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6 *on behalf of amici curiae*
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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KRIS WILSON,

Applicant,

v.

STATE OF CA CAL FIRE, legally
uninsured; STATE COMPENSATION
INSURANCE FUND, adjusting agent,

Defendants.

Case No. ADJ10116932
(San Luis Obispo District Office)

MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF BY
CALIFORNIA WORKERS'
COMPENSATION INSTITUTE and
[PROPOSED] AMICUS CURIAE
BRIEF in support of Defendant's Petition
for Reconsideration of the Opinion and
Decision After Reconsideration (En
Banc) dated 05/10/19

COME NOW California Workers' Compensation Institute ("CWCI") and motions this court for
leave to file an amicus curiae brief in this matter pursuant to Labor Code § 133 and Tit. 8 Cal. Code
Regs. § 10848.

Motion for Leave to File Amicus Curiae Brief

On 05/10/2019, the Appeals Board issued an en banc Decision After Reconsideration in which it
reversed the findings of the Workers' Compensation Judge ("WCJ"). Being newly aggrieved, defendant
State Compensation Insurance Fund has on 06/04/2019 filed a Petition for Reconsideration of the

1 decision. Because of the important legal issues surrounding the decision in this case, the California
2 Workers' Compensation Institute requests that the Appeals Board recognize that consideration of a
3 broad perspective of legal analysis of the issues involved will help to foster a fair and complete
4 presentation of the facts and law in dispute and grant this request for leave to file the proposed *amicus*
5 *curiae* brief.
6

7 **Statement of Interest**

8 CWCI is a private non-profit research, information, and educational organization dedicated to
9 improving the California workers' compensation system. Institute members include insurers writing
10 81% of California's workers' compensation premium, and self-insured employers with \$72.1B of annual
11 payroll (31.7% of the state's total annual self-insured payroll).
12

13 The Institute publishes research that is typically based on claims data collected from member
14 companies, offers analyses and practical expertise on issues and trends affecting California workers'
15 compensation, spotlights problems and concerns within the system, helps build consensus for workable
16 solutions, and is often used to evaluate the impact of various legislative and regulatory proposals.
17 CWCI further serves as a liaison with employer, labor, medical, regulatory, and legal communities
18 within the workers' compensation system, and frequently provides written and oral input at legislative
19 and regulatory hearings. Based upon its recognized expertise in workers' compensation, the Institute
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1 has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme
2 Court and Courts of Appeal.¹

3 As the Appeals Board itself has stated, amicus involvement at the WCAB level is “not unusual.”²
4 The Appeals Board has invited *amicus curiae* briefs from time to time over the past 30 years.³
5 Furthermore, despite the Appeals Board’s general rule against unsolicited amicus briefs,⁴ the Appeals
6 Board has also accepted unsolicited *amicus curiae* briefs at the Reconsideration level in other cases
7

10 ¹ CWCI has been granted amicus status in the cases of *Christian v. WCAB* (1997); *SCIF v. WCAB*
11 *(Stuart)* (1998); *Avalon Bay Foods v. WCAB* (1998); *Rosales v. Depuy Ace Medical Company* (2000);
12 *Lockheed Martin v. WCAB (McCullough)* (2002); *Wal-Mart v. WCAB (Garcia)* (2003); *Honeywell v.*
13 *WCAB (Wagner)* (2005); *Green v. WCAB* (2005); *Rio Linda School District v. WCAB (Scheftner)*
14 *(2005)*; *Nabors v. WCAB* (2006); *Yeager Construction v. WCAB (Gatten)* (2006); *Chang v. WCAB*
15 *(2007)*; *Vaira v. WCAB* (2007); *Brodie v. WCAB* (2007); *Babbitt v. Ow Jing* (2007); *Pendergrass v.*
16 *Duggan Plumbing* (2007); *Tanimura & Antle v. WCAB (Lopez)* (2007); *Palm Medical Group v. State*
17 *Compensation Insurance Fund* (2007); *Smith & Amar v. WCAB* (2007); *Facundo-Guerrero v. WCAB*
18 *(2008)*; *Smith & Amar v. WCAB* (2009); *Benson v. WCAB* (2009); *Boughner v. WCAB* (2009); *Aguilar*
19 *v. WCAB* (2009); *El Aguila Food Products v. WCAB (Cervantes)* (2010); *Almaraz & Guzman v. WCAB*
20 *(2011)*; *Baker v. WCAB & X.S.* (2011); *Ogilvie v. WCAB* (2011); *Valdez v. WCAB* (2012); *Pacific*
21 *Compensation v. WCAB (Nilsen)* (2013); *Southern California Edison v. WCAB (Martinez)* (2013);
22 *Stevens v. Outspoken Enterprises* (2014); *CIGA v. WCAB (Elite Surgery Centers)* (2014); *South Coast*
23 *Framing v. WCAB (Clark)* (2014); *Angelotti Chiropractic v. Baker* (2014); *Ramirez v. WCAB (Calif.*
24 *Dept. of Health Care Services)* (2015); *Contra Costa County v. WCAB (Dahl)* (2015); *State*
25 *Compensation Ins. Fund v. WCAB (Margaris)* (2016); *Ramirez v. WCAB* (2017); *Zuniga v. WCAB*
26 *(2018)*; *SCIF v. WCAB (Guzman)* (2018); *Co. of San Diego v. WCAB (Pike)* (2018); *King v.*
27 *CompPartners* (2018); *First Foursquare Church v. WCAB (Austin)* (2018); *City of Petaluma v. WCAB*
28 *(Lindh)* (2018); *Travelers v. WCAB (Mastache)* (2019); *Co. of Santa Clara v. WCAB (Justice)* (2019);
and *Universal Furniture v. WCAB (Morales)* (pending).

² *Wiener v. Ralph’s Co.* (2009) 74 Cal. Comp. Cases 484 fn. 2 (Appeals Board en banc).

³ For example, the Appeals Board invited amicus briefs following grants of reconsideration of the en banc decisions in *Wiener vs. Ralph’s Co.* (2009) 74 Cal. Comp. Cases 484 (Appeals Board en banc); *Almaraz/Guzman* (2009) 74 Cal. Comp. Cases 201 (Appeals Board en banc); *Ogilvie v. CCSF* (2009) 74 Cal. Comp. Cases 248 (Appeals Board en banc); *Phillips v. Sacramento Municipal Utilities District* (2000) 63 Cal. Comp. Cases 585 (Appeals Board en banc); *Moran v. Bradford Building* (1992) 57 Cal. Comp. Cases 273 (Appeals Board en banc); *Lechner v. Solar Turbines, Inc.* (1992) 57 Cal. Comp. Cases 366 (Appeals Board en banc); *Rocha v. Puccia Construction Co.* (1982) 47 Cal. Comp. Cases 377 (Appeals Board en banc); and *Cabrera v. Intercell Industries* (1980) 45 Cal. Comp. Cases 3 (Appeals Board en banc).

1 involving important legal issues of concern to the entire workers' compensation community.⁵ This has
2 particularly been true when the decision in question is issued en banc,⁶ as was the decision in this case.
3 Many of these cases in which amicus briefing was accepted are among the seminal decisions in workers'
4 comp law (*e.g.*, *Almaraz/Guzman*, *Ogilvie*, *Costa*, *Escobedo*, *Phillips*, and *Thomas v. Sports Chalet*). In
5 one case addressing the question of WCAB jurisdiction to award retroactive VRMA, the en banc
6 Appeals Board explained its rationale for accepting amicus briefs at the reconsideration level:
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8 We are allowing the submission of amicus briefs because **we are**
9 **aware that the question** of the WCAB's jurisdiction to act on
10 vocational rehabilitation issues following the January 1, 2009
11 effective date of the repeal of section 139.5 **is of great interest to**
12 **the workers' compensation community**....[B]y inviting amicus
13 curiae briefs, **we believe we will receive a broad perspective** on
14 any section 139.5 jurisdictional issues, **we will receive assistance**
15 **in analyzing those issues, and we will help ensure that all sides**
16 **of those issues are fairly and completely presented.**⁷

17 Those same considerations should guide and support the acceptance of the proposed amicus brief in this
18 case.
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20 ⁴ *Dubon v. World Restoration, Inc. (Dubon II)* (2014) (Appeals Board en banc) 79 Cal. Comp. Cases
21 1298, 1304 fn. 11. Contrary to the Appeals Board's analysis in *Dubon II*, however, 8 CCR §10848 does
22 not limit supplemental filings to "parties" in the case, but rather references only the return of documents
23 to "the filing party."

24 ⁵ There is extensive WCAB precedent for the submission (and acceptance) of unsolicited amicus
25 briefing. See, *e.g.*, *Enriquez v. Couto Dairy* (2013) 78 Cal. Comp. Cases 323 (Appeals Board en banc);
26 see also *Costa v. Hardy Diagnostic* (2006) 71 Cal. Comp. Cases 1797 (Appeals Board en banc);
27 *Escobedo v. Marshall's* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc); *Greenwald v. Carey*
28 *Distributing Co.* (1981) 46 Cal. Comp. Cases 703 (Appeals Board en banc); *Rountree v. Time D.C.*
(1979) 44 Cal. Comp. Cases 223 (Appeals Board en banc); *Thomas v. Sports Chalet, Inc.* (1977) 42 Cal.
Comp. Cases 625 (Appeals Board en banc); and *Cabello v. NL Industries* (1976) 41 Cal. Comp. Cases
605 (Appeals Board en banc).

⁶ All of the cases cited in fn. 3 and fn. 5, *supra*, are en banc decisions of the Appeals Board.

⁷ *Weiner, supra*, 74 Cal. Comp. Cases at 486-487 (Appeals Board en banc) (emphasis added).

1 **Proposed Amicus Curiae Brief**

2 The proposed *amicus curiae* brief argues that the Appeals Board has acted without or in excess
3 of its powers by rendering an internally inconsistent decision in which it first acknowledges that, in its
4 analysis of Labor Code section 4660.1(c)(2)(B), it would be improper to place any minimum PD level as
5 a criteria, or to consider the economic impact of the underlying injury, or to add language to the statute;
6 and yet, the decision then does consider the severity of the permanent disability, references the “career-
7 ending” nature of the injury, and explicitly adds language to the statute by way of Factors 1-5.
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9 Alternatively, this *amicus curiae* brief contends that the Appeals Board has acted without or in
10 excess of its powers by adding unnecessary language to the statute by including for consideration
11 Factors 1, 2, 3, and 5, inasmuch as this applicant meets the “closely analogous” criteria of Factor 4
12 (severe burn) as supported by the legislative history.
13

14 WHEREFORE, pursuant to Labor Code § 133 and Tit. 8 Cal. Code Regs. § 10848, CWCI
15 requests that the Appeals Board grant leave to CWCI to file the proposed *amicus curiae* brief, attached
16 hereto.
17

18 I declare that the foregoing facts are true and correct under the laws of penalty of perjury in the
19 State of California, except as to those matters stated on information and belief, and as to those matters, I
20 believe them to be true; and that I make such verification as an officer of amicus curiae CWCI. Sworn
21 this date at Oakland, California.
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23 Dated: June 18, 2019

Respectfully submitted,

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Ellen Sims Langille, CWCI General Counsel
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WORKERS' COMPENSATION APPEALS BOARD
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KRIS WILSON,

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STATE OF CA CAL FIRE, legally
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[PROPOSED] AMICUS CURIAE
BRIEF BY CALIFORNIA WORKERS'
COMPENSATION INSTITUTE in
support of Defendant's Petition for
Reconsideration of the Opinion and
Decision After Reconsideration (En
Banc) dated 05/10/19, and
REQUEST FOR JUDICIAL NOTICE

Amicus curiae California Workers' Compensation Institute hereby submits this *amicus curiae*
brief in support of Defendant State Compensation Insurance Fund in the pending Petition for
Reconsideration of the Appeals Board's Decision After Reconsideration in this matter, dated
05/10/2019.

I. INTRODUCTION

In the Decision After Reconsideration, the Appeals Board has grossly expanded the application
of the exception to the bar against increased permanent disability for psychiatric injuries arising out of a
compensable physical injury, where such psychiatric injury results from a "catastrophic" injury. The

1 unwarranted expansion of the statutory exception was made without sufficient reference to statute or
2 case law in violation of basic legal tenets and without consideration of any related argument, pleading,
3 or analysis submitted by the parties. In so doing, the Appeals Board has acted in excess of its authority.
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5 **II. LEGAL ARGUMENT**

6 In its en banc decision, the Appeals Board has exceeded its jurisdiction and its proper role by
7 prematurely issuing essentially an advisory opinion, one that is not sufficiently tied to the controversy
8 presented by the facts of the case before it.

9 A number of first-year law school principles and a great deal of Latin follows in this brief -- and
10 with good reason: In the en banc opinion, the Appeals Board has lost sight of basic legal principles and
11 tenets of common law jurisprudence. Amicus curiae asks this court to take full advantage of the
12 opportunity presented to it on Reconsideration – to actually reconsider, reexamine, and reassess the
13 breadth and scope of the en banc opinion.
14

15 **A. Under principles of *stare decisis*, the development of law interpreting Labor** 16 **Code section 4660.1(c)(2)(B) should occur over time, and not in a single** 17 **pronouncement from the Appeals Board.**

18 Litigants in the California workers’ compensation system have been waiting since 2013 for the
19 first interpretation of section 4660.1(c)(2)(B). But instead of allowing this critical legal interpretation to
20 develop over time, expanding and contracting the exception as warranted by the facts of each successive
21 case, the en banc Appeals Board has in a single instance proclaimed a wide-ranging set of “Factors” to
22 be considered by the trier of fact in each instance.
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24 Labor Code section 115 allows the Appeals Board as a whole to issue en banc decisions “in
25 order to achieve uniformity of decision, or in cases presenting novel issues.”⁸ The Appeals Board is
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27 ⁸ Lab. C. §115.
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1 authorized to issue en banc decisions that “are binding on [all] panels of the Appeals Board and
2 workers’ compensation judges as legal precedent *under the principle of stare decisis*.”⁹ Indeed, our
3 legal system is founded upon the principle of *stare decisis* (Latin: let the decision stand; or, to stand by
4 that which is decided). In practice, this principle generates case law that develops over time, with the
5 analysis of each new fact pattern resting on the reasoning of cases that preceded it.
6

7 Presumably, the Appeals Board has taken care to select this case as one that would allow it to
8 provide workers’ compensation practitioners (judges and litigants alike) with guidelines that could be
9 applied uniformly and fairly in future cases. This case may ultimately serve as the seminal decision on
10 how the “catastrophic” exception in section 4660.1(c)(2)(B) should be applied; indeed, in its Petition for
11 Reconsideration, defendant has conceded that this injured worker has sustained a catastrophic injury and
12 is entitled to increased permanent disability for his psychiatric claim. But ensuring consistency of law
13 and applications, while a laudable goal, cannot be permitted to prevail over the development of
14 consistent, principled rules of statutory interpretation.
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16 *Stare decisis* is commonly understood to promote four virtues of consistency: predictability,
17 fairness, appearance of justice, and efficiency.¹⁰ The basic legal construct helps the law to evolve over
18 time and ensures confidence in the judicial system.
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20 With the principles of *stare decisis* in mind, the en banc decision here should have been narrow
21 and focused rather than expansive and broad. That result could have been accomplished simply by
22 relying on Factor 4 (“whether the physical injury is closely analogous to one of the injuries specified in
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25 ⁹ Cal. Code Regs., tit. 8, § 10341 [emphasis added].

26 ¹⁰ *Hohn v. U.S.* (1998) 524 U.S. 236, 251 (noting that, particularly in instances of statutory
27 interpretation, *stare decisis* is the preferred course because it promotes the evenhanded, predictable, and
28 consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the
actual and perceived integrity of the judicial process).

1 the statute”). In keeping with long-standing principles of American jurisprudence, subsequent cases
2 with differing fact patterns should be left to clarify and further define the breadth and scope of the
3 statutory exception.

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5 **B. The en banc decision correctly addresses many aspects of the necessary**
6 **analysis.**

7 In its Decision After Reconsideration, the Appeals Board provides an extensive, detailed, and
8 largely correct analysis of how the statutory exception to the bar against increased permanent disability
9 rating for a psychiatric compensable consequence injury ought to be interpreted. In particular, over the
10 first 24 pages of the decision and with abundant citation to statutes, case law, and legislative history, the
11 Appeals Board correctly determined that:

- 12 1. The employee bears the burden of proving injury arising out of and in the course of
13 employment by a preponderance of evidence¹¹;
- 14 2. The employee bears the burden of establishing the approximate percentage of permanent
15 disability directly caused by the industrial injury¹²;
- 16 3. Section 4660.1(c) does not bar an employee from claiming a psychiatric injury, or from
17 obtaining treatment for temporary disability for psychiatric disorder that is a compensable
18 consequence of a physical injury occurring on or after January 1, 2013¹³;
- 19 4. Based on the evidence in the record, applicant’s psychiatric injury was not directly caused by
20 the events of employment¹⁴;
- 21 5. Applicant’s psychiatric injury did not result from being a victim of a violent act¹⁵;

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25 ¹¹ Opinion and Decision After Reconsideration (en banc), dated May 10, 2019, at p. 10.

26 ¹² *Id.* at p. 11.

27 ¹³ *Id.* at p. 12.

28 ¹⁴ *Id.* at pp. 12-15.

¹⁵ *Id.* at p. 15.

- 1 6. A dictionary definition may be unsuitable for identifying what constitutes a catastrophic
2 injury¹⁶;
- 3 7. A review of the legislative intent, overall purposes, and policies governing the workers’
4 compensation system provides an appropriate source for interpreting ambiguous statutory
5 language¹⁷;
- 6 8. Other code sections defining “catastrophic injury” do not provide support for the underlying
7 legislative purpose of section 4660.1(c)¹⁸;
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11 ¹⁶ *Id.* at p. 17. While amicus curiae agrees that the dictionary definitions cited by the Appeals Board are
12 not useful for an analysis in this case, it should be noted that Black’s Law Dictionary has been updated
13 five times since the 1990 edition cited in the decision. According to the current version available online,
14 Black’s now defines “catastrophic” using terms including “*incomprehensible*” and “*immense*.” Black’s
15 Law Dictionary Free Online Legal Dictionary 2nd Ed. (<https://thelawdictionary.org/catastrophe/>).
16 Contrary to the other dictionary definitions, this language is quite consistent with the illustrative
17 examples provided by the Legislature in section 4660.1(c)(2)(B) (loss of limb, paralysis, severe burn, or
18 severe head injury).

19 ¹⁷ *Id.* at p. 18. While amicus curiae supports the Appeals Board’s stated position on this point, we object
20 to the actual implementation of the guidance. The en banc decision appropriately recounts the robust
21 and wide-ranging history of legislative intent, but it ultimately reduces the entirety of that analysis to a
22 simplistic proclamation that the injury in this case “is not the type of questionable claim that the
23 Legislature sought to preclude from an increased impairment rating.” *Id.* at 27. This rudimentary
24 distillation of legislative intent ignores the other aspects of stated legislative intent: “The bill specifically
25 limits some of the ‘add-ons’ that can be established by individualized proof – sleep disorders, sex
26 disorders, and to a limited extent, psychological disorders – because these add-ons have greatly
27 expanded in recent years, largely as a result of the inappropriately low permanent disability ratings that
28 followed from the 2004 reforms. Since benefit levels are being substantially increased by the bill, many
believe that these add-ons, which generate substantial litigation expense, are no longer needed.” Sen.
Rules Com., Off. of Sen. Floor Analyses on Sen. Bill No. 863 (2011-2012 Reg. Sess.) Aug. 31, 2012,
pp. 15-16. Even more importantly, while the en banc decision references *Lockheed Martin v. Workers’*
Comp. Appeals Bd. (McCullough) (2002) 96 Cal. App. 4th 1237, the Appeals Board fails to draw from
that case further evidence of the overall statutory scheme – particularly the expressly stated legislative
intent to **establish a new and higher threshold in relation to psychiatric compensable consequence**
injuries. As the Court of Appeal wrote in *McCullough*, psychiatric injuries are particularly complicated
due to the potential for fraud and the problems inherent in psychiatric claims, notably vagueness in
defining the injury and problems of establishing industrial causation and apportionment. 96 Cal. App.
4th at 1249. The Appeals Board would do well to remember the nature of psychiatric injury litigation in
the days prior to the reform legislation.

¹⁸ Opinion and Decision After Reconsideration (en banc), dated May 10, 2019, at p. 21.

- 1 9. Whether an injury is catastrophic is not measured by the injury’s impact on the employee’s
2 earning capacity¹⁹;
- 3 10. Whether an injury is catastrophic is not measured by a minimum level of permanent
4 disability²⁰;
- 5 11. The Appeals Board is prohibited from adding provisions to section 4660.1(c)(2)(B)²¹;
- 6 12. The inquiry into whether an injury is catastrophic is limited to looking solely at the
7 underlying physical injury, without consideration of the compensable consequence
8 psychiatric injury²²;
- 9 13. The employee bears the burden of proving by competent medical evidence that the
10 psychiatric injury was a compensable consequence of the physical injury and was
11 predominantly caused by actual events of employment.²³

12 Each one of these determinations is well supported by the Appeals Board with references to
13 statutory or case law, and is accompanied by careful analysis and proper application to the facts of the
14 present case.

15 **C. Where the Appeals Board fails to provide a legal basis for its proclamations,**
16 **issues rulings unrelated to any facts of the case at bar, and fails to consider**
17 **relevant legal argument from the interested parties, the decision is wholly**
18 **inadequate to support the precedential nature of the en banc designation.**

19 In stark contrast to its careful discussion of what “catastrophic” *does not* mean, the Appeals
20 Board completely loses its way when its discussion turns to what “catastrophic” *does* mean.
21 Notwithstanding the designation of this case as an en banc decision, the legal deficiencies of the opinion
22 render it inadequate as binding precedent.

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25 ¹⁹ *Id.* at pp. 21-22.

26 ²⁰ *Id.* at pp. 23-24.

27 ²¹ *Id.* at pp. 23-24.

28 ²² *Id.* at p. 24.

²³ *Id.* at pp. 24-25.

1 1. THE APPEALS BOARD FAILED TO GROUND ITS PROCLAMATION OF 5
2 FACTORS IN ANY LEGAL AUTHORITY.

3 The concept of *ratio decidendi* (Latin: reason for deciding) refers to the legal principles used by
4 a court to compose the rationale of a decision. The *ratio decidendi* of a case will permit future courts to
5 build upon the decision by citing it as precedent. But the usefulness of a case as precedent is only as
6 valuable as the rationale upon which it is based.

7 Despite its own stated criteria outlined at length above (and particularly the proscription against
8 adding language to a statute), the Appeals Board then proceeds to identify five “factors [that] the trier of
9 fact may consider in determining whether an injury may be deemed catastrophic.” With the notable
10 exception of Factor 4, none of these new factors of consideration is grounded in law. Instead, the decision is
11 suddenly and utterly devoid of any legal basis or considered rationale to support the proclamations.

12 It is obviously acknowledged that, as a case of first impression, precedential case law may not be
13 readily available to assist the Appeals Board in interpreting the statutory exception at issue in this case. But
14 the Appeals Board was still obligated to ground its opinion in some type of legal basis – either by analogy or
15 explanation. Instead, the 5 Factors appear to have been pulled from thin air and do not sufficiently
16 support the decision.²⁴

17 In the absence of any citations to statutory authority, legislative history, prior or similar cases, or
18 even any reference to important moral or social principles, the 5 Factors outlined in the decision here
19 stand naked and alone, without the security of a grounded rationale by which future cases might be
20 measured.

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27 ²⁴ *Lance Camper Mfg. v. Republic Indemnity* (1996) 44 Cal. App. 4th 194, 61 Cal. Comp. Cases 371
28 (“we cannot judicially create out of thin air an administrative remedy not contemplated by the
Legislature”).

1 2. THE 5 FACTORS OUTLINED BY THE APPEALS BOARD WERE NOT
2 INFORMED BY ANY LEGAL ADVOCACY OR ARGUMENT BY THE PARTIES.

3 The manner in which the Appeals Board issued this en banc decision is troubling. Ordinarily, en
4 banc decisions are expected to be scholarly and fully informed – typically by the parties themselves as
5 part of the “vigorous advocacy” that provides probing arguments as to all aspects of the decision:

6 “One who invokes the judicial process does not have ‘standing’ if he, or
7 those whom he properly represents, does not have a real interest in the
8 ultimate adjudication because the actor has neither suffered nor is about to
9 suffer any injury of sufficient magnitude reasonably to assure that all of
10 the relevant facts and issues will be adequately presented.” (Citation)
11 **These rules exist both to preserve the court’s resources and to insure
12 that issues are presented by those with strong interests in vigorous
13 advocacy of the issues.**²⁵

14 Where, as here, judicial declarations are made in a vacuum without the benefit of legal argument
15 advocated by interested parties, the decision itself is at risk to fail as valid and binding precedent for
16 future cases (notwithstanding the en banc designation).²⁶

17 3. THE APPEALS BOARD ERRED BY RENDERING A DECISION THAT GOES
18 BEYOND THE ISSUES IMMEDIATELY PRESENTED BY THE CASE.

19 It is common maxim of judicial procedure that courts are not permitted to decide hypothetical
20 questions or theoretical controversies.²⁷

21 ²⁵ *Municipal Court of Monterey v. Superior Court of Monterey County (Swenson)* (1988) 202 Cal. App.
22 3d 957, 962 (emphasis added).

23 ²⁶ *Hohn v. U.S.*, *supra*, 524 U.S. at 251 (courts feel less constraint to follow precedent where the prior
24 opinion was rendered without full briefing or argument).

25 ²⁷ *See In re Joshua S.* (2007) 41 Cal.4th 261, 273 (courts do not issue purely advisory opinions, or
26 consider a hypothetical state of facts in order to give general guidance rather than to resolve a specific
27 legal dispute); *see also Chorn v. Workers’ Comp. Appeals Bd.* (2016) 245 Cal. App. 4th 1370, 1382 (“a
28 court will not consider every conceivable situation which might arise under the language of the statute
 and will not consider the question of constitutionality with reference to hypothetical situations”);
 Longval v. Workers’ Comp. Appeals Bd. (1996) 51 Cal. App. 4th 792, 802 (same); *Burns v. State Comp.*
 Ins. Fund (1968) 265 Cal. App. 2d 98, 33 Cal. Comp. Cases 931 (courts decline to hold statutes
 discriminatory or unconstitutional upon hypothetical issues not actually involved); *Max Factor & Co. v.*
 Kunsman (1936) 5 Cal.2d 446, 468 (“the [hypothetical] situations conjured up by respondent are not

1 Where a court makes pronouncements of law in the absence of a disputed issue being presented,
2 such as this decision does with regard to Factors 1-3 and 5, the court is engaged in *obiter dictum* (Latin:
3 that which is said in passing; an incidental expression of opinion, not essential to the decision and not
4 establishing precedent). Where a part of a judicial decision does not refer to the crucial facts and law of
5 the case, or where the court engages in hypothetical facts that do not constitute a necessary part of the
6 decision, the judicial statement is merely *dicta*; as *dicta*, such statements are not binding on future
7 cases.²⁸ Factors 1-3 and 5 could each be rightfully omitted from the decision in this case, without
8 altering the outcome under Factor 4, so such factors must necessarily be construed as *dicta*.
9

10 Citing a California Supreme Court opinion, this Appeals Board has previously confirmed that
11 precedent is only binding to the extent that the rationale of that prior decision is tied to points actually
12 raised and necessarily decided:
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14 A decision is not authority for everything said in the opinion but only for
15 the points actually involved and actually decided. Only the *ratio*
16 *decidendi* of an appellate opinion has precedential effect. Thus, we must
17 view with caution seemingly categorical directives not essential to earlier
18 decisions and be guided by this dictum only to the extent it remains
19 analytically persuasive.²⁹

20 But in this en banc decision, the Appeals Board has issued an essentially advisory opinion that
21 addresses legal implications of situations that have not actually arisen in the litigation below. In doing
22 so, the Appeals Board is using *dicta* as a device to declare what the law is in a given area, even though
23 the case does not call for it.

24 here involved, and respondent is limited in his attack to the application of the statute to the factual
25 situation now before the court”).

26 ²⁸ The Wambaugh Inversion Test posits that if the decision would have been different had the statement
27 been omitted then the statement is part of the *ratio decidendi*; if not, it is *dicta*.

28 ²⁹ *City of Long Beach v. Workers' Comp. Appeals Bd. (Weber)* (2007) 72 Cal. Comp. Cases 837, 840
(writ denied) (citing *People v. Mendoza* (2000) 23 Cal. 4th 896, 915) (citations and internal quotations
omitted).

1 It is improper for the Appeals Board to use *dicta* to articulate a principle of law not asserted,
2 urged, or argued by the parties themselves. Moreover, it is patently unfair for the Appeals Board to
3 issue such pronouncements en banc, binding on all future litigants, without providing any explanation,
4 citation, or legal basis for its rationale and decision.

5
6 Because of the innate infirmity of the *ratio decidendi*, the future validity of the en banc decision
7 is at risk. The Appeals Board should take the opportunity on Reconsideration to strike Factors 1-3 and
8 5, and allow the proper interpretation of the statutory exception to develop organically over time as
9 future cases direct.

10
11 **D. The new Factors proposed by the Appeals Board do not provide a proper
12 basis for analysis of the statutory exception.**

13 Contrary to its own stated criteria outlined in Part B, *supra*, and particularly the proscription
14 against adding language to a statute, the Appeals Board proceeds to identify five “factors [that] the trier
15 of fact may consider in determining whether an injury may be deemed catastrophic.” With the notable
16 exception of Factor 4, none of these new factors of consideration provides a proper basis for analysis.

17 1. THE NATURE OF THE TREATMENT REQUIRED IS NOT A VALID MEASURE
18 OF THE NATURE OF THE UNDERLYING INJURY.

19 In Factor 1, the Appeals Board has sanctioned consideration of the intensity and seriousness of
20 *treatment* received for the underlying physical injury as an appropriate basis for the trier of fact to
21 identify a “catastrophic” injury. But the plain language of the statute itself evidences a legislative intent
22 to tie the determination of “catastrophic” to the *injury*, not the outcome.

23
24 The error here is complex and multifaceted. Even assuming that the inquiry is correctly directed
25 to “*nature of the injury*, rather than on the mechanism of injury,”³⁰ the Appeals Board provides an

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27 ³⁰ The opinion’s singular citation on this point is to *Travelers Casualty & Surety Co. v. Workers’ Comp.*
28 *Appeals Bd. (Dreher)* (2016) 246 Cal. App. 4th 1101, 1108, in which the Court of Appeal makes a
passing reference to section 4660.1(c)(2)(B) without any explanation or analysis of “nature of injury.”

1 incorrect analysis when it immediately shifts its focus to “the *result* of the injury.”³¹ Contrary to the
2 Appeals Board’s interpretation, the adjective “catastrophic” refers not to the result but to the injury itself
3 – particularly, the degree of injury.
4

5 A better analysis recognizes that “nature of injury” is a term of art already commonly utilized in
6 workers’ compensation. Indeed, the statute at issue in this case begins with the instruction that “account
7 shall be taken of the nature of the physical injury.”³² Likewise, the Permanent Disability Rating
8 Schedule classifies disability by identifying “the body part, organ system, and/or nature of injury” when
9 it assigns the Impairment Number to begin the calculation of the permanent disability rating.³³
10

11 Perhaps even more useful is the California WCIRB Data Reporting Handbook.³⁴ The WCIRB
12 requires all claims administrators in the state to classify and report injuries for purposes of developing
13 premium rates. Every single claim processed in the state is assigned to each of three categories: **Part of**
14 **Body, Nature of Injury, and Cause of Injury**. In this standardized system, applicant’s injury might
15 have been classified as “Part of Body - #60: Lungs; Nature of Injury - #04: Burn (tissue damage
16 resulting from the corrosive action of chemicals, fumes, etc.); Cause of Injury - #04: Fire or Flame.”
17 From that point, a determination may be made as to whether this particular “Nature of Injury - #04:
18 Burn” is of sufficient degree to qualify as catastrophic.
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23 ³¹ Opinion and Decision After Reconsideration (en banc), dated May 10, 2019, at p. 16.

24 ³² Lab. C. § 4660.1(a).

25 ³³ *Universal City Studios v. WCAB (Lewis)* (1979) 44 Cal. Comp. Cases 1133, 1138 (PDRS classifies
26 disabilities according to the **nature of injury**, anatomical part, age, and occupation).

27 ³⁴ The WCIRB Data Reporting Handbook - Unit Statistical Reporting (February 2019) is available at
28 www.wcirb.com/document/1411. Relevant excerpts from Appendix 5 are attached to this amicus curiae
brief as Exhibit 1. Judicial notice of the Handbook and Appendix is requested pursuant to Evidence
Code section 452, permitting judicial notice of administrative agency records and reports. *Rodas v.*
Spiegel (2001) 87 Cal. App. 4th 513, 518.

1 Tying an analysis of “catastrophic” to the already extant definitions of “nature of injury”
2 (particularly as used by the WCIRB) rather than to the results of the injury fully comports with the
3 Legislature’s own illustrative list of examples, which emphasizes the degree or magnitude of the nature
4 of injury: loss of limb (not merely a laceration); paralysis (not merely a sprain or tear); severe burn (not
5 merely a scalding); severe head injury (not merely a mild concussion).
6

7 The WCIRB classifications provide a valid legal basis by which to analyze the statutory
8 language. With the proper analysis of “nature of injury,” based on definitions already utilized in
9 workers’ compensation, the Appeals Board could create a more useful and acceptable definition for
10 “catastrophic” as it applies to this statutory exception.
11

12 2. CONSIDERATION OF THE EMPLOYEE’S PERMANENT DISABILITY LEVEL
13 WILL INEXORABLY RESULT IN A DE FACTO MINIMUM LEVEL OF
14 PERMANENT DISABILITY.

15 As detailed in Part B above, the Appeals Board’s decision appropriately repudiates consideration
16 of any minimum level of permanent disability in the analysis of the statutory exception. But Factor 2
17 expressly authorizes consideration of “the ultimate outcome” of the employee’s physical injury when
18 permanent and stationary status is reached – *i.e.*, the employee’s permanent disability rating.

19 It should be obvious to even the casual observer that the Appeals Board’s backdoor permission
20 to consider the PD rating will in practice ultimately result in a minimum level of PD being deemed
21 sufficient to support a finding of catastrophic injury. Perhaps the first case of 20% PD will be deemed
22 inadequate, while the second case of 90% PD will suffice; over time that gap might close to 40% on the
23 low end and 60% on the high end. Ultimately, we will be left with a de facto minimum PD level, as
24 litigants avail themselves of Factor 2. Since this result is *precisely* what the Appeals Board recognized
25 as legally inappropriate, Factor 2 must be stricken.
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28

1 3. THE INJURY’S IMPACT ON ACTIVITIES OF DAILY LIVING IS NOT AN
2 APPROPRIATE BASIS BY WHICH TO DEFINE THE STATUTORY EXCEPTION.

3 Perhaps the most egregious element included in the 5 Factors is Factor 3 (severity of the physical
4 injury and impact on ADLs). More than any other proposed factor for consideration, Factor 3 has no
5 legal foundation and – much worse – is particularly susceptible to the type of abuse that the overarching
6 legislative reforms of psychiatric injury claims were aimed at curbing.

7 It is crucial to recognize here the series of reforms related to the compensability of psychiatric
8 injuries dates back to the early 1990s, with the enactment of and multiple amendments to Labor Code
9 section 3208.3.³⁵ As originally enacted, section 3208.3 included a requirement that psychiatric claims
10 would be compensable only if the employee could prove “by a preponderance of the evidence” that
11 “actual events of employment” were responsible for at least 10% of the total causation of the psychiatric
12 injury. The intent of the Legislature was plainly stated in the statute in language that has not changed
13 since the original version:
14

15 **It is the intent of the Legislature in enacting this section to establish a**
16 **new and higher threshold of compensability for psychiatric injuries**
17 **under this division.³⁶**

18 In 1993, the Legislature placed new and even greater restrictions on the compensability of
19 psychiatric claims, including a tighter standard that requires work events to be “predominant as to all
20 causes combined” of the psychiatric injury, raising the compensability threshold from 10% to 50%. And
21 most recently, the Legislature enacted section 4660.1 imposing a bar against increased impairment
22 ratings for compensable consequence psychiatric injuries. The Legislature acted in part because of the
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³⁵ Margolin-Greene Workers’ Compensation Reform Act of 1989 (Stats. 1989, ch. 892).

27 ³⁶ Lab. C. §3208.3(c). *See Sakotas v. WCAB* (2000) 80 Cal. App. 4th 262, 273 (“Rarely is the intent of
28 the Legislature so clearly enunciated within the legislation itself.”).

1 proliferation of fraudulent psychiatric claims, and in part because of the very nature of psychiatric
2 claims -- the difficulty of proving and verifying subject to claims of psychiatric injury.³⁷

3
4 Like psychiatric claims, reports of ADL limitations are, by their very nature, based on subjective
5 findings alone. As such, they are susceptible to the same concerns of proof and abuse. By permitting
6 the determination of “catastrophic” in a psychiatric claim to be made, in part, based on the physical
7 injury’s impact on activities of daily living, the en banc decision has actually compounded the dangerous
8 aspects of both into a single, outrageous opportunity for abuse.

9
10 Where an exception is interpreted so broadly as to undermine the rule to the extent that the rule
11 becomes superfluous, the interpretation must be rejected.³⁸ Accordingly, Factor 3 should also be
12 rejected.

13 4. ONLY FACTOR 4 IS SUPPORTED BY LAW, AND PROVIDES A SUFFICIENT
14 BASIS TO DECIDE THIS CASE IN APPLICANT’S FAVOR.

15 Labor Code section 4660.1(c)(2)(B) provides an illustrative listing of the type of injuries that the
16 Legislature contemplated as sufficient to qualify as “catastrophic,” including loss of limb, paralysis,
17 severe burn, or severe head injury.

18 On the one hand, the facts of this case fall squarely within this list, as applicant sustained severe
19 burns while engaged in industrial firefighting activities, during which time he was not wearing a
20 breathing apparatus. The evidence in the case fully supports a finding that these burn injuries meet the
21

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23 ³⁷ See, e.g., *Hansen v. Workers’ Comp. Appeals Bd.* (1983) 18 Cal. App. 4th 1179, 1184 (“For years
24 commentators have written critically about problems unique to the disposition of psychiatric claims,
25 notably vagueness in defining the injury and problems of establishing industrial causation and
26 apportionment”).

27 ³⁸ *Vera v. Workers’ Comp. Appeals Bd.* (2007) 154 Cal. App. 4th 996, 1010 fn. 16 (finding unreasonable
28 an interpretation of a statutory exception so broad that it would cease to function as an exception);
Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888, 902 (rejecting a proffered statutory
interpretation when the “exception would swallow the rule”).

1 legislative example of “severe burn.” There was no cause for the Appeals Board to look beyond the
2 existing statutory language to support a finding that applicant sustained a catastrophic injury within the
3 meaning of the statute. By expanding the statutory language so far beyond its original limits in so many
4 different directions, the Appeals Board has needlessly acted in a manner that the decision itself
5 acknowledges is proscribed – namely, adding provisions to the statute that the Legislature did not
6 include. Where the Appeals Board devises a new methodology or analysis that is not authorized or
7 compelled by statute, it acts in excess of its authority and its decision should be annulled.³⁹

9 The Appeals Board should have started and ended its analysis in the most narrow fashion
10 sufficient to decide the case before it. In this instance, assuming that the Appeals Board does not agree
11 that the plain language of the statute (“severe burn”) adequately encompasses the injury sustained by
12 applicant, a small judicial expansion of the statutory language may be appropriate. Here, the Appeals
13 Board landed perfectly on the narrowest expansion in Factor 4: Whether the physical injury *is closely*
14 *analogous* to one of the injuries specified in the statute.

16 Factor 4 is a perfectly appropriate place for an orderly analysis of section 4660.1(c)(2)(B) to
17 begin. Grounded directly in the statutory language, Factor 4 nevertheless recognizes the non-exhaustive
18 nature of the statutory examples while providing guidance and leeway for future cases. It is up to those
19 future cases to flesh out whether particular facts are (or are not) sufficiently analogous to one of the
20 specified injuries. In this way, development of case law related to “catastrophic” injuries will mirror the
21 manner in which “sudden and extraordinary” cases have been defined under Labor Code section
22 3208.3(d).⁴⁰ Over time, the definition of the term will become more evident.

26 ³⁹ *Ogilvie v. Workers’ Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262, 1277.

27 ⁴⁰ From gas main explosions to falling lumber to avocado pickers to slippery sidewalks, the development
28 of “sudden and extraordinary” provides an exemplary lesson in *stare decisis*. See *Wal-Mart Stores, Inc.*
v. Workers’ Comp. Appeals Bd. (2003) 112 Cal. App. 4th 1435; *Matea v. Workers’ Comp. Appeals Bd.*

1 5. THE APPEALS BOARD’S REFERENCE TO INCURABLE DISEASES HAS NO
2 RELATION TO THE PRESENT CASE, AND SHOULD BE STRICKEN.

3 As with Factors 1-3, the Appeals Board’s addition of new language in Factor 5 permitting
4 “incurable and progressive disease” as a factor for consideration is without any basis in law – much less
5 in this case. Certainly, if some future case includes facts demonstrating that an incurable and
6 progressive disease at issue is closely analogous to the statutory language (loss of limb, paralysis, severe
7 burn, or severe head injury), then such future case could be appropriately added to the development of
8 the case law related to the exception in section 4660.1(c)(2)(B). But until such facts are presented and
9 argued, the unadorned pronouncement will lead to confusion and unnecessary litigation.
10

11 Quite possibly, the Appeals Board intends for this factor to apply to “insidious progressive
12 diseases” as supported by substantial medical evidence and as have had the benefit of development over
13 the past 30 years.⁴¹ But the Appeals Board failed to include language or reference that might adequately
14 connect its pronouncement to that body of case law. In the absence of proper reference, it must be
15 considered that litigants will seek application of this Factor to any number of disease processes that are
16 wholly outside the necessary confines of the statute.⁴²
17

18 6. THE EN BANC DECISION IS INTERNALLY INCONSISTENT IN THE
19 APPLICATION OF THE STATUTORY EXCEPTION.

20 In the argument above, amicus curiae has demonstrated that the Appeals Board has initially
21 correctly identified valid parameters for its interpretation of the statutory exception, only to run afoul of
22 its own statements with the pronouncement of the 5 Factors. This repeated error is further compounded
23 by the Appeals Board’s actual application of these factors to the facts of the present case. While the
24

25
26 (2006) 144 Cal. App. 4th 1435; *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Garcia)* (2012)
27 204 Cal. App. 4th 766; and *Travelers v. Workers’ Comp. Appeals Bd. (Dreher)* (2016).

28 ⁴¹ See *General Foundry Service v. Workers’ Comp. Appeals Board (Jackson)* (1986) 42 Cal. 3d 331.

⁴² For example, the natural aging process would appear to qualify for consideration under this language.

decision's narrative correctly observes that it would be improper to permit an increased impairment rating for a psychiatric injury based on the particular impact to the employee's earning capacity, the Appeals Board concludes that this injured worker has sustained an injury sufficient to meet the statutory exception expressly because of its economic impact:

Applicant attempted to return to work, but was unable to perform his job duties as a firefighter. Three of the medical-legal evaluators concluded that applicant is unable to return to his work as a firefighter because of his industrial injury. *The injury has essentially been career-ending for applicant who was only 28 years old at the time of his injury.*

These words belie the underlying intent and focus of the Appeals Board, and make manifest that the economic impact *was* considered in the determination of whether the exception applies. As an en banc decision, binding on all future WCJ and Appeals Board panels, it can certainly be anticipated that the quoted language will be cited in future cases as a prime example of what constitutes sufficient evidence of “catastrophic,” to wit: *an inability to return to work in the prior occupation*.

In light of the proliferation of vocational expert reports that already permeate WCAB litigation, this internal inconsistency presents a clear danger of further costs and litigation. Such outcome should be avoided, not invited.

III. CONCLUSION

As a matter of first impression, this case was necessarily precluded from directly relying on past rulings. As such, proper bases for the necessary statutory interpretation included statutory language, dictionary definitions, holdings from other jurisdictions, and other forms of persuasive authority. But as outlined above, the Appeals Board in this instance specifically declined to rely upon any of these types of authority.

With the singular exception of Factor 4, not one of the factors identified as legitimate by the en banc decision is based on any prior case law, statutory interpretation, law, or principle. Instead the

1 factors are unsupported pronouncements, made without citation to any source whatsoever (legal or
2 otherwise). And since the parties did not suggest any of these factors in their arguments and pleadings
3 below, the pronouncements have not received the proper vetting or adversarial scrutiny as is expected
4 from such court rulings.
5

6 *Amicus curiae* California Workers' Compensation Institute urges this court to grant leave to file
7 this amicus brief, and to grant reconsideration of the en banc decision in this case.
8

9 Dated: June 18, 2019
10

Respectfully submitted,

11 California Workers' Compensation Institute
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Ellen Sims Langille, CWCI General Counsel
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IV. VERIFICATION

I declare that the foregoing facts are true and correct under the laws of penalty of perjury in the State of California, except as to those matters stated on information and belief, and as to those matters, I believe them to be true; that I make such verification as an officer of *amicus curiae* California Workers' Compensation Institute. Sworn this date at Oakland, California.

Dated: June 18, 2019

Respectfully submitted,

Ellen Sims Langille, CWCI General Counsel

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON RECONSIDERATION
and
PROPOSED AMICUS CURIAE BRIEF ON RECONSIDERATION
by CALIFORNIA WORKERS' COMPENSATION INSTITUTE

Workers' Compensation Appeals Board – Reconsideration Unit
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San Francisco, CA 94142
original and one copy +1 copy for endorsed return

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