹³ The *Oakland Unified* decision addressed an issue not applicable herein ... i.e., whether the claimant's disability was only *temporary partial* (and therefore governed by the Labor Code Section 4656(b) limit to 240 weeks within a period of five years from the date of injury) ... or whether it was *temporary total* disability ... in which event that limitation did not apply based on the applicable version of the statute then in existence (*id at* 1400-1401) . The *Unigard* decision is equally inapplicable, as it

¹¹ Exhibits In Support of Petition for Writ of Review, Exhibit # 1, Opinion and Order Denying Petition for Reconsideration, Pg . 3, *and see* Dissent at Pg. 6

¹² State Comp. Ins. Fund v. WCAB, (Margaris) (2016) 248 Cal. App. 4th 349 358

¹³ Exhibits In Support of Petition for Writ of Review, Exhibit # 1, Opinion and Order Denying Petition for Reconsideration, Pg . 3 & 4, referencing *Oakland Unified School District v. WCAB (Little)* (2009) 74 Cal.Comp.Cases 1399 (writ den.) (hereafter *Oakland Unified*); *Unigard Insurance Co. v. WCAB (Acosta)* (1994) 59 Cal.Comp.Cases 966 (writ den.)(hereafter *Uniguard*)

interpreted a prior version of the statute and thus considered neither the legislative intent nor the legislative history behind the current statute. As recognized in *Colmenares vs. Bremer Country Club* (2003) 29 Cal. 4th 1019, "Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and *an opinion is not authority for a proposition not therein considered*. (citations omitted and emphasis added)".

It should be recalled that SB899 amended Labor Code Section 4656(c)(1) to limit temporary disability based on date of commencement of payments, stating that

...temporary disability shall not extend for more than 104 compensable weeks *within a period of two years from the date of commencement of temporary disability payments*

That statute was amended by AB338 to change the limitation on temporary disability, now stating that

...temporary disability shall not extend for more than 104 compensable weeks *within a period of five years from the date of injury*.

Notably, the change was only to the window of time within which temporary disability could be payable (i.e., from within two years of first payment, to within five years of the date of injury). Despite the WCAB Judge's conjecture to the contrary,¹⁴ and without any reference to the contrary legislative history, nowhere does the statutory language extend that window outside of five years from the date of injury, nor does the legislative history support an inferred intent to do so.¹⁵ To accomplish its desired outcome, the Appeals Board has adopted a rationale which

¹⁴ Petitioners' Exhibit #4, Findings And Award and Opinion On Decision, Pg. CSD027; and see Petitioners' Exhibit #6, Report and Recommendation on Petition for Reconsideration, Pg. CSD044

¹⁵ See text accompanying fn. 6.

violated both the prohibition against ignoring the express statutory language, and the prohibition against inserting language that the legislature did not include.¹⁶

Because of misplaced reliance on inapplicable WCAB panel decisions, and an analytical underpinning that violates traditional principles of legislative intent determination as outlined above, the decision below should be reversed.

CONCLUSION

The legislative intent to permit 104 weeks of temporary disability within five years of the date of injury is unambiguous. Contrary to what occurred below, Courts are not permitted to rewrite the statute, nor to ignore the clear language of the statute, to achieve a presumed intent not supported by any relevant legislative intent.

Therefore, the decision below should be reversed.

Respectfully submitted,

Allweiss & McMurtry
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By: 
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¹⁶ Rudd v. California Casualty Gen. Ins. Co., 219 Cal. App. 3d 948, 952

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Respondent(s)

Civil No: D072648
WCAB Case No. ADJ 7811907

Declaration of Service
Via TruFiling
plus
Paper Copies To Court

I, the undersigned, declare under penalty of perjury according to the laws of the State of California, that I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is Allweiss & McMurtry, 18321 Ventura Blvd, Suite 500, Tarzana, CA 91356, and that on 10/18/17, filing and service of the *Application of California Workers' Compensation Institute for Leave To File Amicus Curiae Brief AND Amicus Curiae Brief of California Workers' Compensation Institute* was electronically performed through the TrueFiling electronic system of the court for service pursuant to California Rules of Court 8.70 and 8.71. Additionally, three paper copies were on that date mailed to the Court via USPS, postage fully prepaid, at Essex Junction, Vermont, addressed as follows:

4th District Court of Appeal
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