

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. SAL 0107814**

4 **VALERI HAWKINS,**

5 *Applicant,*

6 **vs.**

7 **AMBERWOOD PRODUCTS; and STATE**
8 **COMPENSATION INSURANCE FUND,**

9 *Defendants.*

OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)

10 **INTRODUCTION**

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12 We granted defendant's petition for reconsideration of the September 5, 2006 Findings and
13 Award to study the legal issue presented. It is admitted that applicant sustained a cumulative
14 industrial injury to her spine while employed by Amberwood Products during a period ending July
15 16, 2004. In his decision, the workers' compensation administrative law judge (WCJ) found that
16 defendant "commenced payment of temporary disability for the purposes of Labor Code section
17 4656(c)(1)" on May 3, 2005, and that defendant paid temporary disability benefits for the period
18 from July 17, 2004 through July 14, 2006.¹ The WCJ concluded that the "period of two years
19 from the date of commencement of temporary disability payment" as provided in section
20 4656(c)(1) began on May 3, 2005, the date on which temporary disability indemnity was first *paid*,
21 and not from July 17, 2004, the date for which temporary disability indemnity was first *owed*.
22 Therefore, additional temporary disability indemnity was awarded from July 15, 2006, to the date
23 of the award and continuing because applicant continued to be temporarily disabled.

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¹ All further statutory references are to the Labor Code.

1 Defendant contends that the “the date of commencement of temporary disability payment”
2 as used in section 4656(c)(1) is the date for which temporary disability indemnity is first *owed*
3 instead of the date on which benefits are first *paid*.

4 Because of the importance of the legal issue presented, and in order to secure uniformity of
5 decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members,
6 assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)²

7 We hold that “the date of commencement of temporary disability payment” as used in
8 section 4656(c)(1) means the date on which temporary disability indemnity is first *paid*, and not
9 the date for which temporary disability indemnity is first owed. The decision of the WCJ is
10 affirmed.

11 **FACTS**

12 As shown by the minutes, the following facts were stipulated at the hearing on August 14,
13 2006:

14 “(1) Applicant, born 2/21/57, sustained injury on a cumulative
15 trauma basis ending 7/16/04 to her cervical spine while working
16 for Amberwood Products, then insured for workers’ compensation
17 by State Compensation Insurance Fund.

18 (2) EDD [Employment Development Department] paid benefits
19 from 7/26/04 to 3/31/05 for which State Compensation Insurance
20 Fund has reimbursed them.

21 (3) Applicant has received temporary disability benefits from the
22 period 7/17/04 through 7/14/06.

23 (4) Applicant has not reached maximum medical improvement
24 and is still unable to return to her usual and customary occupation.

25 (5) State Compensation Insurance Fund made its first payment of
26 temporary disability on 5/03/05 (Covering the period 7/17/04 to
27 5/02/05) (Excess of EDD reimbursement).” (Parenthesis in
original, bracketed material added.)

Based upon the stipulations that applicant was continuously temporarily disabled from the
July 16, 2004 date of injury and that the first payment of temporary disability indemnity was not

² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers’ Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Govt. Code, § 11425.60(b).)

1 made until May 3, 2005, the WCJ entered the September 5, 2006 Findings and Award as described
2 above.

3 The WCJ explained why he awarded additional temporary disability indemnity to applicant
4 in his Report and Recommendation on Petition for Reconsideration (Report):

5 “The plain language [of section 4656(c)(1)] requires that the 2 year
6 limitation starts when defendant commences payment. That must
7 mean the date on which defendant made its first payment. That is
8 the date on which payment commences. The Legislature could
9 have said that the two years started ‘On the date eligibility for
10 benefits commences’ or other language that would cause the result
11 that defendant seeks. They could have left out the word ‘payment’
12 leaving the date as ‘commencement of Temporary Disability’.
13 They did not do so.

14 “They used the plain language that the 2 year limit begins on the
15 date of commencement of payment. They included a word,
16 payment, which must be given meaning. It cannot be other [than]
17 that the limitation begins the date payment starts, not disability.

18 “In this case defendant did not make any payment of temporary
19 disability until 5/3/05. That is the date that they commenced
20 payment. They must pay up to 2 years from that date.”

21 DISCUSSION

22 We agree with the WCJ that the limitation of 104 compensable weeks within two years
23 described in section 4656(c)(1) begins on the date temporary disability indemnity is first paid.

24 Section 4656, as amended by the Legislature in April 2004 as part of Senate Bill 899 (SB
25 899) (Stats. 2004, ch. 34, § 29), now provides in full:

26 “(a) Aggregate disability payments for a single injury occurring
27 prior to January 1, 1979, causing temporary disability shall not
extend for more than 240 compensable weeks within a period of
five years *from the date of the injury*.

“(b) Aggregate disability payments for a single injury occurring on
or after January 1, 1979, and prior to the effective date of
subdivision (c), causing temporary partial disability shall not
extend for more than 240 compensable weeks within a period of
five years *from the date of the injury*.

“(c)(1) Aggregate disability payments for a single injury occurring
on or after the effective date of this subdivision, causing temporary
disability shall not extend for more than 104 compensable weeks

1 within a period of two years *from the date of commencement of*
2 *temporary disability payment.*

3 (2) Notwithstanding paragraph (1), for an employee who suffers
4 from the following injuries or conditions, aggregate disability
5 payments for a single injury occurring on or after the effective date
6 of this subdivision, causing temporary disability shall not extend
7 for more than 240 compensable weeks within a period of five years
8 *from the date of the injury:*

- 9 (A) Acute and chronic hepatitis B.
- 10 (B) Acute and chronic hepatitis C.
- 11 (C) Amputations.
- 12 (D) Severe burns.
- 13 (E) Human immunodeficiency virus (HIV).
- 14 (F) High-velocity eye injuries.
- 15 (G) Chemical burns to the eyes.
- 16 (H) Pulmonary fibrosis.
- 17 (I) Chronic lung disease.” (Emphasis added.)

18 Subdivisions (a), (b) and (c)(2) of section 4656 all provide that temporary disability
19 indemnity “shall not extend for more than 240 compensable weeks within a period of five years
20 *from the date of the injury.*” (Emphasis added.) The imposition of a time limit on temporary
21 disability indemnity running from the employee’s “date of injury” has been a component of
22 section 4656 since its inception.³ Subdivision (c)(1), however, takes an entirely different

23 ³ As enacted in 1937, section 4656 provided in full: “Aggregate disability payments for a single injury causing
24 temporary disability shall not exceed three times the average annual earnings of the employee, nor shall the aggregate
25 disability period for such temporary disability in any event extend beyond 240 weeks *from the date of injury.*” (Stats.
26 1937, ch. 90, § 4656 (emphasis added).) Thus, in its original form, section 4656 limited both the maximum amount of
27 temporary disability indemnity that could be paid to three times average annual earnings, and limited the number of
weeks within which it could be paid to 240 weeks *from the date of injury.*

An amendment in 1947 increased the maximum amount that could be paid from “three times” average annual
earnings to “four times” average annual earnings, but retained the time limit within which it could be paid as 240
weeks *from the date of injury.* (Stats. 1947, ch. 1033, § 4 (emphasis added).)

Following an amendment in 1955, section 4656 provided in full: “Aggregate disability payments for a single
injury causing temporary disability shall not extend beyond 240 weeks from the date of injury.” (Stats. 1955, ch. 956,
§ 5 (emphasis added).) The 1955 amendment removed the limit on the maximum amount of temporary disability
indemnity that could be paid, but retained the time limit within which it could be paid as 240 weeks *from the date of*
injury.

Section 4656 was amended again in 1959 to provide in full: “Aggregate disability payments for a single
injury causing temporary disability shall not extend for more than 240 compensable weeks within a period of five
years from the date of injury.” (Stats. 1959, ch. 1189, § 12 (emphasis added).) With that amendment, the Legislature

1 approach. It provides that “temporary disability shall not extend for more than 104 compensable
2 weeks within a period of two years *from the date of commencement of temporary disability*
3 *payment.*” (Emphasis added.) Obviously, by using such distinctly different language in
4 subdivision (c)(1), the Legislature intended this language to have a distinctly different legal effect.
5 (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 717 (“When the
6 Legislature uses materially different language in statutory provisions addressing the same subject
7 or related subjects, the normal inference is that the Legislature intended a difference in meaning”);
8 *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1137-1138 (“we generally
9 do not construe *different* terms within a statute to embody the same meaning” [Court’s
10 emphasis]).) While section 4656(c)(1) plainly establishes a payment limit on temporary disability
11 indemnity of 104 compensable weeks within a period of two years, the question is: When does the
12 104-week/two-year limitation period begin?

13 “Our task in interpreting a statute is to ascertain and effectuate legislative intent.” (*People*
14 *v. Leal* (2004) 33 Cal.4th 999, 1007 (“*Leal*”) (internal quotations omitted); see also *Nickelsberg v.*
15 *Workers’ Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480].) In
16 undertaking this task, “it is well-settled that we must look first to the words of the statute, because
17 they generally provide the most reliable indicator of legislative intent.” (*Murphy v. Kenneth Cole*
18 *Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 (“*Murphy*”) (internal quotations omitted); see also

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20 continued the 240-week time limit, but modified that time limit to provide that it could not extend beyond five years
21 *from the date of injury.*

21 In 1978, section 4656 was amended again to state separate time limits for temporary *total* disability and
22 temporary *partial* disability as follows:

22 “Aggregate disability payments for a single injury occurring prior to January 1, 1979,
23 causing temporary disability shall not extend for more than 240 compensable weeks within
24 a period of five years *from the date of the injury.*”

24 “Aggregate disability payments for a single injury occurring on or after January 1, 1979,
25 causing temporary partial disability shall not extend for more than 240 compensable weeks
26 within a period of five years *from the date of the injury.*” (Stats. 1978, ch. 937, § 1
27 (emphasis added).)

26 The earlier time limits on temporary disability indemnity were continued for all injuries occurring prior to January 1,
27 1979, but, for injuries occurring on or after that date, the amendment effectively eliminated the time limit for
temporary *total* disability. However, for injuries on or after January 1, 1979, the amendment continued to provide that
the time limits for temporary *partial* disability were 240 weeks within five years *from the date of injury.*

1 *Leal, supra*, 33 Cal.4th at p. 1007.) We give a statute’s words “their plain and commonsense
2 meaning” (*Murphy, supra*, 40 Cal.4th at p. 1103; see also *In re Jennings* (2004) 34 Cal.4th 254,
3 263 (“*Jennings*”)) and their “usual and ordinary meaning.” (*Smith v. Superior Court* (2006) 39
4 Cal.4th 77, 83; *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 (“*Day*”); see also *DuBois v.*
5 *Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286, 289] (“*DuBois*”)
6 (“We are required to give effect to statutes according to the usual, ordinary import of the language
7 employed ...”).) “If the statutory language is not ambiguous, then we presume the Legislature
8 meant what it said, and the plain meaning of the language governs.” (*In re Young* (2004) 32
9 Cal.4th 900, 906; accord: *Day, supra*, 25 Cal.4th at p. 272); see also *Jennings, supra*, 34 Cal.4th at
10 p. 263 (“If the language of the statute is not ambiguous, the plain meaning controls and resort to
11 extrinsic sources to determine the Legislature’s intent is unnecessary.” (internal quotations
12 omitted)); *Leal, supra*, 33 Cal.4th at p. 1007 (“[w]hen the language of a statute is clear and
13 unambiguous and thus not reasonably susceptible of more than one meaning, there is no need for
14 construction, and courts should not indulge in it” and “[w]e may not, under the guise of
15 construction, rewrite the law or give the words an effect different from the plain and direct import
16 of the terms used” (internal quotations omitted)); *DuBois, supra*, 5 Cal.4th at pp. 387-388 [58
17 Cal.Comp.Cases at p. 289] (“[w]hen the language is clear and there is no uncertainty as to the
18 legislative intent, we look no further and simply enforce the statute according to its terms”);
19 *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 (“[w]here the statute is clear, courts will
20 not interpret away clear language in favor of an ambiguity that does not exist”) (internal quotations
21 omitted).)

22 Here, the language of section 4656(c)(1) is clear and unambiguous. It provides that
23 “temporary disability shall not extend for more than 104 compensable weeks within a period of
24 two years *from the date of commencement of temporary disability payment.*” (Emphasis added.)
25 The plain and commonsense meaning of “commencement” is “beginning.” (The American
26 Heritage® Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company,
27 2004.) The usual and ordinary meaning of “payment” is “[t]he act of paying or the state of being

1 paid.” (*Ibid.*) Thus, by stating that “temporary disability shall not extend for more than 104
2 compensable weeks within a period of two years from the date of commencement of temporary
3 disability payment,” the Legislature clearly and specifically expressed its intention that the
4 limitation of 104 weeks within two years *begins* on the date on which temporary disability
5 indemnity is first *paid*, and not on the date for which it is first owed.

6 Because the statutory language is not ambiguous, we will presume the Legislature meant
7 what it said and, therefore, the plain meaning will govern. We cannot and will not, under the guise
8 of construction, rewrite section 4656(c)(1) or give its words an effect different from the plain and
9 direct import of the terms used. Rather, we will enforce section 4656(c)(1) according to its actual
10 terms.

11 Moreover, although not necessary to our decision, we observe that our construction of
12 section 4656(c)(1) is in harmony with the workers’ compensation statutory scheme. (Cf. *Chevron*
13 *U.S.A., Inc. v. Workers’ Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1194 [64
14 Cal.Comp.Cases 1, 22] (“*Steele*”); *DuBois, supra*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at pp.
15 289-290].)

16 To qualify for workers’ compensation benefits, a covered worker need only sustain a
17 compensable injury. (Lab. Code, § 3600.) Liability is determined “irrespective of the fault of any
18 party.” (Cal. Const., art. XIV, § 4.) The system is intended to automatically provide an injured
19 worker with medical treatment and temporary disability indemnity without delay.

20 Various provisions of the workers’ compensation law create both economic incentives and
21 disincentives to help ensure that an employer timely acts in good faith to provide benefits. Late
22 payments of disability indemnity are automatically increased by 10 percent in most instances
23 without regard to the reason for the delay. (Lab. Code, § 4650(d).) If an employer or insurer
24 unreasonably delays or refuses to pay compensation, section 5814 provides for an increase in the
25 award as a penalty. A claims administrator may also be penalized for any delayed payments
26 discovered in an audit of its claims by the Division of Workers’ Compensation. (Lab. Code, §
27 129.5.) By providing that the limitation in section 4656(c)(1) runs from the date payment of

1 temporary disability indemnity commences, the Legislature created both an incentive for prompt
2 payment and a disincentive for delay.

3 By encouraging timely action, section 4656(c)(1) advances the purpose of temporary
4 disability indemnity, which is to promptly replace wages lost by the injured employee during the
5 period of disability. (Lab. Code, §§ 4650-4657 and 4661-4661.5.) This purpose of temporary
6 disability indemnity has been repeatedly emphasized by the appellate courts. In *Nickelsberg v.*
7 *Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288 [56 Cal.Comp.Cases 476], the Supreme Court
8 said, “[t]emporary disability indemnity is intended primarily to substitute for the worker’s lost
9 wages, *in order to maintain a steady stream of income.*” (54 Cal.3d at p. 294 [56 Cal.Comp.Cases
10 at p. 479] (emphasis added, internal quotations omitted).) Similarly, in *Granado v. Workmen’s*
11 *Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647], the Supreme Court wrote that
12 “[t]he primary element of temporary disability is wage loss,” that “temporary disability payments
13 [are] *a substitute for lost wages,*” and that “[temporary disability] benefits are based ... directly on
14 lost wages.” (69 Cal.2d at pp. 403, 404, 405 [33 Cal.Comp.Cases at pp. 650, 651] (emphasis
15 added).) More recently, in *Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006)
16 142 Cal.App.4th 790, 801 [71 Cal.Comp.Cases 1044], the Court of Appeal observed that “[t]he
17 essential purpose of temporary disability indemnity *is to help replace the wages the employee*
18 *would have earned,* but for the injury, during his or her period(s) of temporary disability” and that
19 “temporary disability is intended as *a substitute for lost wages during a period of transitory*
20 *incapacity to work.*” (142 Cal.App.4th at pp. 801, 795 [71 Cal.Comp.Cases at pp. 1052-1053,
21 1047] (emphasis added); see also, e.g., *Gamble v. Workers' Comp. Appeals Bd.* (2006) 143
22 Cal.App.4th 71, 79 [71 Cal.Comp.Cases 1015, 1017] (“The purpose of temporary disability
23 indemnity is to provide interim wage replacement assistance to an injured worker during the
24 period he or she is healing.”); *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)*
25 (1993) 16 Cal.App.4th 227, 235 [58 Cal.Comp.Cases 323, 327] (“Temporary disability benefits
26 are intended primarily to replace lost earnings.”).)

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1 Further, consistent with the declaration in the state constitution that a “complete system of
2 workers’ compensation includes adequate provisions for the comfort, health and safety and general
3 welfare of any and *all workers and those dependent upon them for support* to the extent of
4 relieving from the consequences of any injury ... incurred or sustained by workers in the course of
5 their employment” (Cal. Const., art. XIV, § 4 (formerly, art. XX, § 21) (emphasis added)), the
6 Supreme Court long ago held:

7 “[T]he primary purpose of industrial compensation is to insure
8 [*sic*] to the injured employee and those dependent upon him
9 adequate means of subsistence while he is unable to work ... By
10 this means society as a whole is relieved of the burden of caring
11 for the injured workman and his family, and the burden is placed
12 upon the industry. That the injured workman and his dependents
13 may be cared for, compensation in the form of disability benefits is
14 provided for by the act approximating the wages earned by the
15 employee.” (*Union Iron Works v. Industrial Acc. Com. (Henneberry)* (1922) 190 Cal. 33, 39 [9 I.A.C. 223, 226] (emphasis
16 added); see also: *Moyer v. Workmen’s Comp. Appeals Bd.* (1973)
17 10 Cal.3d 222, 233 [38 Cal.Comp.Cases 652, 659]; *Zeeb v.*
18 *Workmen’s Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 500-501 [32
19 Cal.Comp.Cases 441, 443]; *Aetna Casualty & Surety Co. v.*
20 *Industrial Acc. Com. (Charlesworth)* (1947) 30 Cal.2d 388, 407-
21 408 [12 Cal.Comp.Cases 123, 134-135].)

22 Because section 4656(c)(1)’s limitation of 104 weeks within two years does not begin to
23 run until “the date of commencement of temporary disability payment,” there is a strong
24 inducement to promptly start paying temporary disability indemnity. Prompt payment helps
25 ensure that the injured employee and his or her dependents receive some replacement of the
26 employee’s lost wages and a means of subsistence during the period of temporary disability.

27 The balance struck by section 4656(c)(1) is also consistent with the Legislature’s intent in
enacting SB 899, as expressed in section 49 of that bill:

“This act is an urgency statute necessary for the immediate
preservation of the public peace, health, or safety within the
meaning of Article IV of the Constitution and shall go into
immediate effect. The facts constituting the necessity are: [¶] In
order to provide relief to the state from the effects of the current
workers’ compensation crisis at the earliest possible time, it is

1 necessary for this act to take effect immediately.” (Stats. 2004, ch.
2 34, § 49.)

3 As recognized by the Supreme Court, section 49 reflects that SB 899 was adopted as “an urgency
4 measure designed to alleviate a perceived crisis in skyrocketing workers’ compensation costs.”
5 (*Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases __,
6 __]; see also, *Costco Wholesale Corp. v. Workers’ Comp. Appeals Bd. (Chavez)* (2007) __
7 Cal.App.4th __ [72 Cal.Comp.Cases __, 2007 WL 1492341, *3, 2007 Cal.App. LEXIS 816, *10]
8 (“the workers’ compensation ... reforms [of SB 899] were enacted as urgency legislation to
9 drastically reduce the cost of workers’ compensation insurance”).)

10 By placing a limit of 104 weeks of temporary disability indemnity within two years from
11 the date that payment commences, the Legislature has furthered the goal of SB 899 to “provide
12 relief” from the workers’ compensation “crisis” and to reduce workers’ compensation costs.
13 Immediately prior to SB 899, former section 4656 placed *no limit whatsoever* on temporary total
14 disability indemnity payments. (See fn. 3, *supra* [discussing 1978 amendment to section 4656].)
15 Also, although former section 4656 did place some limits on temporary partial disability
16 indemnity, these limits were 240 weeks within five years of the date of injury. (*Ibid.*) Therefore,
17 under new section 4656(c)(1), even an employer that significantly delays the “commencement of
18 temporary disability payment” may have lesser liability – and, at least with temporary total
19 disability indemnity, certainly will not have greater liability – than it would have had prior to
20 section 4656(c)(1)’s adoption. Moreover, under section 4656(c)(1), the employer controls when
21 the limitation on temporary disability benefits begins to run. Accordingly, the sooner the
22 employer commences temporary disability indemnity payments, the sooner it obtains the benefit of
23 the lower liability limits enacted by the Legislature as part of SB 899. And, of course, because
24 section 4656(c)(1) encourages the prompt commencement of temporary disability indemnity
25 payments, it also helps to ensure that an injured employee will seasonably receive some
26 replacement for his or her lost wages, so that the employee – and his or her family – has a means
27 of subsistence during the employee’s period of temporary disability.

1 Our conclusion that the 104-week/two-year limitation of section 4656(c)(1) starts to run
2 with the first actual payment of temporary disability indemnity is not affected by the provisions of
3 section 4656(c)(2). Section 4656(c)(2) provides that temporary disability indemnity for certain
4 injuries or conditions (e.g., hepatitis B and C, amputations, severe burns, HIV, pulmonary fibrosis,
5 and chronic lung disease) may extend up “240 compensable weeks within a period of five years
6 from the date of the injury.” Thus, in enacting section 4656(c)(2), the Legislature exempted these
7 specified injuries or conditions from the 104-week/two-year cap of section 4656(c)(1). Section
8 4656(c)(2)’s exemption of these specific injuries or conditions, however, does not mean that we
9 can rewrite section 4656(c)(1) or give its words an effect different from their plain and ordinary
10 meaning. As discussed above, the usual and commonsense meaning of the phrase “temporary
11 disability shall not extend for more than 104 compensable weeks within a period of two years from
12 *the date of commencement of temporary disability payment*” (emphasis added) is that the 104-
13 week/two-year limitation starts on the date that temporary disability indemnity is first paid. While
14 it is conceivable, as the dissent points out, that in some exceptional circumstances an injured
15 employee could receive more temporary disability indemnity under section 4656(c)(1) than
16 another employee could receive under section 4656(c)(2), the possible existence of such
17 exceptional circumstances does not mean we can disregard the actual language used by the
18 Legislature in section 4656(c)(1). (See, e.g., *Gorham Co., Inc. v. First Financial Ins. Co.* (2006)
19 139 Cal.App.4th 1532, 1543-1544 (“Although courts may disregard literal interpretation of a
20 statute to avoid absurd results ..., they should do so rarely, and only in extreme cases – those in
21 which, as a matter of law, the Legislature did not intend the statute to have its literal effect.”
22 (Internal citations and quotations omitted); accord: *California Highway Patrol v. Superior Court*
23 (*Quigley*) (2007) 150 Cal.App.4th 207, __ [2007 WL 1447694, *4, 2007 Cal.App. LEXIS 764,
24 *12].)

25 Finally, our conclusion that the section 4656(c)(1) limitation of 104 weeks within two
26 years starts to run with the first actual payment of temporary disability indemnity is not affected by
27 the fact that section 4656(c)(1) refers to “[a]ggregate disability payments.” (Emphasis added.)

1 Statutory phrases are not to be read in isolation; rather, they must be examined in the context of
2 the entire statute so that its different parts may be harmonized. (*State Farm Mut. Auto. Ins. Co. v.*
3 *Garamendi* (2004) 32 Cal.4th 1029, 1043; *Steele, supra*, 19 Cal.4th at p. 1194 [64
4 Cal.Comp.Cases at p. 22]; *DuBois, supra*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at p. 289].)
5 Here, section 4656(c)(1) reads, in total, “[a]ggregate disability payments for a single injury
6 occurring on or after the effective date of this subdivision, causing temporary disability shall not
7 extend for more than 104 compensable weeks within a period of two years *from the date of*
8 *commencement of temporary disability payment.*” (Emphasis added.) Therefore, for the reasons
9 discussed above, the 104 weeks of temporary disability indemnity do not start to “aggregate” until
10 payments actually commence.

11 In sum, because the language of section 4656(c)(1) is clear and unambiguous (i.e., that
12 “temporary disability shall not extend for more than 104 compensable weeks within a period of
13 two years *from the date of commencement of temporary disability payment*” (emphasis added)), we
14 will enforce the statute in accordance with the plain and commonsense meaning of the words
15 actually used by the Legislature, i.e., the 104-week/two-year limitation period *begins* (i.e., it
16 “commence[s]”) on the “date” on which temporary disability indemnity is first *paid* (i.e., the
17 “payment”), and not on the date for which it is first owed.

18 **DISPOSITION**

19 In this case, temporary disability indemnity was first *paid* to applicant on May 3, 2005 and
20 defendant made further payments through July 14, 2006. The first payment included retroactive
21 temporary disability indemnity for the period of July 17, 2004 to May 2, 2005. However, none of
22 that retroactive temporary disability indemnity was within the “104 compensable weeks within a
23 period of two years *from the date of commencement of temporary disability payment*” limitation
24 established by section 4656(c)(1). Instead, the 104-week/two-year limitation in this case began to
25 run on May 3, 2005, the date temporary disability indemnity was first *paid* to applicant.
26 Accordingly, the WCJ properly awarded temporary disability indemnity from the date defendant
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1 terminated its temporary disability indemnity payments (i.e., July 14, 2006) to the date of the
2 award (i.e., September 5, 2006) and continuing thereafter.

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4 We are aware that, in making a “continuing” award of temporary disability, the WCJ did
5 not direct that payments were to be stopped on May 3, 2007. As the WCJ explained in his Report,
6 however, it was appropriate to leave the award open-ended because temporary disability might
7 terminate for some reason before the end of the two-year limitation period on May 3, 2007. (See
8 Lab. Code, § 4651.1; Cal. Code Regs., tit. 8, §§ 10462 and 10464.) Although our decision is
9 issuing after May 3, 2007, we will not disturb the “continuing” award, for the reasons stated in the
10 WCJ’s Report.

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4 For the foregoing reasons,

5 **IT IS ORDERED** as the Decision After Reconsideration of the Appeals Board (En Banc)
6 that the September 6, 2006 Finding and Award is **AFFIRMED**.

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WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

9

/s/ Joseph M. Miller

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JOSEPH M. MILLER, Chairman

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/s/ William K. O'Brien

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WILLIAM K. O'BRIEN, Commissioner

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/s/ James C. Cuneo

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JAMES C. CUNEO, Commissioner

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/s/ Janice Jamison Murray

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JANICE JAMISON MURRAY, Commissioner

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/s/ Ronnie G. Caplane

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RONNIE G. CAPLANE, Commissioner

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/s/ Alfonso J. Moreso

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ALFONSO J. MORESI, Commissioner

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I DISSENT (See attached Dissenting Opinion)

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/s/ Frank M. Brass

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FRANK M. BRASS, Commissioner

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***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
6/13/2007***

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***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN
ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS***

JFS/ams

1 **DISSENTING OPINION OF COMMISSIONER BRASS**

2 I dissent. In my view the phrase “date of commencement of temporary disability payment”
3 in section 4656(c)(1) refers to the date for which temporary disability indemnity is first owed, not
4 the date on which it is first paid.

5 I believe that the Legislature amended section 4656 as part of SB 899 in order to establish
6 new “aggregate” amounts of temporary disability indemnity, depending upon the nature of the
7 injury. I do not agree that the Legislature intended section 4656(c)(1) to provide for more than
8 104 compensable weeks of temporary disability indemnity in the event the initial payment has
9 been delayed. While a delay in paying temporary disability indemnity may support other
10 remedies, it should not automatically increase the “aggregate” amount of 104 weeks allowed by
11 section 4656(c)(1).

12 The majority is correct that our “first task” in construing a statute is to “ascertain the intent
13 of the Legislature so as to effectuate the purpose of the law.” (*Dyna-Med, Inc. v. Fair*
14 *Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) Unfortunately, this cannot be done
15 merely by looking at the language of section 4656(c)(1) in isolation because “An ambiguity arises
16 when language is reasonably susceptible of more than one application to material facts.” (*Dore v.*
17 *Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391 (quoting from *California State Auto Assn.*
18 *Inter-Ins. Bureau v. Superior Court* (1986) 177 Cal.App.3d 855, 859, fn. 1.) There is ambiguity
19 in the phrase “date of commencement of temporary disability payment” in section 4656(c)(1)
20 because it may refer to either the date for which temporary disability indemnity is first owed, or
21 the date on which it is first paid.

22 The ambiguity in section 4656(c)(1) must be addressed by giving meaning to *every* word in
23 the statute so as not to render any portion of the statutory language mere surplusage. (*Hassan v.*
24 *Mercy American River Hosp.* (2003) 31 Cal.4th 709, 716; *Moyer v. Workmen’s Comp. Appeals*
25 *Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657].) The language must be construed
26 within the context of the entire statute and statutory scheme of which it is part. (*Chevron U.S.A.,*
27 *Inc. v. Workers’ Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1,

1 22]; *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286,
2 289].)

3 The majority's construction of section 4656(c)(1) does not give full effect to the
4 "aggregate" amount of 104 compensable weeks within two years allowed by the Legislature as
5 part of SB 899. "Aggregate" is defined as "A *total* considered with reference to its constituent
6 parts; a *gross amount*." (The American Heritage® Dictionary of the English Language, Fourth
7 Edition. Houghton Mifflin Company, 2004, emphasis added.) Under the construction adopted by
8 the majority, compensable weeks do not even begin to count until the first check issues. The
9 effect of that construction is to render meaningless the word "aggregate" in section 4656(c)(1) by
10 allowing payment of more than 104 compensable weeks over a period of more than two years
11 regardless of the employee's condition or the reason for the delay in payment. In order to
12 effectuate the purpose of the law, we should look to the statute's specific language and, where
13 possible, give words of the statute their usual and ordinary meaning. (*Smith v. Workers' Comp.*
14 *Appeals Bd.* (2000) 79 Cal.App.4th 530, 537 [65 Cal.Comp.Cases 277].)

15 In considering the proper construction of section 4656(c)(1), it is also useful to look at how
16 the other provisions in the workers' compensation law use the word "payment." For example,
17 section 4650 uses it in four of its subdivisions.¹ In each of those subdivisions, the words
18 "payment" and "payments" refer to the obligation that is owed, not just the act of paying money.

19 ¹ Section 4650(a)-(d) provides in full:

20 "(a) If an injury causes temporary disability, the first *payment* of temporary disability indemnity shall be made not
21 later than 14 days after knowledge of the injury and disability, on which date all indemnity then due shall be paid,
unless liability for the injury is earlier denied.

22 (b) If the injury causes permanent disability, the first *payment* shall be made within 14 days after the date of last
23 *payment* of temporary disability indemnity. When the last *payment* of temporary disability indemnity has been made
24 pursuant to subdivision (c) of Section 4656, and regardless of whether the extent of permanent disability can be
determined at that date, the employer nevertheless shall commence the timely *payment* required by this subdivision
and shall continue to make these *payments* until the employer's reasonable estimate of permanent disability indemnity
due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount
has been paid.

25 (c) *Payment* of temporary or permanent disability indemnity subsequent to the first *payment* shall be made as due
every two weeks on the day designated with the first *payment*.

26 (d) If any indemnity *payment* is not made timely as required by this section, the amount of the late *payment* shall be
27 increased 10 percent and shall be *paid*, without application, to the employee, unless the employer continues the
employee's wages under a salary continuation plan, as defined in subdivision (g). No increase shall apply to any
payment due prior to or within 14 days after the date the claim form was submitted to the employer under Section

1 Similarly, sections 4661 and 4661.5 use the word “payment” to describe the obligation that
2 is owed.² Section 4661 provides that an employee is entitled to permanent disability indemnity in
3 addition to “any payment” received for temporary disability. Section 4661.5 provides that when
4 “payment” of temporary disability indemnity is made two years or more from the date of injury,
5 the “amount of the payment” is to be computed based upon the employee’s average weekly
6 earnings in effect on the date of “payment” unless this would result in a lower “payment” to the
7 injured worker.

8 Increasing awards of temporary disability benefits beyond the aggregate of 104
9 compensable weeks allowed under section 4656(c)(1) is also inconsistent with other provisions in
10 the workers’ compensation statute. Section 4650(a) allows the employer 14 days after knowledge
11 of the injury and disability to make the first payment of temporary disability indemnity. If the
12 employer uses all 14 days to investigate a claim before issuing the first check, the majority’s
13 construction of section 4656(c)(1) would automatically increase the “aggregate” amount of
14 temporary disability indemnity to 106 weeks. Moreover, section 4650(d) also provides that no
15 penalty applies if the employer needs to investigate the claim and provides proper notice to the
16 employee. However, under the majority’s construction of section 4656, the “aggregate” amount of
17 temporary disability indemnity increases merely because the employer investigated the claim. If
18 the Legislature intended to allow more than 104 weeks of temporary disability indemnity when the

19 5401. No increase shall apply when, within the 14-day period specified under subdivision (a), the employer is unable
20 to determine whether temporary disability indemnity *payments* are owed and advises the employee, in the manner
21 prescribed in rules and regulations adopted pursuant to Section 138.4, why *payments* cannot be made within the 14-
22 day period, what additional information is required to make the decision whether temporary disability indemnity
payments are owed, and when the employer expects to have the information required to make the decision.”
(Emphasis added.)

23 ² Section 4661 provides in pertinent part:

24 “Where an injury causes both temporary and permanent disability, the injured employee is entitled to compensation
25 for any permanent disability sustained by him in addition to any *payment* received by such injured employee for
26 temporary disability.” (Emphasis added.)

27 4661.5 provides in full:

“Notwithstanding any other provision of this division, when any temporary total disability indemnity *payment* is made
two years or more from the date of injury, the amount of this *payment* shall be computed in accordance with the
temporary disability indemnity average weekly earnings amount specified in Section 4453 in effect on the date each
temporary total disability *payment* is made unless computing the *payment* on this basis produces a lower *payment*
because of a reduction in the minimum average weekly earnings applicable under Section 4453.” (Emphasis added.)

1 employer investigates a claim, it could have expressed that in section 5402(c), which was also
2 amended as part of SB 899.³

3 Section 4661.5 demonstrates that the Legislature knows how to specify the date on which a
4 payment is made. Under that provision, when “payment” of temporary disability indemnity is
5 made two years or more from the date of injury, the amount of the “payment” is to be computed
6 based upon the injured worker’s average weekly earning “in effect *on the date each temporary*
7 *total disability payment is made*” unless it produces a lower payment. (Emphasis added.) By
8 contrast, section 4656(c)(1) refers to “the date of commencement of temporary disability
9 payment,” not the “date on which the first payment is made.”

10 Increasing the employer’s liability for temporary disability indemnity merely because it
11 timely investigates a claim in good faith is inconsistent with the comprehensive penalty provisions
12 adopted by the Legislature as part of the workers’ compensation law. Historically, section 4656
13 has only described the maximum aggregate temporary disability benefits allowed for a single
14 injury. It has not provided for a penalty if there is a delay in payment. The role of section 4656 in
15 the overall statutory scheme of workers’ compensation did not change when it was amended as
16 part of SB 899. Instead, other provisions continue to specifically address the issue of penalties for
17 delays in payment.

18 In most instances, section 4650(d) provides for an automatic penalty of 10 percent of the
19 delayed amount without regard for the reason for the delay in payment. When the delay or refusal
20 to pay is unreasonable or in bad faith, section 5814 allows for additional penalties of up to 25
21 percent of the award or \$10,000. Moreover, in imposing such an additional penalty, the
22 Legislature specifically required in the SB 899 amendment to section 5814 that the Appeals Board
23 use its discretion “to accomplish a fair balance and substantial justice between the parties.” That

24
25 ³ Section 5402(c) provides in full:

26 “(c) Within one working day after an employee files a claim form under Section 5401, the employer shall authorize
27 the provision of all treatment, consistent with Section 5307.27 or the American College of Occupational and
Environmental Medicine’s Occupational Medicine Practice Guidelines, for the alleged injury and shall continue to
provide the treatment until the date that liability for the claim is accepted or rejected. Until the date the claim is
accepted or rejected, liability for medical treatment shall be limited to ten thousand dollars (\$10,000).”

1 legislative intent is undermined if section 4656(c)(1) is interpreted to automatically increase
2 awards, in some cases by more than 10% and \$10,000, regardless of the reason for the delay.

3 The majority's construction of section 4656(c)(1) is contrary not only to the Legislature's
4 intention to adopt a new aggregate limit on payments in that subdivision, but also to the
5 Legislature's plain intention to establish a higher aggregate limit on temporary disability
6 indemnity when the employee suffers from one of the conditions described in section 4656(c)(2).

7 Section 4656(c)(2) provides that "aggregate disability payments" to an employee with one
8 of the nine conditions specified in that subdivision "shall not extend for more than 240
9 compensable weeks of temporary disability indemnity within a period of five years from the date
10 of injury." There is no ambiguity in that language. The maximum amount of temporary disability
11 indemnity an employee can receive under section 4656(c)(2) is 240 compensable weeks.
12 However, under the construction of section 4656(c)(1) adopted by the majority, an employee who
13 does not have one of the conditions specified by the Legislature in section 4656(c)(2) can receive
14 considerably *more* than 240 compensable weeks of temporary disability indemnity.⁴ Construing
15 section 4656(c)(1) to allow for payment of more temporary disability indemnity than the
16 maximum provided for employees with one of the conditions specified in section 4656(c)(2)
17 disregards the Legislature's plain intention to establish a higher aggregate amount of temporary
18 disability benefits for employees with one of the conditions described in section 4656(c)(2).

19 In addition, section 4656(c)(1) was adopted as part of SB 899; an urgency measure
20 designed to "alleviate a perceived crisis in skyrocketing workers' compensation costs." (*Brodie v.*
21 *Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases __, __]; see also,
22 *Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1441 [70 Cal.Comp.Cases
23 294, 306]; *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (Chavez)* (2007) __
24 Cal.App.4th __ [72 Cal.Comp.Cases __, 2007 WL 1492341, *3, 2007 Cal.App. LEXIS 816, *10].)

25 _____
26 ⁴ The potential discrepancy is substantial. If a determination of eligibility is delayed four years, the retroactive benefit
27 could be as high as 208 weeks. If the employee then obtained an additional 104 weeks, as would be allowed under the
majority's construction of section 4656(c)(1), the employee would receive a total of 312 weeks of temporary disability
benefits.

1 It is unlikely that the Legislature would express a new “aggregate” limit on temporary total
2 disability indemnity in section 4656(c)(1) that did not mean what it says. Consequently, I am
3 constrained to read the phrase “date of commencement of temporary disability payment” in section
4 4656(c)(1) to refer to the date for which temporary disability indemnity is first owed.⁵
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8 /s/ Frank M. Brass
9 **FRANK M. BRASS, Commissioner**

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11 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

12 ***6/13/2007***

13 ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN***
14 ***ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS***

15 ***JFS/ams***
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24 ⁵ The Legislature’s goal of reducing workers’ compensation costs is laudable. However, I am troubled by the
25 draconian swing from unlimited temporary total disability indemnity to the new limit of 104 weeks within two years.
26 The anticipated savings in establishing this limit will result from the termination of payments to those injured workers
27 who are most in need of it because of extended periods of temporary disability. Moreover, an employee who makes
an unsuccessful attempt to return to work after receiving an initial payment of temporary disability indemnity may
lose benefits because of the new limit. In my view, workers’ compensation benefits should be provided for those
most in need and employees should not be penalized for attempting to return to work following an industrial injury.