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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court 8.208

Name of Interested Entity of Person	Nature of Interest
Court of Appeal	Respondent Court
Workers' Compensation Appeals Board	Respondent Court
City of Marysville	Respondent
York Insurance Services Group	Respondent
Mastagni, Holstedt, Amick, Miller & Johnsen	Attorney for Petitioner
John Larkin	Injured Worker; Petitioner

Dated: March 21, 2014

Respectfully submitted,
LENAHAN, LEE, SLATER & PEARSE, LLP

By: _____



PHOEBE M. VU, Esq.
Attorney for Respondent,
City of Marysville, p.s.i.

ANSWER TO PETITION FOR REVIEW

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

INTRODUCTION

On March 6, 2014, JOHN LARKIN, (hereinafter “Petitioner”), by and through his attorney of record, filed a Petition for Review seeking review of one issue. Respondent CITY OF MARYSVILLE, P.S.I., (hereinafter “Respondent”), by and through its attorney of record, hereby Answers Petitioner’s Petition for Review on the basis that there are no grounds to support review pursuant to California Rule of Court 8.500 because the application of Labor Code¹ Section 4458.2 is governed by Section 3362 which applies only to volunteer peace officers.

QUESTION PRESENTED FOR REVIEW

- I. Whether the benefits provided by Labor Code section 4458.2 extend to “volunteer” peace officers or whether the statute applies to regularly sworn, salaried officers, as well.

BACKGROUND

Petitioner, Mr. John Larkin, sustained a specific injury to his neck, right shoulder, left upper thigh, face, right biceps and nose on November 21, 2008, when he was involved in a motor vehicle accident during the course of his employment. At the time of injury, applicant was a regularly

¹ All statutory references herein specifically refer to the California Labor Code unless otherwise stated.

employed, full-time salaried police officer for the City of Marysville. He voluntarily resigned his position with the City following the motor vehicle accident. Workers' compensation benefits were furnished.

This matter was set for an Expedited Trial on May 25, 2010 before the Honorable Workers' Compensation Judge, (hereinafter "WCJ"), Dudley Phenix. Prior to the Expedited Trial, the parties submitted a Pre-Trial Conference Statement stipulating that the only issue for determination was applicant's claim to temporary disability ("TD"), the appropriate earnings rate, and the applicability of Labor Code § 4458.2. TD benefits had been furnished at the rate of \$672.31 per week. His indemnity rate was based on the statutorily defined two-thirds of his average weekly wage. Petitioner sought temporary disability indemnity benefits payable at the maximum statutory temporary disability rate. His actual weekly income of \$1,008.47 was not high enough to justify the maximum TD rate of \$916.33 (to qualify, he would need to earn \$1,374.46 per week; two-thirds of \$1,374.46 is the maximum TD rate of \$916.33).

On July 12, 2010, WCJ Phenix issued a Findings and Award concluding that applicant was not entitled to the maximum TD rate under Section 4458.2; applicant's rate was to be based upon his actual income. Applicant's average weekly earnings were determined to be \$1,008.47, resulting in a TD rate of \$672.31 per week. These facts are not in dispute and are not contested by Petitioner.

Petitioner filed a Petition for Reconsideration before the WCAB on July 21, 2010 alleging that WCJ Phenix erred in finding that Section 4458.2 did not apply to applicant. WCJ Phenix filed his Report and Recommendation on Petition for Reconsideration on July 27, 2010, recommending that the WCAB deny the Petition for Reconsideration as submitted by Applicant. Defendant filed an Answer to Applicant's Petition for Reconsideration on July 29, 2010 supporting the WCJ's findings and correct interpretation of the law. The WCAB issued its Order Denying Reconsideration on August 11, 2010, and adopted and incorporated WCJ Phenix's Report on Petition for Reconsideration, thereby affirming that applicant was not entitled to the maximum TD rate under Labor Code Section 4458.2.

From that Order Denying Reconsideration, Petitioner then submitted his Petition for Writ of Review to the Third District Court of Appeal on August 26, 2010. Respondent timely Answered on September 14, 2010. The Third District Court of Appeal granted the Petition for Writ of Review. The matter was set for oral argument on December 18, 2013. Thereafter, the Third District Court of Appeal issued its Opinion on January 28, 2014 affirming the Board's order denying reconsideration. Petitioner filed the instant Petition for Review on March 6, 2014 (hereinafter "Petition"). The following is Respondent's timely filed Answer to that Petition for Review.

/

ANSWER TO QUESTION PRESENTED
BY PETITION FOR REVIEW

I. THERE ARE NO GROUNDS UPON WHICH REVIEW MAY BE GRANTED.

Review should be denied in this case because the statutory grounds for review are absent. Review is not “necessary” to “settle an important issue of law” or to “secure uniformity of decision.” Cal. R. Ct. 8.500(b)(1). Petitioner suggests that the “important issues of law” pertain to the proper statewide administration of benefits to eligible sworn peace officers and prevention of “manifest prejudice” thereof. (Petition 2.) However, when read in conjunction with the Labor Code statutory scheme, the decision of the Third District Court of Appeal preserves the full statutorily-granted rights of both regularly employed and volunteer peace officers.

a) The plain language of Sections 4458.2 and 3362 apply only to volunteer peace officers.

“In interpreting statutes, if the ‘language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . .’” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) “It is well established that contemporaneous construction of a statute by the controlling agency charged with its enforcement and interpretation, while not necessarily controlling is of great weight; and courts will not depart from such

construction unless it is clearly erroneous or unauthorized.” (*Dickey v. Workers’ Comp. Appeals Bd.* (1990) 224 Cal.App.3d 1460, 1463-1464.)

Section 4458.2 provides:

If an active peace officer of any department *as described in Section 3362* suffers injury or death while in the performance of his or her duties as a peace officer . . . , then, irrespective of his or her remuneration from this or other employment or from both, his or her average weekly earnings for the purposes of determining temporary disability indemnity and permanent disability indemnity shall be taken at the maximum for each, respectively, in Section 4453. (Cal. Lab. Code § 4458.2 (2014) (emphasis added).)

Section 4458.2 expressly confines its application to the class of peace officers discussed in Section 3362 which provides, in part:

Each male or female member *registered as an active policeman or policewoman* of any regularly organized police department having official recognition and full or partial support of the government of the county, city, town, or district in which such police department is located, shall, *upon the adoption of a resolution by the governing body of the county, city, town or district so declaring, be deemed an employee* of such county, city, town or district for the purpose of this division *and shall be entitled to receive compensation* from such county, city, town, or district in accordance with the provision thereof. (Cal. Lab. Code § 3362 (2014) (emphasis added).)

The express language of Section 4458.2 confines the applicability of maximum TD rates to those peace officers “as described” in Section 3362. Although Section 3362 does not make special reference to “volunteer” peace officers, it references the process by which a volunteer police officer is “activated.” This occurs through

an adoption by the governing body of a resolution declaring that such peace officer be “deemed an employee” for eligibility of workers’ compensation benefits, and in particular, the benefit of the statutory presumption of maximum earnings, regardless of actual income. To read otherwise would render Section 3362 superfluous as it would grant (or “deem”) employment upon a volunteer peace officer who would otherwise already be eligible for workers’ compensation indemnity.

Additionally, the need for including “volunteer” in Section 3362 is further obviated because regularly employed peace officers, such as Petitioner, do not have to go through the “registration” and “resolution adoption” process in order to be “deemed” an employee for workers’ compensation benefits. By virtue of being “in the service of an employer under any appoint or contract of hire,” Petitioner is automatically entitled to workers’ compensation benefits under Section 3351.

Therefore, the express language of Section 4462 limits its applicability to those peace officers under Section 3362, which references only volunteer peace officers who must undertake registration process in order to be “deemed” employees for the purposes of obtaining workers’ compensation benefits. Given this statutory scheme, the decision of the Third District Court of Appeal was supported by its clear language.

b) The 1989 Amendments to Section 4458.2 continued to limit the scope of its application to the class of peace officers as defined in Section 3362.

The pre-1989 version of Section 4458.2 provided, in part:

If a *male member* registered as an active police member of any *regularly organized volunteer* department as described in Section 3362 suffers injury or death while in the performance of *his* duty as a *policeman*. . . (Cal Lab. Code Section 4458.2. (Amend. 1989.) (emphasis added).)

The 1989 Amendments to Section 4458.2 replaced the above-emphasized terms with gender-neutral language. The Amendments continued to restrict Section 4458.2's application to the class of peace officers (male or female) as defined under Section 3362. Petitioner may be correct in stating that the legislature broadened Section 4458.2 to apply to both male and female peace officers with the additional language of "'his or her' duty as a peace officer"; however, it did not broaden the scope to include both volunteer and regularly employed peace officers. (Petition 4.) The 1989 Amendments did not reform any provision of Section 3362.

Petitioner relies on *Williams v. Los Angeles Metropolitan Transit Authority* to argue that the 1989 Amendments applied maximum temporary disability benefits to "all police officers, irrespective of gender or volunteer-status, who met the other guidelines outlined in the statute." (Petition 4.) In *Williams*, the Court opined that "an unquestioned line of decisions tells us that [statutory interpretation

maxims] ‘will not be utilized to contradict or vary a clear expression of legislative intent’ . . .” (*Williams v. Los Angeles Metropolitan Transit Authority* (1968) 68 Ca.2d 599, 603.)

Here, the legislative intent is clear. The applicability of maximum temporary disability benefits under Section 4458.2 is governed by Section 3362. As discussed above, Section 3362 applies only to the class of volunteer peace officers. As such, the 1989 Amendments did not extend maximum temporary disability rate benefits upon regularly employed peace officers.

c) The Court of Appeal did not rely upon Section 4855 in determining the benefits allowed under Section 4458.2.

Petitioner also argues that the “Court of Appeal erred in relying on Section 4855 to determine benefits allowed under section 4485.2 by upholding the Board’s decision.” (Petition 5.) Upon a thorough reading of the Court’s Opinion in *Larkin*, there is no discussion or reliance by the Court of Appeal on Section 4855. (*Larkin v. City of Marysville* (2014) 223 Cal.App.4th 538.) As such, Petitioner’s argument in this regard fails.

d) There is no manifest prejudice to all regularly employed, active peace officers as they are entitled to Section 4850 full salary continuation in lieu of temporary disability indemnity.

Contrary to Petitioner’s statement that the Third District Court of Appeal’s decision has “deprived many thousands of officers access to

their maximum benefits.” However, the law already entitles all regularly employed peace officers to full salary continuation in lieu of temporary disability under Section 4850, thereby preserving the full rights of all regularly employed active peace officers. (Petition 8.) On the other hand, volunteer peace officers are not entitled to salary continuation under Section 4850.

Because salary continuation under Section 4850 is limited only to regularly employed peace officers, the application of Section 4458.2 to volunteer peace officers is further underscored. The intent behind Section 4458.2 was to provide some measure of compensation to volunteer peace officers, without extending the full benefit of salary continuation afforded to regularly employed peace officers. This distinction makes sense given that “volunteers” would not normally have a “salary” or sufficient source of income from their duties as a peace officer to sustain themselves while temporarily disabled, if the amount of their temporary disability benefit was determined by what the volunteer was “paid” (if anything) at the time of injury. The public policy underlying the special designation for volunteers of public safety agencies is to encourage public service. Therefore, the Court of Appeal’s application of Section 4458.2 ensures that volunteer peace officers are afforded the maximum statutory benefits in the furtherance of their volunteerism.

CONCLUSION


Petitioner cannot establish any grounds upon which review can be granted. Labor Code Section 4458.2 by its clear terms limits its application to those peace officers defined under Section 3362. Section 3362 describes a class of peace officers who must go through a registration process in order to be deemed eligible for workers' compensation benefits. This registration process applies only to volunteer peace officers, rather than regularly employed peace officers. Additionally, Section 4458.2 must be construed in conjunction with the entire workers' compensation statutory scheme which clearly defines the applicability of Sections 4458.2 and 3362 only to volunteer peace officers to encourage public service. Contrary to Petitioner's argument, the Court of Appeal made neither reference nor reliance upon Section 4855 in its decision.

For all these reasons, respondent requests this Court DENY the Petition for Review in its entirety.

Dated: March 21, 2014

Respectfully submitted,

LENAHAN, LEE, SLATER & PEARSE, LLP

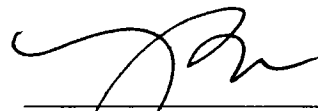
By: 

PHOEBE M. VU, ESQ.
Attorney for Respondent,
City of Marysville, p.s.i.

CERTIFICATE OF BRIEF LENGTH BY APPELLATE COUNSEL

Pursuant to California Rules of Court, Rule 8.204(c)(1), I, PHOEBE M. VU, appellate counsel, relying on the word-count of my computer program, certify that the length of this Answer to Petition for Writ of Review is: 2140 words.

Dated this 21st day of March, 2014



PHOEBE M. VU, ESQ.

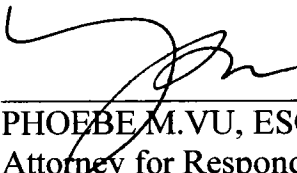
VERIFICATION

I, PHOEBE M. VU, do hereby declare as follows:

1. I am an attorney at law, duly admitted and licensed to practice before all courts of this State, and my professional office is located at 1030 15th Street, Suite 300, Sacramento, County of Sacramento, California 95814.
2. I am the attorney of record for Respondent in the above-entitled matter.
3. I have read the foregoing ANSWER TO PETITION FOR REVIEW and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 21st day of March 2014, at Sacramento, California.



PHOEBE M. VU, ESQ.,
Attorney for Respondent,
CITY OF MARYSVILLE, p.s.i.

PROOF OF SERVICE

1013a, 2015 C.C.P.

RE: JOHN LARKIN v. The City of Marysville, psi, adj. by York

I, Jessica Murray, hereby declare and state that I am over the age of eighteen years, employed in the City and County of Sacramento, California, and not a party to the within action. My business address is 1030 15th Street, Suite 300, Sacramento, California 95814.

On this day, I served the **ANSWER TO PETITION FOR REVIEW**, on the following parties:

Original to:

Supreme Court of the State of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

WCAB
P.O. Box 429459
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Copies to:

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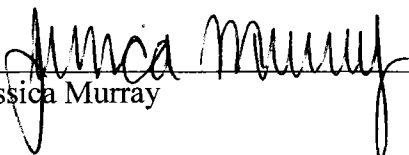
Deborah DeMuyneck (via email only)
York Risk Services Group, Inc.
P.O. Box 619058
Roseville, CA 95661

XX **(BY MAIL)** I placed each such sealed envelope, with postage thereon fully prepared for First-class mail, for collection and mailing on the parties in said action.

_____ **(BY PERSONAL SERVICE)** I personally delivered by hand said documents to the addressee(s) noted above.

_____ **(BY FACSIMILE)** I caused the said document(s) to be transmitted by facsimile to the telephone number(s) indicated to the addressee(s) noted above.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on March 21, 2014, at Sacramento, California.



Jessica Murray