

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**MICHAEL AYALA, *Applicant***

**vs.**

**DEPARTMENT OF CORRECTIONS REHABILITATION/  
LANCASTER STATE PRISON, legally uninsured, STATE COMPENSATION  
INSURANCE FUND/STATE CONTRACTS SERVICE, *Defendants***

**Adjudication Number: ADJ1360597 (VNO 0457429)  
San Bernardino District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings of Fact issued by the workers' compensation administrative law judge (WCJ) on November 8, 2021. By the Findings of Fact, the WCJ found that the Appeals Board lacks jurisdiction to award industrial disability leave (IDL) benefits, but has jurisdiction to award a 50% increase in temporary disability pursuant to Labor Code section 4553. (Lab. Code, § 4553.)

Applicant contends that "compensation otherwise recoverable" in section 4553 includes enhanced IDL. Applicant argues that the language "otherwise recoverable" extends to compensation beyond what is contained in the definition of compensation in Labor Code section 3207. He further argues that Government Code section 19870 provides that IDL "means temporary disability as defined in" division 4 of the Labor Code, which is why IDL payments have been considered in calculating aggregate disability payments under section 4656 per *Brooks v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1522 [73 Cal.Comp.Cases 447]. Applicant contends that the definition of compensation in section 3207 does not apply to section 4553 because it defines compensation "without regard to negligence," which is not applicable where the employer has engaged in serious and willful misconduct. Lastly, applicant argues that the Appeals Board has jurisdiction to award compensation based on the value of the IDL even if the Appeals Board does not have jurisdiction to award IDL.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that applicant's Petition be denied.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the Findings of Fact and issue a new decision finding that applicant is entitled to a 50% increase in compensation per section 4553 to be calculated based on the enhanced IDL he received.

### **FACTUAL BACKGROUND**

Applicant sustained an injury to the back, right shoulder, right knee, psyche, jaw, lower extremities and headaches on August 12, 2002 while employed as a correctional officer by the Department of Corrections & Rehabilitation/Lancaster State Prison. The injury occurred as a result of an attack on prison staff by the inmates. The parties entered into Stipulations with Request for Award, wherein it was agreed that the injury caused 85% permanent disability. The Award was approved on July 31, 2012.

Applicant filed a petition alleging that the injury occurred as a result of serious and willful misconduct by defendant per section 4553. In a Joint Findings of Fact issued on October 4, 2018, the WCJ found that defendant did not engage in serious and willful misconduct. Applicant sought reconsideration.

In a split panel decision issued on April 27, 2020, the Appeals Board rescinded the WCJ's decision and issued a new decision finding that applicant sustained an injury as a result of serious and willful misconduct by defendant. The decision included an award for a 50% increase in compensation and up to \$250.00 in costs and expenses less a 15% attorney's fee with the amount to be adjusted by the parties and jurisdiction reserved at the trial level in the event of a dispute. Defendant filed a petition for writ of review of the Appeals Board's decision, which the Court of Appeal denied on August 11, 2020.

The matter proceeded to trial again on July 29, 2021 with the issues identified as:

#### **APPLICANT'S ISSUES ARE AS FOLLOWS:**

1. Whether the computation of the serious and willful award under Labor Code Section 4553 applies to all the benefits the applicant received, including or the Enhanced Industrial Disability Leave (E-IDL).

2. Can CDCR/State Compensation Insurance Fund pay a lesser benefit-TDD rather than the value of the Enhanced Industrial Disability Leave when they have been found liable for serious and willful misconduct.

DEFENDANT’S ISSUES ARE AS FOLLOWS:

1. Whether the WCAB has jurisdiction to award Industrial Disability Leave or Enhanced Industrial Disability Leave, including 50 percent increase for Labor Code Section 4553, based on the amount of Enhanced Industrial Disability Leave benefits.

2. Whether Applicant’s entitlement to 50 percent increase per Labor Code Section 4553 is limited to benefits that are provided in Division IV of the Labor Code.

(Minutes of Hearing, July 29, 2021, pp. 2-3.)

Pursuant to applicant’s trial brief, applicant was paid enhanced IDL at the rate of his full salary for 845 days, valued at \$155,000, 50% of which would be \$77,500. (Applicant’s Trial Brief, August 12, 2021, p. 2.) Defendant argued in its post-trial brief that the Appeals Board does not have jurisdiction to award IDL or to impose a 50% increase based on what applicant received for enhanced IDL. (Defendant’s Post-Trial Brief, August 13, 2021, p. 2.) Defendant further argued that the 50% increase may only be applied to applicant’s temporary disability rate during that period, which both parties agree is \$490.00 per week and would have a value of approximately \$47,000 for the section 4553 award. (*Id.* at p. 2; Applicant’s Trial Brief, August 12, 2021, p. 2.)

The WCJ issued the resulting Findings of Fact as discussed above.

**DISCUSSION**

**I.**

Government Code section 19871 provides for state employees to receive IDL (full pay less withholding for taxes and certain deductions/contributions) for 52 weeks when they are temporarily disabled due to an industrial injury. (Gov. Code, § 19871(a).) Certain employees receive “enhanced” IDL pursuant to Government Code section 19871.2:

When an excluded employee is temporarily disabled for more than 22 consecutive working days by an injury or type of injury designated by the director as qualifying an employee for the benefits of this section, he or she shall receive an enhanced industrial disability leave benefit. The enhanced benefit shall be equivalent to the injured employee’s net take home salary on the date of occurrence of injury. Eligibility and benefits may not exceed 52 weeks within

a two-year period after the date of occurrence of the injury. For the purposes of this section, “net salary” means the amount of salary received after federal income tax, state income tax, and the employee’s retirement contribution has been deducted from the employee’s gross salary.

**The final decision as to whether an employee is eligible for, or continues to be eligible for, enhanced benefits shall rest with the appointing authority or his or her designee.** The appointing authority may periodically review the employee’s condition by any means necessary to determine an employee’s continued eligibility for enhanced benefits.

(Gov. Code, § 19871.2, emphasis added.)

We agree with applicant that the question here is not whether the Appeals Board has jurisdiction to award IDL. There is no dispute that the Appeals Board does not have jurisdiction to award IDL, enhanced or otherwise. (See Cal. Code Regs., tit. 2, § 599.768 [outlining that employees must “first seek departmental administrative remedy” for complaints arising out of IDL and then must appeal to the DWC “on matters within the jurisdiction of the Workers’ Compensation Act” and to the Department of Personnel Administration (DPA) “on employee benefit matters as provided by the Government Code or applicable bargaining unit contracts”]; see also *Blankenship v. Workers’ Comp. Appeals Bd.* (1986) 51 Cal.Comp.Cases 38 (writ den.) [the Appeals Board found that it does not have jurisdiction to award IDL]; *Brooks, supra*, 161 Cal.App.4th at p. 1529 [the employee’s first level of administrative remedy for complaints arising out of IDL lies with the employing state department and thereafter, complaints arising under the Government Code, such as those related to the payment of IDL and leave administration, must be appealed to the DPA].) However, the Appeals Board unquestionably has jurisdiction to issue and calculate applicant’s serious and willful award that he is entitled to under section 4553. (See Lab. Code, §§ 5300, 5301 [the Appeals Board is vested with full power, authority, and jurisdiction to try and determine all matters specified in section 5300 including for the recovery of compensation provided in division 4 of the Labor Code].) The question then is how to calculate the increase in compensation applicant is entitled to for that award: based on the enhanced IDL payments he received or based on his temporary disability rate.<sup>1</sup>

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<sup>1</sup> Defendant does not dispute in its trial brief or answer that applicant was entitled to receive enhanced IDL per Government Code section 19871.2 and applicant confirmed in his petition that he received enhanced IDL payments. It may thus be presumed that he was entitled to those payments.

## II.

Section 4553 provides as follows in relevant part:

The amount of **compensation otherwise recoverable** shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars (\$250), where the employee is injured by reason of the serious and willful misconduct of [the employer].

(Lab. Code, § 4553, emphasis added.)

Section 3207 contains the following definition:

“Compensation” means compensation under this division and **includes every benefit or payment conferred by this division upon an injured employee**, or in the event of his or her death, upon his or her dependents, **without regard to negligence**.

(Lab. Code, § 3207, emphasis added.)

IDL is defined in the Government Code:

“Industrial disability leave” **means temporary disability as defined in Divisions 4 (commencing with Section 3201) and 4.5 (commencing with Section 6100) of the Labor Code** and includes any period in which the disability is permanent and stationary and the disabled employee is undergoing vocational rehabilitation.

(Gov. Code, § 19870, subd. (a), emphasis added.)

The Court of Appeal has held that because IDL is statutorily defined as identical to temporary disability, payments made to a state employee as IDL are included in calculating aggregate disability payments under Labor Code section 4656.<sup>2</sup> (*Brooks, supra*, 161 Cal.App.4th at p. 1532.) The employee in *Brooks* was a correctional officer who sustained an injury to her right shoulder and psyche. She was paid IDL for one year and then temporary disability for another year before SCIF stopped payments. Brooks argued that she was entitled to another year of temporary disability for a total of three years of indemnity benefits because IDL and temporary

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<sup>2</sup> Section 4656(c)(1) limits aggregate disability payments for temporary disability as relevant to the Court’s decision:

Aggregate disability payments for a single injury occurring on or after April 19, 2004, causing temporary disability shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of temporary disability payment.

(Lab. Code, § 4656(c)(1).)

disability are different species of benefits. In affirming the Appeals Board’s decision that applicant was not entitled to another year of temporary disability per the cap in section 4656, the Court of Appeal held in relevant part:

Despite Brooks’s arguments to the contrary, the Legislature has already answered her inquiry. Located within the IDL provisions, Government Code section 19870, subdivision (a) expressly provides that IDL “means temporary disability.” Because IDL is statutorily defined as the equivalent of TD, then the two-year limitation under section 4656, subdivision (c)(1), necessarily must apply to both IDL and TD.

(*Brooks, supra*, 161 Cal.App.4th at p. 1532, fn. omitted.)<sup>3</sup>

Although the Court in *Brooks* considered IDL equivalent to temporary disability for purposes of the statutory cap in section 4656, there does not appear to be case law holding that the “otherwise recoverable” language in section 4553 encompasses benefits or payments beyond those provided by the Labor Code, such as enhanced IDL. In evaluating whether the serious and willful award may be calculated based on the enhanced IDL applicant received, it is thus necessary to evaluate what constitutes “compensation otherwise recoverable” under section 4553.

“Compensation” is specifically defined in section 3207 and has been further delineated by the Court of Appeal as follows:

The term “compensation” is a technical one and includes all payments conferred by the act upon an injured employee. “Compensation” of an employee in the form of wages or salary for services performed, does not have the same meaning as the word “compensation” in the Workmen’s Compensation Act. The former is remuneration for work done; the latter is indemnification for injury sustained. **Wages and salary may, under some circumstances, be paid as compensation in lieu of the normal temporary disability payments prescribed by the act. Such payments do not constitute salary or gratuities, but are payments of compensation under the act.**

(*Hawthorn v. Beverly Hills* (1952) 111 Cal.App.2d 723, 728, emphasis added.)

Case law has tracked with the statutory definition of “compensation” in finding that the

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<sup>3</sup> See also *Mt. Diablo Unified School Dist. v. Workers’ Comp. Appeals Bd. (Rollick)* (2008) 165 Cal.App.4th 1154 [the Court held that wage payments made pursuant to Education Code section 44043 are in part temporary disability benefits for purposes of determining when payments commence under Labor Code section 4656(c)(1)] and *County of Alameda v. Workers’ Comp. Appeals Bd. (Knittel)* (2013) 213 Cal.App.4th 278 [78 Cal.Comp.Cases 81] [the Court held that payments made to public safety officers per section 4850 are included as “aggregate disability payments” under section 4656(c)(2)].

Appeals Board has jurisdiction to issue a penalty pursuant to Labor Code section 5814<sup>4</sup> for an unreasonable delay in benefits that are contained in division 4 of the Labor Code even where those benefits are not within the Appeals Board’s jurisdiction to award. For example, the Court of Appeal held that the Appeals Board had jurisdiction to award a penalty under section 5814 for an unreasonable delay in advance disability pension payments made pursuant to Labor Code section 4850.4. (*Gage v. Workers’ Comp. Appeals Bd.* (2016) 6 Cal.App.5th 1128 [81 Cal.Comp.Cases 1127]; Lab. Code, § 4850.4.) The Court concluded that advance disability pension payments per section 4850.4 are compensation “as they are provided for in division 4” and since they are paid in lieu of temporary disability, the “benefits are intended to serve the same purpose as workers’ compensation benefits.” (*Gage, supra*, 6 Cal.App.5th at p. 1141.)<sup>5</sup>

Similarly, in *Cal. v. Workers’ Comp. Appeals Bd. (Ellison)* (1996) 44 Cal.App.4th 128 [61 Cal.Comp.Cases 325], the Court of Appeal affirmed an amended award for a section 5814 penalty to be calculated on the basis of the temporary disability amount that was due to applicant. Ellison pled a psychiatric claim arising out of and in the course of her employment as a correctional officer. The parties stipulated that her injury caused temporary disability for approximately eight months and that applicant was entitled to her full salary during the entire temporary disability period pursuant to the IDL provisions in the Government Code. State Compensation Insurance Fund (SCIF) did not timely pay the award and applicant sought penalties for an unreasonable delay in compensation per section 5814.

On review, the Court of Appeal in *Ellison* affirmed the Appeals Board’s amended award

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<sup>4</sup> Section 5814 provides for penalties for delay in compensation:

When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars (\$10,000), whichever is less...

(Lab. Code, § 5814(a).)

<sup>5</sup> It is acknowledged that the Court in *Gage* stated in dicta:

Of course, as the WCAB recognized in its *Ellison* decision, if IDL had not been “identical” to TD (*Ellison, supra*, 44 Cal.App.4th at p. 130), the WCAB would have lacked jurisdiction to impose any penalty because IDL is not “compensation”; IDL is not a benefit under division 4 of the Labor Code, but is provided under the Government Code. (*Ellison*, at pp. 141–142.)

(*Gage, supra*, 6 Cal.App.5th at pp. 1140-1141.)

applying the penalty to the amount of temporary disability that would have been paid rather than based on the IDL amount owed and explained its rationale as follows:

Our conclusion is based on the Legislature’s definition of IDL as identical with temporary disability indemnity (TD) under the Labor Code (Gov. Code, § 19870, subd. (a)), the Board’s unquestioned jurisdiction of TD which is also available to an injured state employee, the Board’s construction of its authority which is not clearly erroneous, the Legislature’s salutary general purpose in authorizing the penalty in cases of unreasonably delayed payment, and the requirement that statutory enactments pertaining to workers’ compensation are to be construed liberally in favor of the injured worker.

(*Ellison, supra*, 44 Cal.App.4th at p. 130, fn. omitted.)<sup>6</sup>

In order to determine whether enhanced IDL may come under the umbrella of “compensation otherwise recoverable,” we must also evaluate the case law addressing which benefits and payments must be included in calculating a serious and willful award pursuant to the statute, as well as the purposes behind section 4553. (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286] [“[a] fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law”].)

In *Ferguson v. Workers’ Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1621 [60 Cal.Comp.Cases 275], the Court of Appeal held “that an award for increased compensation due to the serious and willful misconduct of an employer under section 4553 must be calculated with reference to ‘every benefit or payment conferred by Division 4 upon an injured employee’ (italics added), as broadly defined in section 3207 to include medical treatment payments, medical-legal fees and vocational rehabilitation costs, as well as all indemnity benefit payments.” The Court also addressed the concern that a serious and willful award could be constitutionally excessive by inclusion of all benefits:

[S]o long as an award for increased compensation under section 4553 calculated

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<sup>6</sup> Similar to *Ellison*, there have been appellate decisions finding that payments made per Labor Code section 4850 are compensation. (See *Kosowski v. Workers’ Comp. Appeals Bd.* (1985) 170 Cal.App.3d 632 [50 Cal.Comp.Cases 427] [the Court of Appeal held that payment of full salary in lieu of temporary disability benefits per section 4850 is compensation within the meaning of section 3207 and the Appeals Board has jurisdiction to award a credit for those benefits per section 4909 even though it has no jurisdiction to issue an award for section 4850 benefits] and *Boyd v. Santa Ana* (1971) 6 Cal.3d 393, 397 [37 Cal.Comp.Cases 887] [section 4850 benefits are not salary, but are workers’ compensation benefits].)

on the basis of all compensation received by the injured worker, including indemnity as well as nonindemnity benefits, does not provide the injured worker more than is necessary to fully compensate the worker for all damages he or she sustained as a result of the injury caused, at least in part, by the willful misconduct of the employer, the award does not constitute punitive damages and is therefore not constitutionally excessive.

(*Id.* at p. 1624.)

The Court also stated:

Because conventional workers' compensation benefits do not fully compensate an employee for his or her injuries and other detriment, **the increase allowed under section 4553 may only provide full or more nearly full compensation than would be available in the absence of the employer's serious and willful misconduct.**

(*Id.* at p. 1622, emphasis added.)

There is a potential tension between the mandate to provide compensation "without regard to negligence" under section 3207 and determination of whether a serious and willful award is warranted under section 4553, which necessitates an analysis of whether there has been something *more than* negligence by the employer:

The term "serious and wilful misconduct" is described...as being something "much more than mere negligence, or even gross or culpable negligence" and as involving "conduct of a *quasi* criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences"...

(*Mercer-Fraser v. Industrial Acc. Com. (Soden)* (1953) 40 Cal.2d 102, 117 [18 Cal.Comp.Cases 3], citing *Porter v. Hofman* (1938) 12 Cal.2d 445, 447-448.)

The Court in *Ferguson* acknowledged that section 4553 is not quite consistent with the no-fault principle applicable to the workers' compensation system:

To be sure, the serious and willful misconduct remedy provided by section 4553 is "punitive" in the sense that it requires an employer to pay an injured employee more than would be required in the absence of such misconduct. Thus the remedy departs to some extent from the no-fault principle upon which our workers' compensation system is primarily based. It bears noting, however, that this departure may be made only in the event of an exceptionally high degree of employer fault, surpassing even gross negligence.

(*Ferguson, supra*, 33 Cal.App.4th at pp. 1621-1622.)

While a serious and willful award is sometimes considered a penalty for the employer's reckless conduct, the Court of Appeal has opined that the statute's purpose is to more fully compensate the employee rather than to punish the employer. (See e.g., *State Dep't of Corrections v. Workers' Comp. Appeals Bd. (Jensen)* (1971) 5 Cal.3d 885 [36 Cal.Comp.Cases 638] [holding that section 4553 may be imposed against the government and does not violate Government Code section 818's prohibition against imposing damages on a public entity by way of punishment].) Considering the differing remedies available in the workers' compensation system versus a civil action, the California Supreme Court has identified "a tripartite system for classifying injuries arising in the course of employment" as follows:

First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, **there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553.** Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.

(*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 713-714 [59 Cal.Comp.Cases 296], emphasis added.)<sup>7</sup>

Here, applicant's injury resulted from the employer's serious and willful misconduct per the Appeals Board's prior decision on this matter, which was upheld by the Court of Appeal. There is no question that applicant is entitled to a 50% increase in his compensation as a result of the employer's misconduct.

The inclusion of IDL to calculate aggregate disability payments in *Brooks* indicates that

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<sup>7</sup> The California Supreme Court recently acknowledged in dicta the "enhanced" remedy provided by section 4553 and its availability against public employers:

The purpose of [section 4553] is to provide "more nearly full compensation to an injured employee" who is injured as a result of such willful misconduct. (*State Dept. of Corrections v. Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 885, 889 [97 Cal. Rptr. 786, 489 P.2d 818].) This enhanced workers' compensation benefit is available against public employers. (*Id.* at p. 891.) This means that although the workers' compensation scheme allows more limited recovery than what is available through tort litigation (see, e.g., *Shoemaker, supra*, 52 Cal.3d at p. 16), plaintiffs like the Gunds may be able to recover more complete compensatory damages if they are able to establish willful misconduct.

(*Gund v. County of Trinity* (2020) 10 Cal.5th 503, 526 [85 Cal.Comp.Cases 735].)

applicant's IDL payments must also be considered compensation for purposes of the serious and willful award because IDL is statutorily defined and treated as identical to temporary disability, a benefit provided as part of compensation. If calculation of an employee's aggregate temporary disability payments must include IDL payments, it follows that these payments are part of the employee's "compensation" and must be included in determining the "extra compensation" applicant is entitled to for his section 4553 award. The "otherwise recoverable" language in section 4553 is fairly expansive with the potential to contemplate compensation received outside of division 4 of the Labor Code. Furthermore, the purpose of an award under section 4553 is to more fully compensate the employee for an injury caused by the employer's serious and willful misconduct. This purpose is best served by interpreting "compensation otherwise recoverable" as including applicant's enhanced IDL payments, which provides for a greater amount of compensation than calculating the section 4553 award based on his temporary disability rate.

In *Ferguson*, the Court concluded that whether a serious and willful award is constitutionally excessive must be evaluated based on the employee's potential civil tort recovery for damages. (*Ferguson, supra*, 33 Cal.App.4th at pp. 1625-1626.) The measure of civil tort damages is "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (Civ. Code, § 3333.) "Tort damages are awarded to compensate a plaintiff for *all* of the damages suffered as a legal result of the defendant's wrongful conduct." (*North American Chemical Co. v. Super. Ct.* (1997) 59 Cal.App.4th 764, 786, emphasis in original.) Recovery in a civil tort thus "includes compensatory damages as follows: (1) the reasonable value of necessary medical expenses thus far incurred and fairly certain to be incurred in the future; (2) the value of loss of earnings or impairment of earning capacity from the time of injury to the time of settlement and loss or impairment of future earning capacity; (3) a reasonable compensation for physical pain, physical disability and mental suffering, including past and future; and (4) the value of all other special losses or expenses that can be proven." (*Ferguson, supra*, 33 Cal.App.4th at pp. 1625-1626.)

Alternatively, workers' compensation benefits are provided as part of the "presumed 'compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range

of damages potentially available in tort.” (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16 [55 Cal.Comp.Cases 494].) Civil tort damages are generally understood to provide for a larger recovery than workers’ compensation benefits due to the greater remedies available in the civil arena.<sup>8</sup> (See e.g., *Livitsanos v. Super. Ct.* (1992) 2 Cal.4th 744, 754-755 [57 Cal.Comp.Cases 355]; see also *Fermino, supra* [outlining the tripartite system of recovery from workers’ compensation benefits up to increased compensation for a serious and willful award and up to civil tort damages].)

The estimated difference if the increase for applicant’s section 4553 award is calculated based on his enhanced IDL payments rather than his temporary disability rate is approximately \$30,000.<sup>9</sup> We cannot conclude on this record that using applicant’s enhanced IDL payments to calculate his serious and willful award would result in a larger amount than his potential civil tort recovery. The record therefore does not reflect that the award here will be constitutionally excessive as defined in *Ferguson*.

Finally, it has long been established that “where provisions of [the workers’ compensation statutes] are susceptible of an interpretation either beneficial or detrimental to injured employees or an ambiguity appears, they must be construed favorably to the employees.” (*Granado v. Workmen’s Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 404 [33 Cal.Comp.Cases 647]; Lab. Code, § 3202.) Liberal construction of the Labor Code advocates in favor of calculating the serious and willful award based on applicant’s enhanced IDL benefits as part of compensation otherwise recoverable under section 4553.

Therefore, we will rescind the Findings of Fact and issue a new decision finding that applicant is entitled to a 50% increase in compensation per section 4553 to be calculated based on the enhanced IDL he received. We will retain the WCJ’s finding of fact that the Appeals Board lacks jurisdiction to award IDL pursuant to the analysis above in section I.

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<sup>8</sup> For example, as discussed herein, Labor Code section 4656 provides maximum periods for aggregate temporary disability payments and the amount of temporary total disability payments are limited to two-thirds of the employee’s average weekly earnings per section 4653 with statutory limits in computing average weekly earnings provided in section 4453. (Lab. Code, §§ 4653, 4453.) Civil tort does not have similar restrictions in calculating damages for the value of a plaintiff’s lost earnings.

<sup>9</sup> This is an estimate based on the numbers provided by the parties and is not dispositive on the amount owed to applicant, which is to be adjusted by the parties with jurisdiction reserved in the event of a dispute.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact issued by the WCJ on November 8, 2021 is **RESCINDED** in its entirety and is **SUBSTITUTED** with the following:

#### **FINDINGS OF FACT**

1. Michael Ayala, while employed on August 12, 2002, as correctional officer, at Lancaster, California by Department of Corrections & Rehabilitation sustained injuries caused by the serious and willful misconduct of his employer.
2. The WCAB does not have jurisdiction to award IDL benefits.
3. Applicant is entitled to a 50% increase in compensation per Labor Code section 4553 to be calculated based on the enhanced IDL payments he received from his employer.

**AWARD**

**AWARD IS MADE** in favor of **MICHAEL AYALA** against defendant,  
**CALIFORNIA DEPARTMENT OF CORRECTIONS &  
REHABILITATION** of:

A 50% increase in compensation per Finding of Fact No. 3 less an attorney's fee of 15% payable to ADAMS, FERRONE & FERRONE. The amount shall be adjusted by the parties with jurisdiction reserved at the trial level in the event of a dispute.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**/s/ DEIDRA E. LOWE, COMMISSIONER**



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

**APRIL 13, 2022**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT  
THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**ADAMS, FERRONE & FERRONE  
MICHAEL AYALA  
STATE COMPENSATION INSURANCE FUND**

***AI/pc***

I certify that I affixed the official seal of  
the Workers' Compensation Appeals  
Board to this original decision on this date.  
CS