

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

3 **VINCE PHILLIPS (Deceased);**
4 **TINA PHILLIPS, individually, and as**
5 **Guardian ad Litem and Trustee for COLE**
6 **PHILLIPS and JAKOB PHILLIPS,**

7 *Applicants,*

8 **vs.**

9 **SACRAMENTO MUNICIPAL UTILITIES**
10 **DISTRICT,**
11 **Permissibly self-insured,**

12 *Defendant.*

Case No. RDG 57899

OPINION AND DECISION
AFTER RECONSIDERATION
(En Banc)

13 The issue presented in this case involves the rate at which
14 death benefits are payable to a decedent's dependents. Because of
15 the significant legal issue presented, and in order to secure
16 uniformity of decision, the Chairman of the Appeals Board,
17 pursuant to a majority vote of the Board, reassigned this case to
18 the Appeals Board as a whole for an *en banc* decision. We granted
19 reconsideration in order to allow sufficient opportunity to study
20 the factual and legal issues presented. We sought amicus curiae
21 briefs in order to ensure that all points of view were considered.
22 For the reasons expressed below, we conclude that the decision of
23 the workers' compensation referee (WCR) applying Labor Code
24 section 4661.5 to the death benefit indemnity rate should be
25 affirmed.

26 The decedent, Vince Phillips, was employed as a tree trimmer
by the Sacramento Municipal Utilities District. On June 30, 1993,

1 he died as a result of being electrocuted in the course of his
2 employment. On November 30, 1993, based on the stipulations of
3 the parties, a WCR awarded applicants, the decedent's dependents,
4 death benefits of \$277,824.96 payable at the rate of \$336 per
5 week. On January 23, 1997, another WCR issued a corrected award
6 which awarded applicants death benefits of \$115,000 payable at
7 various rates up to \$441.40 per week, consistent with Labor Code
8 section 4661.5, and thereafter benefits pursuant to Labor Code
9 section 4703.5 payable at the rate of \$441.40 per week until
10 decedent's younger child reached the age of 18. Defendant filed a
11 timely petition for reconsideration contending that Labor Code
12 section 4661.5 is inapplicable to death benefits and to benefits
13 under section 4703.5. Defendant contends that benefits should
14 have been awarded at the rate of \$336, rather than \$441.40, per
15 week.

16 The issue is before us because of legislative changes in
17 1990, which created a new type of workers' compensation death
18 benefits. Originally, there was only one type of death benefit -
19 a fixed amount which was determined by the date of the injury, the
20 number of decedent's dependents, and the extent of their
21 dependency. In this case, the fixed amount under Labor Code
22 section 4702(a)(1) is \$115,000, payable in installments. In
23 addition to this amount, for injuries occurring in 1990 and
24 thereafter, Labor Code section 4703.5 provides for the
25 continuation of death benefit payments, after the fixed death
26 benefit amount has been paid, until the youngest dependent child
reaches the age of 18. This is generally referred to as the

1 special minors' death benefit. The issue in this case is the
2 weekly rate at which the fixed death benefit and the special
3 minors' death benefit are to be paid.

4 **THE PLAIN LANGUAGE OF LABOR CODE SECTIONS**
5 **4702(b), 4703.5 AND 4661.5 REQUIRES THAT RATES**
6 **OF DEATH BENEFITS BE INCREASED**

7 The statutes which establish the weekly rates for the fixed
8 death benefit and the special minors' death benefit are similar,
9 but
10 not identical. For the fixed death benefit, Labor Code section
11 4702(b) provides that

12 "The death benefit in all cases shall be paid in
13 installments in the same manner and amounts as temporary
14 total disability indemnity would have to be made to the
15 employee, unless the appeals board otherwise orders.
16 However, no payment shall be made at a weekly rate of
17 less than two hundred twenty-four dollars (\$224)."

18 With regard to the special minors' death benefit, Labor Code
19 section 4703.5 provides, in part, that

20 ". . . payment of death benefits shall continue until
21 the youngest child attains age 18 in the same manner and
22 amount as temporary total disability indemnity would
23 have been paid to the employee, except that no payment
24 shall be made at a weekly rate of less than two hundred
25 twenty-four dollars (\$224)."

26 Thus, the rate of payment of both the fixed death benefit and the
special minors' death benefit is determined by the temporary
disability indemnity rate.

Pursuant to Labor Code section 4653, the temporary disability
indemnity rate is two-thirds of a worker's "average weekly
earnings." But Labor Code section 4453 limits "average weekly
earnings" to a maximum amount which depends on the date of injury.

1 In this case, the parties stipulated that the decedent's earnings
2 were \$662.80 per week. Two-thirds of that amount is \$441.87. In
3 1993, the maximum temporary disability rate was \$336 per week so
4 the proper rate to pay death benefits initially in this case was
5 \$336 per week. However, Labor Code section 4661.5 provides that

6 "Notwithstanding any other provision of this division,
7 when any temporary total disability indemnity payment is
8 made two years or more from the date of injury, the
9 amount of this payment shall be computed in accordance
10 with the temporary disability indemnity average weekly
11 earnings amount specified in Section 4453 in effect on
12 the date each temporary total disability payment is made
13 unless computing the payment on this basis produces a
14 lower payment because of a reduction in the minimum
15 average weekly earnings applicable under Section 4453."

16 Beginning July 1, 1995, the maximum temporary disability rate was
17 increased to \$448 per week. Relying on Labor Code section 4461.5,
18 the WCR awarded death benefits at rates of up to \$441.40 per week.

19 The plain language of sections 4702(b) and 4703.5 requires
20 that death benefits be paid in the same manner and amount as
21 temporary disability benefits would have been paid to the
22 employee. Therefore, when the temporary disability rate is
increased pursuant to section 4661.5, the death benefit rate must
similarly be increased. The words of sections 4702(b) and 4703.5
leave no room for any other interpretation. "It is an established
principle of statutory interpretation that where the words of a
statute are clear and unambiguous, its plain language should be
followed." *Midas Recovery Services, Inc. v. Workers' Comp.
Appeals Bd.* (1997) 55 Cal.App.4th 1321, 62 Cal.Comp.Cases 763.

23 **THE APPLICATION OF LABOR CODE SECTION 4661.5 TO DEATH BENEFITS IS**
24 **JUSTIFIED BY CASE LAW AND THE LABOR CODE**

1 In its petition for reconsideration defendant argues that
2 section 4661.5 refers only to payment of temporary total
3 disability indemnity and that the Appeals Board has previously
4 refused to apply that section to other species of benefits, citing
5 *Duncan v. The Singer Company* (1978) 43 Cal.Comp.Cases 467. In
6 that case, the Appeals Board, *en banc*, held that benefits for
7 total permanent disability, although subject to the same maximum
8 rate as temporary disability benefits, is a separate species of
9 benefits to which Labor Code section 4661.5 does not apply. In
10 reaching this conclusion, the Appeals Board noted that Labor Code
11 section 4659(b) provided that the indemnity rate for permanent
12 total disability was to be determined under Labor Code section
13 4453. Labor Code section 4453 provided that temporary disability
14 indemnity and permanent total disability indemnity were to be
15 calculated based upon the same earnings formula. Thus, although
16 they are different species of compensation, they are initially to
17 be paid at the same rate under section 4453. However, Labor Code
18 section 4661.5, which provides for the increase in benefits,
19 refers only to temporary total disability indemnity. Therefore,
20 by its terms Labor Code section 4661.5 is not applicable to
21 permanent total disability indemnity. The Appeals Board noted
22 that if the Legislature intended for "permanent total disability
23 indemnity" to come within the scope of section 4661.5, that term
24 could have been included within the section's language.

25 Following a similar analysis, in the present case the
26 application of section 4661.5 to death benefits is justified and
consistent with the above rationale. Labor Code sections 4702(b)

1 and 4703.5 specifically provide that death benefits are to be paid
2 at the same rate that temporary disability benefits would have
3 been paid to the injured worker. The manner of payment and the
4 temporary disability rate are governed by Labor Code sections
5 4453, 4650(d) and 4653 as well as section 4661.5. Those sections
6 specify the manner and amount that temporary disability indemnity
7 is to be paid. Accordingly, and using a similar analysis as used
8 in *Duncan, supra*, because the statutes specifically require that
9 death benefits are to be paid in the same manner and amount as
10 temporary disability indemnity, the provisions of not only
11 sections 4453, 4650(d) and 4653, but also the provisions of Labor
12 Code section 4661.5 are applicable and result in the increase in
13 the indemnity rate. We see no basis for applying only the
14 provisions of the first three sections and not the provisions of
15 Labor Code section 4661.5, nor has such a distinguishing basis
16 been provided. Moreover, the Legislature could have amended Labor
17 Code sections 4702(b) and 4703.5 to make death benefits payable in
18 the same manner and amount as permanent total disability and thus,
19 make the provisions of section 4661.5 inapplicable pursuant to the
20 rationale of *Duncan*, but it did not do so. Or the Legislature
21 could have amended those sections to specifically exclude the
22 application of the provisions of section 4661.5. No such
23 amendments have been made. Therefore, while death benefits and
24 temporary disability benefits may be a different species, those
25 benefits under the provisions of the Labor Code are to be paid in
26 the same manner and amount.

**LABOR CODE SECTION 4661.5 IS A STATUTORY
EXCEPTION TO LABOR CODE SECTION 4453.5**

The dissent argues that the death benefits payable in this case should not be increased pursuant to section 4661.5 because Labor Code section 4453.5 provides that

"Benefits payable on account of an injury shall not be affected by a subsequent statutory change in amounts of indemnity payable under this division, and shall be continued as authorized, and in the amounts provided for, by the law in effect at the time the injury giving rise to the right to such benefits occurred."

This argument overlooks the fact that section 4661.5 begins with the words "Notwithstanding any other provision of this division . . ." Section 4453.5 was enacted in 1972. Section 4661.5, as originally enacted in 1974, began with the phrase "Notwithstanding any other provision of this chapter . . ." The word "chapter" was later changed to "division." Section 4453.5 is in the same division as section 4661.5. Thus, both the Court of Appeals and the Appeals Board have previously concluded that section 4661.5 creates an exception to section 4453.5. See *Jimenez v. Workers' Comp. Appeals Bd.* (1991) 1 Cal.App.4th 61, 56 Cal.Comp.Cases 682; *Diaz v. Borchers Bros., Inc.* (1978) 43 Cal.Comp.Cases 800. We therefore conclude that section 4453.5 is inapplicable to increases in benefits pursuant to section 4661.5.

The dissent argues that the law in effect at the time of the injury governs all rights and liabilities arising from the injury, citing *Harrison v. Workmen's Compensation Appeals Board* (1974) 44 Cal.App.3d 197, 39 Cal.Comp.Cases 867, and *Aetna Casualty & Surety Co. v. Industrial Acc. Comm.* (1947) 30 Cal.2d 388, 12 Cal.Comp.Cases 123. Both of these cases were decided before

1 section 4661.5 was enacted and before the leading case of
2 *Hofmeister v. Workers' Comp. Appeals Bd.*, (1984) 156 Cal.App.3d
3 848 at 852, 49 Cal.Comp.Cases 438, was decided. In *Hofmeister*,
4 the Court held that, pursuant to section 4661.5, temporary
5 disability benefits paid more than two years after the date of
6 injury were payable at the rate in effect on the date of the
7 payment rather than the rate in effect on the date of injury. And
8 while it is true that the law in effect at the time of an injury
9 normally governs the rights and liabilities arising out of the
10 injury, section 4661.5, which was in effect on the date of the
11 injury in this case, provides a specific statutory exception to
12 that general principle.

11 **THE WCR DID NOT ABUSE HIS DISCRETION**

12 The dissent also argues that the WCR exceeded the limits of
13 his discretion by increasing the weekly death benefit rate beyond
14 the maximum temporary disability indemnity rate of \$336 per week
15 in effect at the time of injury, citing *L. P. Price Mercantile Co.*
16 *v. Industrial Acc. Comm.*¹ (1957) 49 Cal.2d 13, 22 Cal.Comp.Cases
17 170. However, this argument assumes that section 4661.5 does not
18 increase the rate at which death benefits are paid, and it relies

19 ¹In *L. P. Price Mercantile Co. v. Industrial Acc. Comm.*, the Court was
20 interpreting the portion of section 4702 which was the predecessor to the
21 clause "unless the appeals board otherwise orders", which now appears in
22 section 4702(b). The Court held that that language gave the Appeals Board
23 discretion to increase the rate of payment of death benefits to an amount equal
24 to the maximum temporary disability rate, despite the fact that the decedent's
25 earnings would support only the minimum rate. Because section 4661.5 is
26 applicable to death benefit payments made more than two years after the date of
injury, the Appeals Board has discretion to increase the weekly rate at which
the fixed death benefit is paid to the then-current maximum temporary
disability rate. However, we note that such an increase in the rate will
accelerate the payment of the fixed death benefit and could increase the
employer's liability for the special minor's death benefit, so such increases
should be allowed only in limited circumstances after careful consideration.
This issue is not presented by this case.

1 on a case which was decided before section 4661.5 was enacted.
2 For the reasons explained above, we have concluded that section
3 4661.5 is applicable to death benefits. Thus, the WCR could not
4 have abused his discretion by following the law.

5 The dissent further argues that the WCR abused his
6 discretion by awarding benefits at a rate other than the rate to
7 which the parties stipulated. But it is well-settled that the
8 stipulations of the parties are not binding on the Appeals Board
9 and may be rejected where notice and opportunity to be heard are
10 given. Labor Code section 5702; *Robinson v. Workers' Comp.*
11 *Appeals Bd.* (1987) 194 Cal.App.3d 784, 52 Cal.Comp.Cases 419;
12 *Turner Gas Company v. Workmen's Comp. Appeals Bd.* (1975) 47
13 Cal.App.3d 286, 40 Cal.Comp.Cases 253. The parties and the
14 community at large have had ample opportunity to present their
15 arguments. In this case, where the underlying facts and
16 applicable law are not in dispute, there is good cause to issue an
17 award of benefits payable at the correct rate.

18 We note that there is apparently a clerical error in the
19 WCR's findings and award. The WCR awarded death benefits payable
20 at the rate of \$441.40 per week, but his report refers to a rate
21 of \$441.87 per week, which is the correct rate based upon
22 decedent's earnings. We will therefore correct that clerical
23 error.

24 For the foregoing reasons, as the Decision After
25 Reconsideration of the Workers' Compensation Appeals Board,
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1 IT IS ORDERED that paragraphs 5 and 6 of the findings dated
2 January 22, 1997, be CORRECTED by substituting \$441.87 for
3 \$441.40.

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12 IT IS FURTHER ORDERED that the Findings & Order and Corrected
13 Award dated January 22, 1997 be AFFIRMED as corrected.

14 WORKERS' COMPENSATION APPEALS BOARD

15 /s/ Arlene N. Heath
Arlene N. Heath, Commissioner

16 /s/ Richard Gannon
Richard Gannon, Commissioner

17 /s/ Colleen Casey
Colleen Casey, Commissioner

18 /s/ Dennis J. Hannigan
Dennis J. Hannigan, Deputy Commissioner

19 WE DISSENT

1 in Labor Code section 4453.5 -- benefit payments are not affected
2 by subsequent statutory change in amounts and the amounts
3 provided for shall be continued at the statutory rate in effect
4 at the time the injury occurred.

5 **DEATH BENEFITS AND TEMPORARY DISABILITY INDEMNITY**
6 **ARE DIFFERENT SPECIES OF BENEFITS**

7 Death benefits are a different species of benefits; they are
8 unlike temporary disability indemnity and they serve a different
9 purpose. Temporary disability indemnity is the basic benefit
10 payable to a worker who is temporarily disabled due to an
11 industrial injury;² it serves as a substitute for wages lost by
12 the employee during the time he or she is incapacitated from
13 working. *Ritchie v. Workers' Comp. Appeals Bd.* (1994) 24
14 Cal.App.4th 1174 at 1179, 59 Cal.Comp.Cases 243. Death benefits
15 are intended to relieve "an employee's dependents of the
16 financial consequences of his or her death in the course of
17 employment." *Zenith Insurance Company v. Workers' Comp. Appeals*
Bd. (1981) 124 Cal.App.3d 176, 46 Cal.Comp.Cases 1126, 1133.

18 In *Duncan v. The Singer Company* (1978) 43 Cal.Comp.Cases
19 467, the applicant was totally and permanently disabled. He
20 asserted that his permanent disability benefits payable more than
21 two years after the date of injury should be increased pursuant

22 ²An employee who is considered temporarily totally disabled (unable to work
23 for any wages during the period of healing) is entitled to temporary total
24 disability indemnity which is at the rate of two-thirds of the average weekly
25 earnings during the period of such disability (Lab. Code § 4653). A worker
26 who can return to limited kinds of work before the healing period is over is
entitled to temporary partial disability indemnity which is two-thirds of the
weekly loss in wages during the period of such disability (Lab. Code §4654).

1 to Labor Code section 4661.5. The Appeals Board, *en banc*, held
2 that, although temporary total disability and permanent total
3 disability benefits are paid at the temporary total disability
4 rate, they are different species of benefits and that section
5 4661.5 is not applicable to permanent total disability benefits.

6 As in *Duncan*, death benefits are a different species of
7 benefits than temporary disability, therefore section 4661.5,
8 which refers only to temporary total disability payments, is
9 inapplicable to death benefits.

10 Just as the majority argues that "if the legislature
11 intended for 'permanent total disability indemnity' to come
12 within the scope of section 4661.5, that term could have been
13 included within the section's language", we would hasten to point
14 out that inclusion of death benefits within the scope of section
15 4661.5 must be accomplished by an appropriate legislative
16 amendment to that section.

17 **THE LAW IN EFFECT AT THE TIME OF THE INJURY**
18 **GOVERNS ALL RIGHTS AND LIABILITIES ARISING**
19 **FROM THE INJURY**

20 In workers compensation cases, it is elemental that the law
21 in effect at the time of injury is the law governing all rights
22 and liabilities arising out of the injury. *Harrison v. Workers'*
23 *Comp. Appeals Bd.* (1974) 44 Cal.App.3d 197, 202 fn. 5, 39
24 Cal.Comp.Cases 867.

25 In *Aetna Casualty & Surety Co. v. Industrial Acc. Comm.*
26 (1947) 30 Cal.2d 388, 12 Cal.Comp.Cases 123, the Supreme Court
stated:

1 "Since the industrial injury is the basis for any
2 compensation award, the law in force at the time of the
injury is to be taken as the measure of the injured
person's right of recovery." (at page 392).

3 In *Aetna*, a case closely on point with the issues in the
4 present case, the Supreme Court considered whether a new statute,
5 increasing workers' compensation benefits, could be applied to
6 awards made after the effective date of the statute even though
7 the awards pertained to injuries suffered before the new
8 legislation had been enacted. The Supreme Court concluded that
9 "a statute changing the measure or method of computing
10 compensation for disability or death is not given retrospective
11 effect when applied to disability or death resulting from an
12 injury sustained before the effective date of the statute" and
13 accordingly held that the employee was not entitled to the
increased benefits when his injury pre-dated the effective date
of the amendment:

14 "The prior industrial injury was not a mere antecedent
15 fact relating to the permanent disability ensuing there
16 from; on the contrary, it was the basis of the right to
17 be compensated for such disability. . . . Since the
18 industrial injury is the basis of any compensation
award, the law in effect at the time of the injury is
to be taken as the measure of the injured person's
recovery" (at page 392).

19 The rate used by the WCR in this case was not the proper
20 rate since the increased rate was not in effect on the date of
21 injury.

22
23 **LABOR CODE §4453.5 PRECLUDES INCREASES IN BENEFITS BASED ON**
24 **STATUTORY CHANGES ENACTED AFTER THE DATE OF INJURY**

1 The holding in the Aetna case was codified in 1973 as Labor
2 Code section 4453.5 which provides:

3 "Benefits payable on account of an injury shall not be
4 affected by a subsequent statutory change in amounts of
5 indemnity payable under this division, and shall be
continued as authorized, and in the amounts provided
for, by the law in effect at the time the injury giving
rise to the right to such benefits occurred."

6 In this case, the injury occurred on June 30, 1993. At that
7 time the maximum temporary total disability rate was \$336 per
8 week. The amendment to section 4653 which increased the maximum
9 temporary total disability rate to \$448 per week beginning July
10 1, 1995, did not become effective until July 16, 1993, after the
11 date of injury. Because section 4453.5 precludes increases in
12 benefits based upon statutory changes enacted after the date of
13 injury, the WCR's award which increased the weekly payment rate
14 of death benefits to an amount greater than \$336 per week was
improper.

15 One might argue that sections 4453.5 and 4661.5 are
16 inconsistent. Section 4453.5 forbids subsequent statutory
17 benefit increases from affecting the amount of benefits to which
18 an injured worker or his dependents are entitled, while section
19 4661.5 requires that any payment of temporary total disability
20 indemnity made more than two years after injury shall be paid at
21 the rate in effect at the time of the payment. This perceived
22 contradiction can be easily resolved: In accordance with section
23 4661.5 an injured worker is entitled to increased benefits based
24 on earnings at the time of the injury, provided that the

1 increases were statutorily enacted and on the books at the time
2 of the injury as required by section 4453.5.

3 **THERE WAS AN ABUSE OF DISCRETION IN SETTING THE RATE**
4 **OF PAYMENT IN EXCESS OF THE MAXIMUM**
5 **TEMPORARY TOTAL DISABILITY RATE IN EFFECT AT THE TIME OF**
6 **INJURY**

7 The WCR has discretion to set the rate of payment of death
8 benefits pursuant to Labor Code section 4702, but that discretion
9 is limited to rates between the minimum and maximum temporary
10 total disability rates in effect at the time of injury.. *L. P.*
11 *Price Mercantile Co. v. Industrial Acc. Comm.* (1957) 49 Cal.2d
12 13, 22 Cal.Comp.Cases 170; *State Compensation Insurance Fund v.*
13 *Workers' Comp. Appeals Bd. (Gonzalez)* (1992) 57 Cal.Comp.Cases
14 761, 762 (writ denied). The amount of the death benefit is based
15 on the number of dependents and the extent of their dependency as
16 determined at the time of the injury. *Granell v. Industrial Acc.*
17 *Comm.* (1944) 25 Cal.2d 209, 9 Cal.Comp.Cases 301.

18 In this case, by setting a rate of payment which exceeded
19 the maximum temporary total disability rate at the time of
20 injury, the WCR abused his discretion.

21 In addition, it was improper to increase the rate at which
22 death benefits were to be paid after the parties stipulated to
23 payment at \$336 per week. "Stipulations are designed to expedite
24 trials and hearings and their use in workers' compensation cases
25 should be encouraged." *Robinson v. Workers' Comp. Appeals Bd.*
26 (1987) 194 Cal.App.3d 784, 52 Cal.Comp.Cases 419. In *Brannen v.*
Workers' Comp. Appeals Bd. (1996) 46 Cal.App.4th 377, 61
Cal.Comp.Cases 554, the Court stated that

1 "... an award based [on] an executed stipulation may be
2 reopened and rescinded if the stipulation 'has been
3 'entered into through inadvertence, excusable neglect,
4 fraud, mistake of fact or law, where the facts
5 stipulated have changed or there has been a change in
6 the underlying conditions that could not have been
7 anticipated, or where special circumstances exist
8 rendering it unjust to enforce the stipulation.'" [Citation omitted.] On the other hand, "'[w]hen there
9 is no mistake but merely a lack of full knowledge of
10 the facts, which ... is due to the failure of a party
11 to exercise due diligence to ascertain them, there is
12 no proper ground for relief.'"

13 In *Brannen*, the Court held that the Appeals Board erred in
14 rescinding the original award and disregarding the stipulation of
15 the parties. In the present case, there is no basis for
16 rescinding the original award, which was based on the stipulation
17 of the parties to the payment rate of \$336 per week. The record
18 does not show any inadvertence, excusable neglect, fraud,
19 mistake, change in circumstances, or special circumstances.
20 Therefore, the WCR erred in rescinding the award and issuing a
21 new award of death benefits at a rate of payment other than the
22 rate to which the parties stipulated.

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25 **PRACTICAL RAMIFICATIONS APPLYING LABOR CODE 4661.5 TO SPECIAL**
26 **MINOR'S DEATH BENEFITS**

We would note that the effect of the majority opinion in
applying Labor Code 4661.5 to the special minor's death benefit
(continuation death benefit payments from the time the fixed
death benefit is paid in full until the dependent child reaches
18) would, in the last analysis, result in the same type of open-

1 ended situation recognized in *Duncan* which would make it
2 impossible for insurance carriers to properly estimate liability
3 for insurance premium purposes. We would also point out that this
4 also inhibits an employer/insurance carrier from quantifying
5 reserves. As pointed out by one of the amicus briefs, there is
6 the additional possible ramification of discouraging settlements
7 due to either party's inability to determine how much a future
8 total temporary disability payment rate might be when attempting
9 to develop a total settlement figure.

10 There is one last practical ramification of the application
11 of section 4661.5 to the payment of death benefits. The majority
12 seems to overlook that the very purpose of 4661.5 (to take into
13 account the effect of inflation) has already been considered when
14 the Legislature periodically raised the death benefit to keep
15 pace
16 with inflation.³ Over the same period of time, the Legislature
17 has

18
19
20 ³ The statutory amount of the death benefit for three total dependents (regardless of the number of partial
21 dependents) (Labor Code section 4702(a)(1)) was increased by the Legislature:

Death From Injury On or After			
1/1/84	1/1/91	7/1/94	7/1/96
\$95,000	\$115,000	\$150,000	\$160,000

1 raised the basis for the temporary total disability payment rate
2 (two-thirds of the injured worker's "average weekly earnings").⁴

3 If one compares the increases of these two benefits, one
4 realizes that the Legislature has made comparable adjustments for
inflation in both benefits:

Injuries after	Average Weekly Earnings	Death Benefits
1/1/91	20.8%	17.4%
7/1/94	17.4%	23.3%
7/1/96	9.1%	6.3%

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10 Therefore, the practical effect of the majority's decision
11 is to compound this legislative recognition of inflation by
12 increasing the death benefit after two years.

13 **CONCLUSION**

14 The fixed amount of the death benefit was established by the
15 Legislature without regard to the decedent's earnings. The fact
16 that the Legislature specified that the death benefits were to be
17 paid "in the same manner and amount as temporary total disability
18 payments" simply indicates that the Legislature "intended full
death benefits to be made available promptly so that they may

19 ⁴ The temporary total disability is two-thirds of the average weekly earnings (Labor Code section 4453(a))
with the maximum earnings having been ratcheted up over the years.

Average Weekly Earnings		Injuries occurring on or after
Minimum	Maximum	
189	504	1/1/91
189	609	1/1/94
189	672	1/1/95
189	735	1/1/96

1 serve as a substitute for lost support." *Zenith Insurance*
2 *Company v. Workers' Comp. Appeals Bd.* (1981) 124 Cal.App.3d 176,
3 187, 46 Cal.Comp.Cases 1126, 1134.

4 For all of the foregoing reasons, the findings and award
5 should be amended to provide for payment of death benefits under
6 both Labor Code section 4702(b) and section 4703.5 at the rate of
7 \$336 per week.

8 /s/ Jane S. Wiegand
Jane S. Wiegand, Commissioner

9 /s/ Robert Ruggles
10 Robert Ruggles, Commissioner

11 /s/ Douglas M. Moore, Jr.

12 _____
Douglas M. Moore, Jr., Chairman

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14 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

15 APRIL 8, 1998

16 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON
17 THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS

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