ITEM 12

TEST CLAIM
SUPPLEMENTAL STAFF ANALYSIS

Labor Code Section 4850
Statutes 2000, Chapters 920 (AB 1883) & 929 (SB 2081)
Statutes 1999, Chapters 270[1] (AB 224) & 970 (AB 1387)
Statutes 1989, Chapter 1464
Statutes 1977, Chapter 981

Workers' Compensation Disability Benefits for Government Employees
(00-TC-20, 02-TC-02)

County of Los Angeles, Claimant
San Diego Unified School District, Co-Claimant

EXECUTIVE SUMMARY

This is a supplement to the revised final staff analysis for the *Workers' Compensation Disability Benefits for Government Employees* test claim. This analysis is necessary to address the attached comments filed by the claimant, County of Los Angeles, on May 29, 2007. However, the recommendation to deny the test claim, and the basis for that recommendation, has not changed.

Background

A revised final staff analysis was issued on May 17, 2007, with a recommendation to deny the test claim. On May 24, 2007, claimant, County of Los Angeles, requested postponement of the hearing based on the fact that the revised final staff analysis relied upon new legal principles that were not raised in earlier analyses. Commission staff denied the request on May 25, 2007, for failure to show good cause.

The letter submitted on May 29, 2007, asserts the same arguments provided in previous comments, i.e., that providing the workers' compensation benefits under Labor Code section 4850 to specified local safety officers results in an enhanced service to the public. Claimant provided two additional documents to support its assertion, a Workers' Compensation Appeals Board case and the statement of decision issued by the Commission for the *Threats Against Peace Officers* test claim (CSM 96-365-02).

Analysis

The previous staff analyses found that the test claim statutes do not mandate a new program or higher level of service in an existing program. First, the analysis found that the plain language of the test claim statutes does not impose any state-mandated activities. Moreover, the California Appellate and Supreme Court cases have consistently held that additional costs for

[1] Claimant incorrectly identified Statutes 1999, chapter *224* on the test claim form, but correctly identified the 1999 statute as chapter 270 on page 5 of the test claim text.

increased employee benefits, in the absence of some increase in the actual level or quality of governmental services *provided to the public*, do not constitute an "enhanced service to the public" and therefore do not impose a new program or higher level of service on local governments within the meaning of article XIII B, section 6 of the California Constitution.

Claimant, County of Los Angeles, asserts that "[t]he governmental protections are special."[2] Citing *City of Oakland Integrated Resources v. Workers' Compensation Appeals Board* (2007) 72 Cal.Comp.Cases 249 to support the principle that these salary continuation benefits are "clearly different than workers' compensation short term disability benefits,"[3] claimant concludes that the salary continuation benefits are separately administered and paid for by the County and not administered and paid for as part of temporary disability workers' compensation benefits.

Staff does not dispute that the salary continuation benefits are different from temporary disability benefits. However, the fact remains that the plain language of the statutes providing these salary continuation benefits *does not* impose any state-mandated activities on the local agency. Labor Code section 4850 states:

> (a) Whenever any person listed in subdivision (b) who is a member of the Public Employees' Retirement System or the Los Angeles City Employees' Retirement System or subject to the County Employees Retirement Law of 1937, is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, *he or she shall become entitled*, regardless of his or her period of service with the city, county, or district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under section 139.5, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments or advanced disability pension payments pursuant to Section 4850.3. (Emphasis added.)

Furthermore, the salary continuation benefit is a *workers' compensation* benefit. It is part of Division 4 of the Labor Code, entitled "Workers' Compensation and Insurance," which sets forth the workers' compensation statutory scheme in California. Thus, the California cases addressing workers' compensation and other employee benefits in the context of state mandates are unquestionably applicable to Labor Code section 4850.

Claimant continues to argue that because the salary continuation benefits are applicable to local safety officers, the benefits result in an enhanced service to the public. Claimant cites once again the 1968 California Attorney General opinion which concluded that Labor Code section 4850 results in an enhanced service to the public. Claimant also relies on a past decision of the Commission, *Threats Against Peace Officers* (CSM 96-365-02), which found a

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[2] Comments from J. Tyler McCauley, Auditor-Controller, County of Los Angeles, submitted May 29, 2007, page 2.

[3] *Ibid.*

reimbursable state mandated program was imposed by statutes that required local agencies employing peace officers to reimburse such employees, or any member of their immediate family residing with the officer, for moving and relocation expenses incurred when a peace officer has received a credible threat of life threatening action against the peace officer or the officer's immediate family.

However, neither of those documents provides any authority that can be relied upon for this analysis, since there are numerous California cases directly on point for workers' compensation and other employee benefits in the context of state mandates. Moreover, the argument made by claimant that workers' compensation or other employee benefits provided to local safety officers results in an enhanced service to the public has been repeatedly raised by local agencies *and denied by the courts* in those cases. The cases have consistently held that additional costs for increased employee benefits, in the absence of some increase in the actual level or quality of governmental services provided to the public, do not constitute an "enhanced service to the public" and therefore do not mandate a "new program or higher level of service" within an existing program within the meaning of article XIII B, section 6.[4]

Conclusion

Staff finds that because the test claim statutes do not impose a new program or higher level of service, they do not create a reimbursable state-mandated program on local governments within the meaning of article XIII B, section 6 of the California Constitution.

Recommendation

Staff recommends that the Commission adopt the revised final staff analysis and this supplemental staff analysis, and deny this test claim.

[4] *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877, citing *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51; *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478; *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

COUNTY OF LOS ANGELES
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J. TYLER McCAULEY
AUDITOR-CONTROLLER

May 29, 2007

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Los Angeles County's Review
Revised Commission Staff Test Claim Analysis
Workers' Compensation Disability for Government Employees

Enclosed is our review of the subject test claim analysis which was recently revised by Commission staff and received on May 22, 2007. It is our understanding that this review will be included in the administrative record in this matter prior to the hearing scheduled for May 31, 2007.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:CY:LK
Enclosures

Los Angeles County's Review
Revised Commission Staff Test Claim Analysis
Workers' Compensation Disability for Government Employees

On June 29, 2001, the County of Los Angeles [County], just months before the tragic events of '9/11', sought reimbursement for special protections the Legislature ordered for certain public safety personnel placed in harms way.

In the test claim[1] filed with the Commission on State Mandates [Commission], we detailed and documented the new benefits afforded airport, harbor, and other special classes of public safety personnel. We computed the increased costs we incurred in providing what the Legislature had promised --- a leave of absence without loss of salary for up to one year when disabled by injury or illness arising out of and in the course of their perilous employment.

Commission staff, in their March 22, 2007 analysis, found that the test claim legislation constituted a new 'program', a threshold requirement for finding reimbursable 'costs mandated by the State", as defined in Government Code section 17514. Specifically, staff found, on page 9 of their analysis, that:

> "... the test claim legislation does constitute a "program" that is subject to article XIII B, section 6 of the California Constitution".
>
> "... the requirements imposed by the test claim legislation are carried out by *local government agencies* that employ the specified local safety personnel who are entitled to the benefit, and do not apply "generally to all residents and entities in the state," as did the requirements for workers' compensation and unemployment insurance benefits that were the subject of the County of Los Angeles case."

[1] The provisions of the 'test claim', filed with the Commission on State Mandates, pursuant to article XIII B, section 6 of the California Constitution, includes Labor Code section 4850, as amended by Statutes of 2000, Chapter 920 and 929, Statutes of 1999, Chapter 270 and 970, Statutes of 1989, Chapter 1464, Statutes of 1977, Chapter, 1981.

We concur in staff's finding that the resulting benefit costs here are not the 'incidental' costs which all California employers must bear in compensating their employees. Here, the benefits claimed are solely and exclusively governmental benefits --- benefits for performing quintessential government services ... for protecting local safety personnel placed in harms way.

Special Protections

The governmental protections are special. As noted in the City of Oakland Integrated Resources v. Workers' Compensation Appeals Board [72 Cal. Comp. Case 249: 2007 Cal. Work Comp, attached hereto as Exhibit one, these benefits are clearly different than workers' compensation short term disability benefits. As explained by the Oakland Court[2]:

> " . . . [A]t least two provisions of the Labor Code demonstrate that salary continuation benefits are intended to be distinct from temporary disability indemnity. [**9] Section 4853 provides that where an employee entitled to salary continuation benefits remains disabled beyond the one year section 4850 period, "such member shall thereafter be subject as to disability indemnity to the provisions of this division other than Section 4850 during the remainder of the period of said disability or until the effective date of his retirement under the Public Employee's Retirement Act, and the leave of absence shall continue." Thus, under the provision a public safety worker may become eligible to receive temporary disability benefits upon the termination of the one year leave of absence during the remainder of the period of his or her disability, subject to the limitations on payment of temporary disability benefits.
>
> We note further that pursuant to section 4854, injured public safety workers who are receiving salary continuation benefits are specifically prohibited from receiving concurrent payment of temporary disability indemnity. This section provides that "[n]o disability indemnity shall be paid to any such officer or employee concurrently with wages or salary."

[2] See page 3 of Exhibit one.

> While salary continuation benefits paid pursuant to section 4850 may be considered [**10] compensation, they are clearly not temporary disability benefits and not interchangeable with temporary disability benefits." [Emphasis added.]

Therefore, the salary continuation benefits here are separately administered and paid for by the County ... not administered and paid for as a part of temporary disability workers' compensation benefits.

County's Costs

We note that Commission staff do not dispute the County's costs in administering this program or the County's costs in paying the mandated salary continuation benefits. As explained by Dr. Constance Sullivan, Division Chief, Health, Safety & Disability Benefits Division, Department of Human Resources of the County of Los Angeles, in her declaration filed on June 29, 2001, such increased costs may be precisely determined "... when a Labor Code Section 4850 is paid ... the increased cost to the County is the difference between the 70% salary continuation benefits (Los Angeles County Code 6.20.070) and the 100% entitlement provided under Labor Code Section 4850".

Nevertheless, Commission staff, in their March 22, 2007 analysis denied the claim. The sole basis for this determination was that they did not find "... some increase in the actual level or quality of governmental services *provided to the public*", [which does] ... not constitute "an enhanced service to the public". [March 22, 2007 Staff Analysis, pages1-2.]

We disagree. Public safety is enhanced.

Enhanced Service to the Public

The Legislature clearly provided an "enhanced service to the public". As noted by the Attorney General, Labor Code section 4850 results in an enhanced service to the public. In Opinion No. 68-1, pages 32-35 of Volume 51, attached as Exhibit 1 of the County's April 20, 2007 filing, he indicates:

> "The reason for such exceptional treatment for police and firemen [in Section 4850] is obvious: not only are their

> occupations particularly hazardous, but they undertake these hazards on behalf of the public. The Legislature undoubtedly sought to ensure that police and firemen would not be deterred from zealous performance of their mission of protecting the public by fear of loss of livelihood." [Emphasis added.]

Clearly, the zealous performance of public safety duties is better than duties not zealously preformed ... than duties performed by reluctant warriors.

May 22, 2007 Analysis

In Commission's May 22, 2007 analysis, staff did not dispute County's and the Attorney General's contentions that zealous performance of duties actually enhances service to the public. Nevertheless, Commission staff found that "... it does not do so "... for purposes of article XIII B, section 6 analysis... [it does not result] ... in an enhanced service to the public". [Staff Analysis, page 13.]

After not finding the required type of public service enhancement, Commission staff denied the claim.

We disagree. Reimbursement is required.

Reimbursement is Required

Reimbursement is required because the County has met all the conditions for finding a reimbursable program under article XIII B, section 6 of the California Constitution --- even the new one added by staff --- that the program result in an enhanced service to the public.

We agree with staff's March 22, 2007 finding that the test claim legislation is clearly a "program" subject to article XIII B, section 6. Moreover, we agree with the basis for staff's March 22, 2007 finding, as previously noted on page 1 herein.

And we agree with Commission's past decisions which have found reimbursable State mandated programs where the test claim legislation does not apply generally to all residents and entities in the state. And, we find

such decisions to be compelling here. Consider Commission's decision in the "Threats Against Peace Officers" program.

Threats Against Peace Officers

In Commission's "Threats Against Peace Officers" decision [attached as Exhibit two], the appropriate analysis is clearly described, on pages 3-4:

> "The term "program" has two alternative meanings: "programs that carry out the governmental function of providing services to the public, or laws which to implement a state wide policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. ...
>
> In order to make a mandate determination, only one of these findings is necessary to trigger reimbursement.(County of Los Angeles v. State of California(January 1987) 43 Cal.3rd 46, 56.
>
> There is no question that police protection is a peculiarly governmental function ...
>
> However, the test claim statute does not require governmental entities employing peace officers to provide services to the public. Rather Penal Code section 832.9 requires employers (who are, for the most part, local agencies) to reimburse certain moving costs incurred by their peace officer in a specific situation.
>
> The alternative meaning of "program" is laws which to implement a state wide policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state (County of Los Angeles v. State of California (January 1987) 43 Cal.3rd 46, 56). The Commission concluded that the second prong of the Supreme Court's test for a new program is the basis to approve this test claim because Penal Code section 832.9 manifests a statewide policy of protecting and assisting peace officers and their immediate families upon receipt of a credible threat. This statewide policy imposes unique requirements on local agencies that do not

> apply generally to all residents in the state because police protection is primarily a local government function."

Therefore, 'a statewide policy of protecting and assisting peace officers and their immediate families' was a reimbursable program under the second prong of the [above] Supreme Court test. And so is the statewide policy here.

Statewide Policy

In the present test claim, the statewide policy imposed unique requirements on local governments and schools which entitled specified classes of public safety personnel, including lifeguards, peace officers, probation officers, airport law enforcement officers, harbor or port police officers, school police officers, to a leave of absence without loss of salary for up to one year when disabled by injury or illness arising out of and in the course of employment.

Moreover, while not necessary for a finding of a reimbursable "program", "an enhanced service to the public" resulted. As noted by the Attorney General, above, public safety personnel "... would not be deterred from zealous performance of their mission of protecting the public by fear of loss of livelihood". There would be fewer 'reluctant warriors', clearly of benefit to the public.

Accordingly, for all of the above reasons, reimbursement is required as claimed herein.

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J. TYLER McCAULEY
AUDITOR-CONTROLLER

County of Los Angeles Review
Commission Staff May 22, 2007 Test Claim Analysis
Workers' Compensation Disability Benefits for Government Employees

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I, Leonard Kaye, SB90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims, reviews of State agency comments, Commission staff analyses, requests for extension of time, postponement of hearings and for proposing, or commenting on, parameters and guidelines (Ps&Gs) and amendments thereto, and for filing incorrect reduction claims, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the subject review, captioned above.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the attached filing, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

5/26/07; Los Angeles, CA
Date and Place

Leonard Kaye
Signature

Exhibit one
Page 1

1 of 140 DOCUMENTS

CALIFORNIA COMPENSATION CASES

City of Oakland, PSI, JT2 Integrated Resources, Petitioner v. Workers' Compensation Appeals Board, **Felicia Aisthorpe**, **Johnna Watson**, Respondents

Civil No. A115839--

Court of Appeal, First Appellate District, Division One

72 Cal. Comp. Cas 249; 2007 Cal. Wrk. Comp. LEXIS 22

January 9, 2007

PRIOR HISTORY: [**1]
Prior History: W.C.A.B. Nos. SFO 0485663, SFO 0485664--WCJ Susan V. Hamilton (SFO); WCAB Panel: Commissioners Cuneo, Rabine, Murray (concurring, but not signing) [*see* Aisthorp v. City of Oakland; *Watson v. City of Oakland, 2006 Cal. Wrk. Comp. PD Lexis 34* (Appeals Board panel decision)]

DISPOSITION: *Disposition:* Petition for writ of review denied

HEADNOTE: Public Employees--Salary in Lieu of Benefits--Police Officers--WCAB held that salary continuation benefits paid under *Labor Code § 4850* are not subject to two-year limitation period for payment of temporary disability indemnity set forth in *Labor Code § 4656*, as amended by SB 899. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 3.114[1], [2].] [*250]

Applicants Felicia Aisthorpe and Johnna Watson were injured on 6/10/2004 while working as police officers for Defendant City of Oakland. The injuries occurred when their patrol car was struck. Both officers required medical treatment and time off work. Defendant accepted the claims and provided benefits.

As a result of the accident, Officer Aisthorpe [**2] sustained injuries to her neck, back, bilateral knees, and right sciatic nerve. She was off work for a few days and received her full salary under *Labor Code § 4850*. She then returned to full duty and worked until she underwent surgery on her left knee in 6/2005. On 1/25/2006, Officer Aisthorpe returned to modified duty, working six hours per day and receiving two hours of *Labor Code § 4850* benefits until Defendant terminated the benefits on 6/10/2006.

Officer Watson sustained injuries to her neck, back, right hip, foot, left arm, bilateral knees, head, and face and was off work for several weeks following the accident. She received *Labor Code § 4850* benefits while she was off work. Officer Watson then returned to full duty and worked until 12/12/2005, at which time she became TTD. Defendant terminated *Labor Code § 4850* benefits on 6/11/2006. On 7/18/2006, Officer Watson underwent back surgery.

The cases were consolidated and proceeded to an expedited hearing on the sole issue of whether the 104-week limitation for payment [**3] of TD indemnity set forth in *Labor Code § 4656* applies to benefits paid under *Labor Code § 4850*. On 7/21/2006, the WCJ issued an F&O, in which she concluded that the 104-week limit on the payment of TD set forth in *Labor Code § 4656* does not apply to payments made pursuant to *Labor Code § 4850*.

Defendant filed a Petition for Reconsideration, contending in relevant part that payments made under *Labor Code § 4850* are the equivalent of TD payments made under *Labor Code § 4656* and, therefore, are subject to the two-year limitation for payment as set forth in that section.

The WCJ recommended that reconsideration be denied. In her report, the WCJ rejected Defendant's contention that *Labor Code § 4850* benefits are equivalent to TD benefits, pointing out that *Labor Code § 4850* benefits are distinct and more expansive than TD paid pursuant to *Labor Code § 4656* [**4] . First, unlike TD benefits, *Labor Code § 4850* benefits are payable without a waiting period and are paid at the full salary rate for a period of one year to eligible police officers who are either TD or PD. In addition, *Labor Code § 4850* provides special benefits to police officers and firefighters to compensate them for the particularly dangerous activities they undertake on the public's behalf. The WCJ noted that in SB 899 the Legislature amended *Labor Code § 4656* to include the 104-week limitation on TD but did not make any change to *Labor Code § 4850*. She found this omission to be significant in expressing the legislative intent to apply the limitation to TD only. The WCJ opined that interpreting *Labor Code § 4850* benefits to be subject to the two-year limitation period set forth in *Labor Code § 4656* is not only inconsistent with the acknowledged purpose of the full salary benefit, but also contrary to the [*251] fundamental purpose of SB 899, to promptly [**5] return injured workers to suitable gainful employment.

The WCJ rejected Defendant's contention that the decision in *Eason v. City of Riverside (1965) 233 Cal. App. 2d 190, 43 Cal. Rptr. 408, 30 Cal. Comp. Cases 464*, was controlling in this case and barred payment of *Labor Code § 4850* benefits more than two years from the date of injury even if the worker has not received these benefits for the allowable one-year period, since she found that the analysis in *Eason* on the disputed issue was "incomplete and shallow." Moreover, the WCJ did not believe that the decision in *Radesky v. City of Los Angeles (1974) 37 Cal. App. 3d 537, 112 Cal. Rptr. 444, 39 Cal. Comp. Cases 916*, supported the proposition that *Labor Code § 4850* benefits were subject to the two-year limitation on the payment of TD indemnity contained in *Labor Code § 4656*, since *Radesky* did not involve *Labor Code § 4850* benefits but, rather, Los [**6] Angeles Admin. Code § 4.177, which the WCJ pointed out is significantly different from *Labor Code § 4850*. In this regard, the WCJ stated in relevant respects:

> "In contrast, *Labor Code § 4850* payments are specifically made *in lieu of* temporary disability indemnity payments, and are payable whether the eligible officer is temporarily or permanent disabled as a result of an industrial injury. Second, and more importantly, subsection (d) of section 4.177 of the Los Angeles Administrative Code specifically requires that the benefits payable under the Code must be administered in accordance with Division IV of the Labor Code. *Labor Code section 4656* is within Division IV of the Labor Code and, thus, the *Radsky* [*sic*] court concluded, temporary disability payments made under section 4.177 of the Los Angeles Administrative Code are subject to the limitation period set forth in *Labor Code Section 4656. Labor Code section 4850* does not contain a similar provision regarding the manner in which [**7] its payments are to be administered. These distinctions are critical and make the *Radsky, supra*, [*sic*] holding inapplicable in this case. [*Emphasis by WCJ*]"

The WCJ noted that *Labor Code § 3202* requires that Divisions IV and V of the Labor Code be liberally construed to extend benefits to injured workers, and that Applicants in this case were entitled to an interpretation of *Labor Code § 4850* that did not restrict benefits. In addition, she noted in pertinent part that:

> " . . . Notwithstanding their accepted industrial injuries, Aisthorpe and Watson returned to work as soon as it was medically feasible after the injuries. Officer Aisthorpe initially returned to full duty six days after the accident, and Officer Watson returned to work several weeks after the accident. Unfortunately, conservative treatment measures were not successful and both Aisthorpe and Watson have required more aggressive forms of treatment (surgery) with the concomitant result of an inability to work during the healing period. If the officers had remained off-work for one full year after the injury, they would [**8] have received [*252] their full salary under *Labor Code section 4850* without any question. Because of their early return to work, however, they will be penalized by a holding that *Labor Code section 4656* limits the payment of section 4850 benefits more than two years after the industrial injury. Such result would be contrary to the prompt return of injured workers to gainful employment, which Governor Schwarzenegger heralded as one of the reform's successes upon the first anniversary of his signing of Senate Bill 899. [*WCJ's footnote reads as follows:* Office of the Governor, Press Release, April 19, 2005. Statement by Arnold Schwarzenegger on Anniversary of Workers' Compensation Reform. Retrieved 7/19/06 at http://gov.ca/index.php/print-version/press-release/2005.]"

The WCAB denied reconsideration, affirmed the WCJ's decision, and adopted and incorporated the WCJ's report. In addition, the WCAB noted in relevant respects that:

> " . . . [A]t least two provisions of the Labor Code demonstrate that salary continuation benefits are intended to be distinct from temporary disability indemnity. [**9] Section 4853 provides that where an employee entitled to salary continuation benefits remains disabled beyond the one year section 4850 period, "such member shall thereafter be subject as to disability indemnity to the provisions of this division other than Section 4850 during the remainder of the period of said disability or until the effective date of his retirement under the Public Employee's Retirement Act, and the leave of absence shall continue." Thus, under the provision a public safety worker may become eligible to receive temporary disability benefits upon the termination of the one year leave of absence during the remainder of the period of his or her disability, subject to the limitations on payment of temporary disability benefits.
>
> We note further that pursuant to section 4854, injured public safety workers who are receiving salary continuation benefits are specifically prohibited from receiving concurrent payment of temporary disability indemnity. This section provides that "[n]o disability indemnity shall be paid to any such officer or employee concurrently with wages or salary."
>
> While salary continuation benefits paid pursuant to section 4850 may be considered [**10] compensation, they are clearly not temporary disability benefits and not interchangeable with temporary disability benefits."

Defendant filed a Petition for Writ of Review, contending in relevant part that the WCAB erred in finding that the two-year limitation applicable to TD indemnity pursuant to *Labor Code § 4656(c)(1)* did not apply to *Labor Code § 4850* benefits.

Applicant filed an Answer, contending in relevant portion that the WCAB correctly held that *Labor Code § 4656* was not applicable to benefits under *Labor* [*253] *Code § 4850*. Applicant also requested a supplemental award of attorney's fees pursuant to *Labor Code § 5801* and costs pursuant to *Labor Code § 5811*.

WRIT DENIED and Applicant's request for supplemental attorney's fees and costs DENIED January 9, 2007.

COUNSEL: *Counsel:* For petitioner--Mullen & Filippi, by Joseph H. Leonard
For respondents employees--Jones, Clifford, Johnson & Johnson, by Alexander J. Wong, Kenneth G. Johnson [**11]

Exhibit two
Page 1

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Penal Code Section 832.9, as added and amended by Chapter 1249, Statutes of 1992 and Chapter 666, Statutes of 1995, filed on December 30, 1996,

By the County of San Diego, Claimant.

NO. CSM -96-365-02

Threats Against Peace Officers

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

DECISION

The attached Statement of Decision is hereby adopted by the Commission on State Mandates as its Decision in the above-entitled matter.

The Decision shall become effective on April 24, 1997.

It is so ordered on April 28, 1997.

Paula Higashi

PAULA HIGASHI, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Section 832.9, as added and amended by Chapter 1249, Statutes of 1992 and Chapter 666, Statutes of 1995, filed on December 30, 1996, By the County of San Diego, Claimant.	NO. CSM -96-365-02 *Threats Against Peace Officers* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

STATEMENT OF DECISION

Issue: Do the provisions of Penal Code section 832.9, as added and amended by Chapter 1249, Statutes of 1992, and Chapter 666, Statues of 1995, impose a new program or higher level of service upon local governments within the meaning of section 6 of article XIII B of the California Constitution and section 17514 of the Government Code?

This test claim was heard by the Commission on State Mandates (Commission) on April 24, 1997, during a regularly scheduled hearing. Mr. Kevin G. Kennedy, Deputy County Counsel, appeared for the County of San Diego. Mr. Jim Apps appeared for the Department of Finance.

At this hearing, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq. and section 6, article XIIIB of the California Constitution and related case law.

BACKGROUND AND FINDINGS OF FACT

The County of San Diego (claimant) alleges a state mandated cost was created by Chapter 1249/92, requiring local governments to reimburse peace officers for certain moving expenses incurred when relocation becomes necessary because of a verified threat against the life or safety of either the officer or a member of his or her immediate family.

Penal Code Section 832.9, as added by Chapter 1249/92 and amended by Chapter 666/95 reads as follows (underlined text is the 1995 amendment):

"(a) The governmental entity employing the peace officer shall reimburse the moving and relocation expenses of a peace officer, as defined in Section 830, or any member of his or her immediate family residing with the officer in the same household or on the same property when it is necessary to move because the officer has received a credible threat that a life threatening action may be taken against the officer or his or her immediate family as a result of the peace officer' s employment.

"(b) The person relocated shall receive actual and necessary moving and relocation expenses incurred both before and after the change of residence, including reimbursement for the costs of moving household effects either by a commercial household goods carrier or by the employee.

(1) Actual and necessary moving costs shall be those costs that are set forth in the Department of Personnel Administration rules governing promotional relocations while in the state service. The department shall not be required to administer this section.

(2) The public entity shall not be liable for any loss in value to a residence or for the decrease in value due to a forced sale.

(3) Officers shall receive approval of the appointing authority prior to incurring any cost covered by this section.

(4) Officers shall not be considered to be on duty while moving unless approved by the appointing authority.

(5) For a relocation to be covered by this section, the appointing authority shall be notified as soon as a credible threat has been received.

(6) Temporary relocation housing shall not exceed 60 days.

(7) The public entity ceases to be liable for relocation costs after 120 days of the original notification of a viable threat if the officer has failed to relocate.

"(c) As used in this section, "credible threat" means a verbal or written statement or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

"(d) As used in this section, "immediate family" means the spouse, parents, siblings, and children residing with the officer. "

THE COMMISSION FINDS:

Penal Code section 832.9, as added by Chapter 1249/92, requires governmental entities employing peace officers to reimburse such employees, or any member of their immediate family residing with the officer, for moving and relocation expenses incurred when a peace officer has received a credible threat' of life threatening action against the peace officer or their immediate family.[2] The 1995 amendment added parameters for reimbursement. The Commission found no prior law requiring such reimbursement.

However, the Commission observed that the requirement to reimburse a peace officer for such costs was affirmed by a decision of the San Diego Superior Court. The October 11, 1996, trial decision held that the county's employee had received verifiable and credible threats on the life and safety of himself and his immediate family, (as defined by Penal Code section 832.9), and was entitled to reimbursement from San Diego County for relocation expenses as allowed under California Code of Regulations sections 599.715, 599.716, and 599.718-19.

Although this test claim was filed by a county, the Commission noted that the test claim statute specifies

its application to "governmental entity employing the peace officer. " Governmental entities employing peace officers (as defined in Pen. Code, § 830) may include cities, counties, school districts, and special districts.

The Commission recognized that the test claim legislation requires local governmental entities to reimburse peace officers for certain costs, and that the test claimant did in fact incur such costs. However, the Commission noted that in *Lucia Mar,* the California Supreme Court cautioned that not all increased costs incurred by local government are reimbursable as "costs mandated by the state. " The court recognized that, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon
them by the state. " *(Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal. 3d at 835 .)

The term "program" has two alternative meanings: "programs that carry out the governmental function
of providing services to the public, *or* laws which, to implement a statewide policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."

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[1] "Credible threat" is defined as a verbal or written statement or a threat implied by a pattern of conduct or a combination of any previously mentioned with the intent and apparent ability to carry out the threat to the extent that the person threatened reasonably fears for their safety or that of their immediate family. (Pen. Code, § 832.9, subd. (c).)

[2] Immediate family is defined as the peace officer's spouse, parents, siblings and children, residing with the peace officer. (Pen. Code, § 832.9, subd. (d).)

In order to make a mandate determination, only one of these findings is necessary to trigger reimbursement. (County of *Los Angeles* v. *State* of *California* (January 1987) 43 Cal.3d 46, 56.)

There is no question that police protection is a peculiarly governmental function. (*Verreos v. City and County of San Francisco* (1976) 63 Cal. App. 3d 86, 107, as cited in *Carmel Valley Fire Protection Disk. v. State of California* (Feb. 1987) 190 Cal.App.3d 521, 537. However, the test claim statute does not require governmental entities employing peace officers to provide services to the public. Rather Penal Code section 832.9 requires employers (who are, for the most part, local agencies) to reimburse certain moving costs incurred by their peace officers in a specific situation.

The alternative meaning of "program" is "laws which, to implement a statewide policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. " (*County of Los Angeles v. State of California* (January 1987) 43 Cal. 3d 46, 56.) The Commission concluded that this second prong of the Supreme Court's test for new program is the basis to approve this test claim because Penal Code section 832.9 manifests a statewide policy of protecting and assisting peace officers and their immediate families upon receipt of a credible threat. This statewide policy imposes unique requirements on local agencies that do not apply generally to all residents and entities in the state because police protection is primarily a local government function.

CONCLUSION

Therefore, the Commission determines that Penal Code section 832.9, as added by Chapter 249, Statutes of 1992, and amended by Chapter 666, Statutes of 1995, imposes upon local governments, a new program or higher level of service in an existing program, as defined in section 6, Article XIIIB of the California Constitution and section 17514 of the Government Code, by requiring local governmental entities employing peace officers to reimburse such employees, or any member of their immediate family residing with the officer, for moving and relocation expenses incurred when a peace officer has received a credible threat of life threatening action against the peace officer or their immediate family.

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DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 29th day of May 2007, I served the attached:

Documents: Los Angeles County Review, Revised Commission Staff Test Claim Analysis, Workers' Compensation Disability for Government Employees, [00-TC-20 and 02-TC-02] , including *a 1 page letter of J. Tyler McCauley dated 5/29/07, a 6 page narrative, Exhibits One and Two, and a 1 page declaration of Leonard Kaye dated 5/29/07, now* pending before the Commission on State Mandates.

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

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

Executed this 29th day of May 2007 , at Los Angeles, California.

Hasmik Yaghobyan