



California Workers' Compensation Institute  
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October 31, 2018

Supreme Court of California  
350 McAllister St.  
San Francisco, CA 94102

**Re: Department of Corrections v. WCAB (Fitzpatrick)**  
**C085850 / S252184**

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

On behalf of the membership of the California Workers' Compensation Institute and pursuant to California Rules of Court 8.1125(b), I am writing to **OPPOSE** the request of the California Applicants' Attorneys Association for this Honorable Court to decertify the 9/25/18 published decision in this case.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 82% of California's workers' compensation premium, and self-insured employers with \$69.8B of annual payroll (31.5% of the state's total annual self-insured payroll). The Institute publishes research that is typically based on claims data collected from member companies, offers analyses and practical expertise on issues and trends affecting California workers' compensation, spotlights problems and concerns within the system, helps build consensus for workable solutions, and is often used to evaluate the impact of various legislative and regulatory proposals. CWCI further serves as a liaison between its members and employer, labor, medical, regulatory, and legal communities within the workers' compensation system, and frequently provides written and oral input at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, the Institute has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal.<sup>1</sup>

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<sup>1</sup> CWCI has been granted amicus status in the cases of *Christian v. WCAB* (1997); *SCIF v. WCAB (Stuart)* (1998); *Avalon Bay Foods v. WCAB* (1998); *Rosales v. Depuy Ace Medical Company* (2000); *Lockheed Martin v. WCAB (McCullough)* (2002); *Wal-Mart v. WCAB (Garcia)* (2003); *Honeywell v. WCAB (Wagner)* (2005); *Green v. WCAB* (2005); *Rio Linda School District v. WCAB (Scheftner)* (2005); *Nabors v. WCAB* (2006); *Yeager Construction v. WCAB (Gatten)* (2006); *Chang v. WCAB* (2007); *Vaira v. WCAB* (2007); *Brodie v. WCAB* (2007); *Babbitt v. Ow Jing* (2007); *Pendergrass v. Duggan Plumbing* (2007); *Tanimura & Antle v. WCAB (Lopez)* (2007); *Palm Medical*

The first contention made in the depublication request is that the Court of Appeal misread and/or misstated the statutory language of Labor Code section 4662(b), quoting from page 13 of the Slip Opinion and pointing to the court's use of the permissive "may" instead of the mandatory "shall." Regrettably, the argument does not provide a full recitation of the decision's statement on page 13, which does, in fact, properly reference the statutory language:

Section 4662, subdivision (b), provides that, in nonconclusively presumed permanent total disability cases (i.e., those cases not enumerated in section 4662, subdivision (a)), permanent total disability may be found "in accordance with the fact." This section does not, however, address *how* such a determination shall be made; ***read plainly, it merely provides that a determination of permanent total disability shall be made on the facts of the case.*** [Emphasis added]

As the full passage reflects, the court's point here was not at all directed to whether the presumption was mandatory or permissive; rather, the court was focused on whether and how a determination of permanent total disability may be made. Indeed, other than this singular instance, the Court of Appeal correctly references the statutory language in section 4662(b) as "shall." See, e.g., Slip Opinion at pp. 2, 7, and fn. 9.

The request for decertification next criticizes the decision for (a) failing to address an argument (2) proffered by amicus and (3) leaving open the possibility for different interpretation for more recent dates of injury. Of course, the Court of Appeal is under no obligation to address arguments raised by amicus. But in fact, the Court of Appeal did address the argument in a lengthy footnote (see Slip Opinion at page 13 fn. 8). While it is true that the court left open the possibility (*albeit highly unlikely*) of a different interpretation under the successor statute (§4660.1), that was the correct result. It would have been improper for the court to have addressed a dispute regarding a successor statute, where that dispute was not actually presented by the case.

Contrary to the request to decertify, the decision of the Court of Appeal does not render any of section 4662(b) as "superfluous." Actually, the decision has confirmed the opportunity provided under section 4662(b) for an injured worker to obtain a permanent

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*Group v. State Compensation Insurance Fund* (2007); *Smith & Amar v. WCAB* (2007); *Facundo-Guerrero v. WCAB* (2008); *Smith & Amar v. WCAB* (2009); *Benson v. WCAB* (2009); *Boughner v. WCAB* (2009); *Aguilar v. WCAB* (2009); *El Aguila Food Products v. WCAB (Cervantes)* (2010); *Almaraz & Guzman v. WCAB* (2011); *Baker v. WCAB (X.S.)* (2011); *Ogilvie v. WCAB* (2011); *Valdez v. WCAB* (2012); *Pacific Compensation v. WCAB (Nilsen)* (2013); *Southern California Edison v. WCAB (Martinez)* (2013); *Stevens v. Outspoken Enterprises* (2014); *CIGA v. WCAB (Elite Surgery Centers)* (2014); *South Coast Framing v. WCAB (Clark)* (2014); *Angelotti Chiropractic v. Baker* (2014); *Contra Costa County v. WCAB (Dahl)* (2015); *State Compensation Ins. Fund v. WCAB (Margaris)* (2016); *Ramirez v. WCAB* (2017); *Zuniga v. WCAB* (2018); *SCIF v. WCAB (Guzman)* (2018); *Co. of San Diego v. WCAB (Pike)* (2018); *First Foursquare Church v. WCAB (Austin)* (2018); *Black v. CorVel* (2018); *King v. CompPartners* (2018); and *City of Petaluma v. WCAB (Lindh)*.

total disability finding “in accordance with the fact” by rebutting a scheduled rating pursuant to section 4660 -- putting to rest any argument that rebuttal of a scheduled rating is not permitted, or even that section 4660 allows only awards up to 99%.

Lastly, it is practically incomprehensible that the request to decertify contends that the decision removes the authority of the WCJ to act as a trier of fact. Nothing in the opinion removes or restricts a WCJ’s power and authority to find facts and weigh evidence; indeed, the decision provides a roadmap for a WCJ to find that a scheduled rating has been rebutted (or more precisely, for an applicant’s attorney to provide such evidence) and substitute a finding of a higher percentage of disability or even total disability. While the decision does restrict a WCJ from making subjective determinations that could lead to inconsistent and nonuniform permanent disability ratings, this is exactly the result sought by the reform legislation (SB 899). Furthermore, the judge is still tasked with the fact-finding mission of evaluating the rebuttal evidence presented by the injured worker, and retains the power to award total disability should the weight of the evidence support it.

Simply put, the decision requires that *actual evidence* be presented in rebuttal to a scheduled rating. Once presented, the evidence can be weighed by the WCJ to determine whether the rating has been rebutted. Once the scheduled rating has been rebutted, it is again up to the WCJ to determine the appropriate disability rating -- including total.

Continued publication of the Court’s decision in this case will provide much-needed guidance to litigants and the Appeals Board itself, as evidenced by the widespread dissemination and discussion generated by the case within the workers’ compensation legal community.

Thank you for your consideration of this opposition.

Very truly yours,

*Ellen Sims Langille*

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