

S 216986

Supreme Court Copy

**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.
C065891, WCAB NO. ADJ7191871

REPLY TO ANSWER TO PETITION FOR REVIEW

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SUPREME COURT
FILED

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Frank A. McGuire Clerk

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

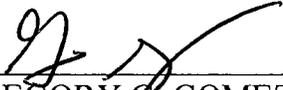
California Rules of Court 8.208

Name of Interested Entity or Person	Nature of Interest
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: April 3, 2014

Respectfully submitted,

**MASTAGNI, HOLSTEDT,
AMICK, MILLER & JOHNSEN**



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filed on January 28, 2014 A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN LARKIN,

CASE NO: C065891

Petitioner,

WCAB CASE NO: ADJ7191871

v.

**REPLY TO ANSWER TO
PETITION FOR REVIEW**

THE CITY OF MARYSVILLE,

Respondents.

_____ /

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 and incorrectly determined that the benefits provided under section 4458.2 extend only to volunteer police officers and not to regularly sworn, salaried peace officers. Moreover, the Court of Appeal also erred in relying upon Labor Code section 4855 (section 4855) to interpret section 4458.2, since section 4855 concerns a different article and section of the Labor Code. And allowing maximum benefits to all applicable officers follows the intent of the legislature in 1989, and is in line with Labor Code section 3202 (section 3202), and protects the benefits of thousands of statewide sworn peace officers.

In its answer, Respondent City of Marysville, P.S.I. (Marysville), offers only the same errant logic as the Court of Appeal, ignoring the legislative intent behind section 4458.2 to make maximum benefits available to all sworn peace officers otherwise entitled to benefits under section 4855. Because these thousands of statewide officers' benefits are at risk, this issue is of immediate falling under this Court's jurisdiction.

Thus, the Court should grant review to resolve the statewide issue that the Court of Appeal's decision creates and ensure that section 4458.2 benefits are properly administered statewide to all otherwise eligible sworn peace officers.

LEGAL DISCUSSION

I. REVIEW IS NECESSARY TO ENSURE ALL PEACE OFFICERS OTHERWISE ENTITLED HAVE ACCESS TO MAXIMUM BENEFITS, WHICH IS AN ISSUE OF IMMEDIATE STATEWIDE IMPORTANCE.

In its answer, Marysville contends that “[r]eview is not necessary to settle an important issue of law or to secure uniformity of decision.” (Resp. Answer at 4 (citing Cal. R.Ct. 8.500(b)(1)).) But 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 v. Workers' Comp. Appeals Bd.* (2014) 223 Cal.App.4th 538, 540.) Supreme Court review is required to prevent manifest injustice to these officers.

In its order, 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.”
(*Larkin, supra*, 223 Cal.App.4th at 540.) This limitation has
deprived many thousands of officers access to their maximum
benefits.

Indeed, 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?So
ccode=333051&Geography=0601000000](http://www.labormarketinfo.edd.ca.gov/OccGuides/Detail.aspx?So
ccode=333051&Geography=0601000000)> [as of April 2, 2014]
 (“Estimated current employment of Police and Sheriff patrol officers
is 73,100.”)¹

Thus, to prevent manifest injustice to the many thousands of
presumably male and female, volunteer and salaried, peace officers,
the Court should grant Appellant’s petition for review.

II. THE PLAIN LANGUAGE OF SECTION 4458.2 GIVES NO INDICATION THAT IT IS RESTRICTED TO VOLUNTEER PEACE OFFICERS ONLY.

Section 4458.2’s plain language gives an active peace officer
temporary disability indemnity at the maximum statutory rate. Section
4458.2 provides in pertinent part:

If an active peace officer . . . suffers injury or death while in the
performance of his or her duties as a peace officer” then without
regard to his or her remuneration, “average weekly earnings for
the purposes of determining temporary disability indemnity and

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

permanent disability indemnity” will be taken at the maximum rate under Labor Code section 4453. (Cal. Lab. Code §4458.2.)

Nothing in the section restricts the maximum benefit to be provided to volunteer police officers only.

III. SECTION 3362 HAS NO BEARING ON WHETHER SECTION 4458.2 BENEFITS WERE LIMITED TO ‘VOLUNTEER’ POLICE OFFICERS.

In their answer, Marysville claims that section 4458.2 limits maximum benefits to, “an active peace officer of any department as described in section 3362 . . .,” and which it contends are volunteer peace officers only.

Section 3362, shown in summary is:

Each male or female member registered as an active policeman or policewoman of any regularly organized police department 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, shall, upon the adoption of a resolution by the governing body of” . . . [the entity] “. . . so declaring, be deemed an employee of such . . .” [entity] “. . . for the purposes of this division and shall be entitled to receive compensation from such . . .” [entity] “. . . in accordance with the provision thereof.” (Pet. Answer at 5 (citing Cal. Lab. Code §3362 (2014).)

Marysville next acknowledges that this section does not make “special reference to “volunteer” peace officers. The WCJ similarly so acknowledged in his opinion. (See RP at 110.) Indeed, Mr. Larkin agrees that it makes no such reference. Thus, section 3362 is irrelevant to this determination at issue of whether maximum benefits are limited to volunteer sworn peace officers only.

IV. SECTION 4458.2 RELIES ON SECTION 3362 TO DESCRIBE THOSE POLICE DEPARTMENTS WHERE ACTIVE SWORN POLICE OFFICERS WORK.

As shown earlier, 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.” (*Id.*)

V. THE MODERNIZING 1989 AMENDMENT TO SECTION 4458.2 REMOVED LIMITS ON GENDER-NEUTRAL LANGUAGE AND ON VOLUNTEER OFFICERS, ALLOWING ALL SWORN OFFICERS ACCESS TO MAXIMUM BENEFITS.

Until 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.)

Marysville correctly noted that the legislature broadened the application of this section to all sworn officers in removing the limiting word “male” from the section. (Resp. Answer at 7.) But it also removed “volunteer” from that section as well. Section 3362 has remained unchanged since its adoption in 1959. It has continued to be referenced in section 4458.2 before, and after, the 1989 reforms. Thus, “male” and “volunteer” were stricken from section 4458.2 because the 1989 legislature intended for these distinctions to 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.) Mr. Larkin meets the requirements of section 4458.2, and the Court of Appeal erred by failing to provide maximum benefits, as the legislature intended. The Court should grant Appellant's petition for review.

VI. THE MODERNIZING 1989 AMENDMENT WAS IN LINE WITH THE LABOR CODE'S PRIME DIRECTIVE TO BE LIBERALLY CONSTRUED, AS WELL AS WITH THIS COURT IN *MEREDITH*, TO ALLOW MAXIMUM BENEFITS TO ALL SWORN SALARIED OFFICERS.

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*, (2014) 223 Cal.App.4th at 543.) And Marysville does not address the Court of Appeal's argument in its answer.

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."

By removing and modernizing section 4458.2 in 1989, the legislature reinforced the prime directive of the Labor Code, indicated in section 3202, which 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.)

As noted in Mr. Larkin’s petition, the Court of Appeal’s reliance on *Meredith v. Workers' Comp. Appeals Bd.*, only furthers this point. Thirty-six years ago, this 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 v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 777, 781–782).) The 1989 Legislature similarly concluded in allowing maximum benefits to be available to all otherwise eligible sworn peace officers. Thus, the Court should grant Appellant’s petition for review.

VII. REVIEW BY THE SUPREME COURT IS NECESSARY TO PREVENT MANIFEST PREJUDICE TO ALL ACTIVE PEACE OFFICERS.

In its order, 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.” (*Larkin, supra*, 223 Cal.App.4th at 540.) As noted in Mr. Larkin’s petition, this limitation has deprived many thousands of officers access to their maximum benefits.

And Marysville's discussion of section 4850 salary continuation benefits is not relevant. (Resp. Answer at 9.) At issue before the Court, is whether the 1989 Amendment to Section 4458.2 provided maximum benefits to all sworn officers. Mr. Larkin has shown that it has, and whether volunteer officers have access to another species of benefit is not before this Court.

Thus, to prevent manifest injustice to the many thousands of presumably male and female, volunteer and salaried, peace officers, the Court should grant Mr. Larkin's petition for review.

CONCLUSION

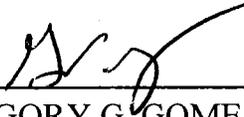
In affirming the Board's decision, the Court of Appeal ignored the intent of the legislature and common sense by finding that benefits provided under section 4458.2 extend only to volunteer police officers and not to regularly sworn, salaried peace officers. Indeed, the legislature's intent to strike '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." Section 3262, 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 is of prescient statewide importance falling under this Court's jurisdiction.

Thus, the Court should grant review to resolve the statewide issue that the Court of Appeal's decision creates and ensure that section 4458.2 benefits are properly administered statewide to all otherwise eligible sworn peace officers.

Dated: April 3, 2014

Respectfully submitted,

**MASTAGNI, HOLSTEDT, AMICK,
MILLER & JOHNSEN**



GREGORY G. GOMEZ, ESQ.

Attorney for Petitioner,

John Larkin

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that Respondent's brief consists of 1,861 words, as counted by the computer program used to generate the document.

Dated: April 3, 2014

Respectfully submitted,

**MASTAGNI, HOLSTEDT, AMICK,
MILLER & JOHNSEN**



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

VERIFICATION

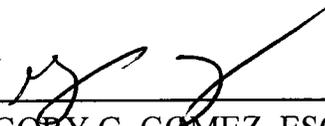
I am the attorney for Petitioner John Larkin, in the instant action or proceeding.

I have read the foregoing **REPLY TO ANSWER TO PETITION FOR REVIEW** 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 April 3, 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 April 3, 2014 I served the within:

REPLY TO ANSWER TO PETITION FOR REVIEW

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:

Court of Appeal
Third Appellate District
914 Capitol Mall
Sacramento, CA 95814
(2 copies)

Copies to:

Workers' Compensation Appeals Board
P.O. Box 429459
San Francisco, CA 94142-9459

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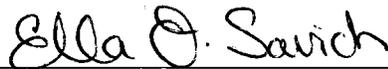
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Judge Dudley Phenix
Workers' Compensation Appeals Board
160 Promenade Circle, Suite 300
Sacramento, CA 95833

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 April 3, 2014 at Sacramento, California.



Ella O. Savich
Legal Assistant



Rec'd MHAMJ JAN 29 2014

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

FILED

JAN 28 2014

Court of Appeal, Third Appellate District
Deena C. Fawcett, Clerk
BY _____ Deputy

JOHN LARKIN,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD
and THE CITY OF MARYSVILLE,

Respondents.

C065891

(WCAB Case No.
ADJ7191871)

ORIGINAL PROCEEDING: petition for writ of review. Writ of review issued and order denying reconsideration affirmed.

Mastagni, Holstedt, Amick, Miller & Johnsen, Gabriel R. Ullrich and Brian A. Dixon for Petitioner.

No appearance for Respondent Workers' Compensation Appeals Board.

Lenahan, Lee, Slater & Pearse and Gerald M. Lenahan for Respondent City of Marysville.

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The sole issue raised in this writ of review proceeding is whether the Workers' Compensation Appeals Board (the Board) correctly determined that the benefits provided under Labor Code section 4458.2 extend only to volunteer peace officers and not to regularly sworn, salaried peace officers. (Further statutory references are to the Labor Code unless otherwise designated.) We conclude the Board correctly determined that the language of section 4458.2, when considered in light of the legislative scheme of which it is a part and, in particular, section 3362, was intended to establish benefits for a discrete group, volunteer peace officers, and cannot be applied to enhance benefits for peace officers generally. We reject petitioner's arguments to the contrary and affirm the Board's order.

RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In the course of his employment as a police officer for the City of Marysville, petitioner John Larkin sustained injuries to his neck, right shoulder, left upper thigh, face, right biceps, and nose. The only issues at trial were Larkin's claim to temporary disability payments, the appropriate earnings rate, and the applicability of section 4458.2.

Following an expedited hearing, the workers' compensation judge (WCJ) found that sections 4458.2 and 3362 applied only to active volunteer peace officers, not regularly sworn, salaried peace officers, and therefore did not apply to Larkin.

Larkin petitioned the Board for reconsideration of the decision, contending the plain language of the statutes entitled industrially injured peace officers to temporary disability payments at the maximum rate. The Board agreed with the reasoning of the WCJ and denied the petition for reconsideration. Defendant's petition for writ of review followed. We granted review and now affirm the Board's decision.

DISCUSSION

In this case, there are no material facts in dispute; the issue presents a pure question of law. Statutory interpretation claims are reviewable by this court de novo. However, “[i]t is well established that contemporaneous construction of a statute by the agency charged with its enforcement and interpretation, while not necessarily controlling, is of great weight; and courts will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]” (*Dickey v. Workers’ Comp. Appeals Bd.* (1990) 224 Cal.App.3d 1460, 1463-1464 (*Dickey*)).

“In interpreting statutes, if the ‘language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature’ (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) However, this ‘“plain meaning” rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.’ (*Ibid.*) We must strive to harmonize ‘provisions relating to the same subject matter . . . to the extent possible.’ (*Ibid.*) Therefore, ‘[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.’ (*Ibid.*)” (*Rehman v. Department of Motor Vehicles* (2009) 178 Cal.App.4th 581, 586 (*Rehman*)).

“ ‘The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute’s legislative history, appear from its provisions considered as a whole.’ (*Silver v. Brown* (1966) 63 Cal.2d 841, 845 [48 Cal.Rptr. 609, 409 P.2d 689].)” (*Rehman, supra*, 178 Cal.App.4th at p. 587.) In such circumstances, “we apply reason and practicality, and interpret the statute in accord with common sense and justice, and to avoid an absurd result. [Citations.]” (*Kono v. Meeker* (2011) 196 Cal.App.4th 81, 87-88.) “Such a result is appropriate here, particularly when we look to the legislative purposes of these statutes.” (*Rehman*, at p. 587.)

As relevant to this case, section 4458.2 provides: “If an active peace officer of any department as described in Section 3362 suffers injury or death while in the performance of his or her duties as a peace officer, . . . then, irrespective of his or her remuneration from this or other employment or from both, his or her average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the maximum fixed for each, respectively, in Section 4453.” Section 3362 provides: “Each male or female member registered as an active policeman or policewoman of any regularly organized police department 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, shall, upon the adoption of a resolution by the governing body of the county, city, town or district so declaring, be deemed an employee of such county, city, town or district for the purpose of this division and shall be entitled to receive compensation from such county, city, town or district in accordance with the provisions thereof.”

Larkin takes the plain language of these statutes and interprets them to mean that an active police officer is entitled to temporary disability at the maximum rate, irrespective of his actual wages. This would be an absurd result.

Section 3362 is contained in chapter 2, article 2 of the Labor Code, entitled “Employees.” This article contains statutory provisions defining employees for purposes of entitlement to workers’ compensation benefits and setting out excluded categories, such as volunteers (§ 3352) and independent contractors (§ 3353). An “ ‘[e]mployee’ means every person in the service of an employer under any appointment or contract of hire” (§ 3351.) There is no dispute that Larkin, as an active duty peace officer, came within this definition of employee and was entitled to workers’ compensation benefits. As such, there is no reason to have a special statute deeming an active duty peace officer to be an employee.

Article 2 goes on to delineate certain workers who would not ordinarily be considered employees and indicates they shall be deemed employees for purposes of entitlement to workers' compensation benefits. These workers include volunteer firefighters (§ 3361), volunteer members of a sheriff's reserve (§ 3364), and those who assist law enforcement and firefighters at the request of a public officer or employee (§§ 3365, 3366, 3367). Under these statutes, volunteers to public safety agencies are all treated the same way: they are deemed employees of the agency and awarded temporary disability at the maximum rate.

The policy underlying these statutes is to encourage public service to these agencies by providing maximum benefits to volunteers injured in providing such service. (See *Dickey*, *supra*, 224 Cal.App.3d at pp. 1464-1465.) In *Meredith v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 777, 781-782, in the context of an identical statute regarding volunteer firefighters, the Supreme Court recognized these fictitious earnings were created by the Legislature as it was " '[c]ognizant of the public service provided by the volunteer civilian firefighter and the potential loss of his earnings from other employment [and] determined that the usual benefit schedules should not apply but that a fictitious earnings component should be used. 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.' " The same policy considerations apply to providing these fictitious earnings for volunteer peace officers.

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. Not only would this punish them for their service, it would leave such volunteers in a markedly different position than volunteers of other public safety agencies. This cannot be what the Legislature intended. Accordingly, to give effect to

the statutory policy underlying these statutes, we find that sections 4458.2 and 3362 apply to volunteer peace officers only.

DISPOSITION

The Board's order denying reconsideration is affirmed. Each party shall bear its own costs in this original proceeding.

_____ RAYE _____, P. J.

We concur:

_____ HULL _____, J.

_____ ROBIE _____, J.

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THIRD APPELLATE DISTRICT

STATE OF CALIFORNIA

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MAILING LIST

Re: Larkin v. Workers' Compensation Appeals Board
C065891
Sutter County No. ADJ7191871

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