

COPY

SUPREME COURT COPY

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

JOHN C. DUNCAN, DIRECTOR OF  
INDUSTRIAL RELATIONS, as  
ADMINISTRATOR of the SUBSEQUENT  
INJURIES BENEFITS TRUST FUND of the  
STATE OF CALIFORNIA,

*Petitioner,*

v.

WORKERS' COMPENSATION APPEALS  
BOARD of the STATE OF CALIFORNIA,

*Respondent,*

XYZZX SJO2,

*Real Party In Interest.*

Case No.: S179194

(Court of Appeal:  
Case No.: H034040)

(WCAB No. ADJ1510738  
[SJO 0251902])

SUPREME COURT  
FILED

JAN 25 2010

Frederick K. Ohlrich Clerk

Deputy

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL  
SIXTH APPELLATE DISTRICT.

REPLY TO ANSWER TO PETITION FOR REVIEW

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Steven A. McGinty, Asst. Chief Counsel, SB # 170606  
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Industrial Relations as Administrator of the  
Subsequent Injuries Benefits Trust Fund

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## INTRODUCTION

In answering the Petition for Review Real Party in Interest conceded that it would be improper to impose two separate payment escalators during the same period of time. Thus, Real Party agrees with Petitioner that the meaning of Labor Code section 4659, subdivision (c) was misconstrued by the Court of Appeal if that is the effect of the Court of Appeal decision. Real Party merely insists that the Court of Appeal decision has yet to be implemented by the Workers' Compensation Appeals Board ("WCAB"). This Court need not wait until the WCAB follows the instructions of the Court of Appeal before it determines that the Court of Appeal decision was wrong.

## ARGUMENT

### **THE COURT OF APPEAL DECISION RESULTS IN DOUBLE ESCALATION OF PAYMENTS THUS REVIEW IS NECESSARY NOW.**

Real Party in Interest contends that increases to total permanent disability payments authorized by Labor Code 4659, subdivision (c) apply only after the increases to the temporary disability rates authorized by Labor Code section 4453, subdivision (a) have occurred.<sup>1</sup> (Answer, ¶ 4, p. 2.) The Court of Appeal decision makes no such distinction and does not limit the payment increases required under section 4659, subdivision (c) to those occurring after the date of injury as Real Party suggests. Real Party's position that date of injury controls was rejected by the Court. (See Slip Opinion attached to Petition for Review as Exhibit 1, at p.10.) The Court of Appeal decision requires total permanent disability payment increases be calculated starting January 1, 2004 irrespective of date of injury or permanent and stationary date when entitlement to total permanent disability payments begin, and irrespective of the benefit rate increases authorized by section 4453, subdivision (a).

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<sup>1</sup> All further statutory references are to the Labor Code.

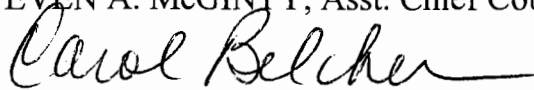
The Court of Appeal's decision gives no discretion to the WCAB or the workers' compensation administrative law judge ("WCALJ") at the local District Office to apply payment increases as they see fit. The decision announced a rule for application for payment which is not subject to interpretation. The WCALJ must follow the law and calculate the temporary disability rate in accordance with section 4453, subdivision (a) and must follow the Court of Appeal's decision and calculate the total permanent disability payment increases starting on January 1, 2004 pursuant to section 4659, subdivision (c). Thus, the double escalation will occur, and further action by the WCALJ in calculating the payment increases starting on January 1, 2004 is a ministerial act. The method for calculating the payment increase has been determined by the Court of Appeal and the propriety of that method is clearly ripe for review.

Real Party in Interest contends there is no reason to apply increases to total permanent disability payments authorized by Labor Code 4659, subdivision (c) during the same period of time when the temporary disability benefit rate upon which those payments are initially based already has been increased. (Answer, ¶ 3, p. 3.) Thus, Real Party acknowledges that double escalation was never intended by the Legislature and implicitly agrees that the Court of Appeal decision was wrong. Thus, the Court should grant review for all of the reasons set forth in the Petition and this Reply.

January 25, 2010

Respectfully submitted,

DEPT. OF INDUSTRIAL RELATIONS  
VANESSA L. HOLTON, Chief Counsel  
STEVEN A. MCGINTY, Asst. Chief Counsel



By: CAROL BELCHER, Staff Counsel  
ANTHONY MISCHER, Staff Counsel  
JESSE N. ROSEN, Staff Counsel  
Attorneys for Petitioner, John C. Duncan, Director  
of Industrial Relations as Administrator of the  
Subsequent Injuries Benefits Trust Fund

**VERIFICATION**

(CODE CIV. PROC. §§ 446, 2015.5.)

I, Carol Belcher, am an attorney for Petitioner Director of Industrial Relations as Administrator of the Subsequent Injuries Benefits Trust Fund, a governmental agency of the State of California, in the above-entitled action.

I have read the foregoing Reply to Answer to Petition for Review and know the contents thereof. The same is true of my own knowledge, except as to matters stated on information and belief or otherwise supported by citations to the record or legal authority, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on January 25, 2010 at San Francisco, California.

  
CAROL BELCHER

## CERTIFICATE OF COMPLIANCE

Counsel for Petitioner, Director John C. Duncan, California Department of Industrial Relations, certifies that pursuant to California Rules of Court, rule 8.204(C)(1), there are 575 words in Petitioner's Reply including footnotes, relying on the word count function of Microsoft Word, the computer word processing program used to prepare this brief.

January 25, 2010

Respectfully submitted,  
DEPT. OF INDUSTRIAL RELATIONS  
VANESSA L. HOLTON, Chief Counsel  
STEVEN A. MCGINTY, Asst. Chief Counsel



By: CAROL BELCHER, Staff Counsel  
ANTHONY MISCHER, Staff Counsel  
JESSE N. ROSEN, Staff Counsel  
Attorneys for Petitioner, John C. Duncan,  
Director of Industrial Relations as  
Administrator of the Subsequent Injuries  
Benefits Trust Fund

CERTIFICATE OF SERVICE

(Code Civ. Proc. § 1013)

CASE: John C. Duncan, Director of Industrial Relations, as Administrator of the Subsequent Injuries Benefits Trust Fund of the State of California v. Workers' Compensation Appeals Board of the State of California, et al.

Supreme Court Case No. S179194

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 455 Golden Gate Avenue, Suite 9516, San Francisco, California 94102. On January 25, 2010, I served the following document(s):

**REPLY TO ANSWER TO PETITION FOR REVIEW**

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) By Overnight Delivery: The notice or other paper was delivered to an authorized courier or driver authorized to receive documents, in an envelope or package designated by the carrier with delivery fees paid or provided for, addressed to the person to whom it is to be served, at the office address as last given by that person on the document filed in the cause and served on the party making service.
- (B) By Personal Service: I caused each such envelope to be personally delivered to the office of the addressee by a member of the staff of the Department of Industrial Relations, Office of the Director - Legal Unit, on the date last written below.
- (C) By First Class Mail: I am readily familiar with the practice of the Department of Industrial Relations, Office of the Director - Legal Unit, for the collection and processing of correspondence for mailing with the United States Postal Service. I caused each such envelope, with first-class postage thereon fully prepared, to be deposited in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

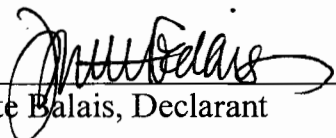
TYPE OF  
SERVICE

ADDRESSEE

PARTY  
REPRESENTED

B	Workers' Compensation Appeal Board Reconsideration Unit 455 Golden Gate Avenue, Ste. 9328 San Francisco, CA 94102 (two copies)	Respondent
C	Arthur L. Johnson, Esq. Butts & Johnson 481 North First Street San Jose, CA 95112	Attorney for Real Party in Interest
C	Sixth District Court of Appeal 333 W. Santa Clara Street, Suite 1060 San Jose, CA 95113	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed January 25, 2010, at San Francisco, California.

  
\_\_\_\_\_  
Janette Balais, Declarant



