EXHIBIT 11

Weber v. Board of Retirement of Los Angeles County Retirement Ass'n
Court of Appeal, Second District, Division 3, California. | April 10, 1998 | 62 Cal.App.4th 1440 | 73 Cal.Rptr.2d 769

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62 Cal.App.4th 1440
Court of Appeal, Second District, Division 3, California.

Katherine WEBER, et al., Plaintiffs and Appellants,
v.
BOARD OF RETIREMENT OF the LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION, Defendant and Respondent.

No. B110776. | April 10, 1998. | Certified for Partial Publication.* | Review Denied July 8, 1998.**

Class action petition for writ of mandate was filed by former county employees, seeking interest on retroactive portion of disability retirement benefits. County retirement board's motion for judgment on the pleadings was granted by the Superior Court, Los Angeles County, Bruce Mitchell, J., and employees appealed. The Court of Appeal, Aldrich, J., held that: (1) prejudgment interest statute did not authorize board to pay interest on retroactive portion of benefits, awarded administratively for the period before the board made eligibility determination; (2) County Employees Retirement Law, and county retirement board's bylaws adopted pursuant thereto, did not authorize board to pay such interest; (3) retroactive portion did not constitute "damages" under prejudgment interest statute; and (4) procedural delay in awarding benefits does not constitute a wrongful denial of benefits, and cannot be read as implicit authority to grant prejudgment interest.

Affirmed.

West Headnotes (5)

[1] **Counties**
Interest

104Counties
104XIClaims Against County
104k198Interest

Prejudgment interest statute did not authorize county retirement board to pay interest on retroactive portion of disability retirement benefits, awarded administratively for the period before the board made eligibility determination, and which had never been wrongfully denied. West's Ann.Cal.Civ.Code § 3287(a).

3 Cases that cite this headnote

[2] **Counties**
Interest

104Counties
104XIClaims Against County
104k198Interest

County Employees Retirement Law, and county retirement board's bylaws adopted pursuant thereto, did not authorize board to pay interest on retroactive portion of disability retirement benefits, awarded administratively for period before the board made eligibility determination; there is no mandated interest implied in the requirement that payment of benefits be retroactive to an earlier "effective" date. West's Ann.Cal.Gov.Code §§ 31200 et seq., 31525, 31724, 31727.4.

5 Cases that cite this headnote

[3] **Interest**
Particular cases and issues

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.20)Particular cases and issues

Retroactive portion of disability retirement benefits, awarded administratively for period before county retirement board made eligibility determination, did not constitute "damages" under prejudgment interest statute; prejudgment interest under that statute is designed to compensate for lengthy delay resulting from mandamus made necessary to vindicate agency's wrongful denial of benefits. West's Ann.Cal.Civ.Code § 3287(a).

4 Cases that cite this headnote

[4] **Counties**
Pensions and benefits

104Counties
104IIIOfficers and Agents
104k68Compensation
104k69.2Pensions and benefits

County retirement board, as trustee administering retirement benefits, is a fiduciary who must administer the trust in good faith and deal fairly with the members.

1 Cases that cite this headnote

[5] **Interest**
Particular cases and issues

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.20)Particular cases and issues

Procedural delay by county retirement board in awarding disability retirement benefits does not constitute a wrongful denial of benefits, and cannot be read as implicit authority to grant prejudgment interest. West's Ann.Cal.Civ.Code § 3287(a).

Cases that cite this headnote

Attorneys and Law Firms

****770 *1441** David B. Bloom, Los Angeles, Peter O. Israel, Beverly Hills, and Stephen S. Monroe, Los Angeles, for Plaintiffs and Appellants.

David L. Muir, Chief Counsel, Margaret L. Oldendorf, Staff Counsel, for Defendant and Respondent.

***1442** ALDRICH, Associate Justice.

INTRODUCTION

In this appeal, we are asked to determine whether Los Angeles County employees are entitled to interest under Civil Code section 3287, subdivision (a)[1] on the lump-sum portion of their disability retirement benefits which portion was administratively awarded to them by the Board of Retirement. Petitioners are members of the Los Angeles County Employees Retirement Association (LACERA) who have been granted service-connected disability retirement pensions under the County Employees Retirement Law of 1937, Government Code sections 31200 et seq. (CERL). When LACERA denied petitioners' requests for interest on the retroactive portion of their benefits which is paid in a lump sum, petitioners filed this class-action petition for writ of mandate asking the court to order LACERA to pay the interest. LACERA moved for judgment on the pleadings based on the Supreme Court's holding in *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 56 Cal.Rptr.2d 109, 920 P.2d 1314 (*AFL–CIO*) arguing that as an administrative body, it has no statutory authority to award interest when paying the retroactive portion of disability benefits and otherwise section 3287(a) provides for the award of prejudgment interest only in judicial as opposed to administrative proceedings. The trial court agreed with LACERA and granted their motion. On appeal, petitioners attempt to distinguish *AFL–CIO.* We hold CERL does not authorize the Board, either implicitly or explicitly, to award interest under section 3287(a), and so based on *AFL–CIO* and CERL, judgment was properly entered on the pleadings. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *LACERA.*

LACERA is a public entity created under the authority of CERL to hold and invest the pensions and administer the benefits to the employees of the County of Los Angeles who are its members. LACERA's Board of Retirement (Gov.Code, § 31520, hereinafter the Board) is charged with the responsibility of ascertaining the eligibility for and paying pension benefits to eligible employees under CERL.

1443 B. *Katherine Weber.
For seven years, Katherine Weber was a mental health hearing referee for the Los Angeles County Superior Court. Weber suffered injuries in an on-duty automobile accident on August 31, 1989, and applied for service-connected disability retirement. LACERA found Weber was not permanently incapacitated and so she filed an administrative appeal. After a hearing, the referee recommended Weber be granted service-connected disability retirement effective immediately, commencing retroactively to the day following the last day she received full compensation.

On March 3, 1993, LACERA's Board voted to adopt the findings of the referee and granted Weber service-connected disability retirement under CERL effective April 10, 1991, and retroactive to August 1989. Weber ****771** was paid a lump sum of $48,455.51 to cover the benefits retroactively owed, thereby making the payments current. Weber is also receiving her current monthly allowance. The Board notified Weber of her right, should she disagree with the decision, to file a petition for writ of mandate. Instead, Weber asked the Board to pay her interest on the retroactive lump-sum payment. LACERA denied the request, explaining there was no legal authority for the payment of such interest.

C. *Laura Garnica.*
Laura Garnica was an intermediate typist clerk for the Los Angeles County Sheriff's Department for 13 years. On January 22, 1988, Garnica applied for a service-connected disability and on April 5, 1989, the Board ruled she was permanently incapacitated as the result of a nonservice-connected cause. At Garnica's request, a de novo hearing was held. During the period of reevaluation, Garnica applied for and received nonservice-related payments. After the hearing, the referee recommended a service-connected disability retirement allowance. The Board adopted the referee's findings and granted Garnica disability retirement effective June 3, 1988. Garnica was paid $16,791.37 in retroactive benefits which amount constitutes the difference between the nonservice-connected benefit received during the pendency of the de novo proceeding and the service-connected disability to which she had been entitled as of the date she was initially eligible. Garnica's request for interest on the retroactive benefits was denied by LACERA for lack of legal authority to make such payments.

D. *The mandamus petition.*
Weber and Garnica (petitioners) then filed their class action petition for writ of mandate under Code of Civil Procedure section 1094.6. In paragraph ***1444** five of the first cause of action, petitioners sought to direct the Board to pay them and others similarly situated interest under section 3287(a) on the lump-sum payment of the retroactive portion of the CERL benefits administratively awarded to them.

LACERA answered the petition, specifically denying the allegations of the fifth paragraph. LACERA then filed its motion for judgment on the pleadings, arguing the petition was insufficient as a matter of law based on the authority of *AFL–CIO.* In its motion, LACERA argued CERL does not authorize or compel administrative payment of interest on retroactive retirement allowances. LACERA noted petitioners sought the award of interest under section 3287(a) at the administrative level, whereas section 3287(a) applies to court-ordered awards in mandamus actions upon a determination that benefits were wrongfully withheld.

Petitioners opposed LACERA's motion by distinguishing *AFL–CIO* and the Unemployment Insurance Code on the ground the interest they sought constituted "damages" as defined by section 3287(a).

The trial court granted LACERA's motion for judgment on the pleadings, explaining simply, "*AFL–CIO* controls." The court also denied leave to amend the petition, stating "[s]hould plaintiffs wish to file a petition in mandate re[:] 'wrongful withholding' of benefits, plaintiffs should file a new action." Judgment was entered in favor of LACERA, and petitioners' timely appeal followed.

CONTENTION

Petitioners contend the trial court improperly granted the motion for judgment on the pleadings on the authority of *AFL–CIO* because that case does not bar prepayment interest on retirement benefits.

DISCUSSION

The question of whether petitioners are entitled to interest on the lump-sum payment of the retroactive portion of their retirement benefits "is one of law, concerning which we exercise our independent judgment." (*Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 1531, 258

Cal.Rptr. 106, citation omitted.)

[1] Section 3287(a) provides in relevant part, "Every person who is entitled to recover *damages* certain, or capable of being made certain by calculation, *and the right to recover which is vested in him upon a particular* **772 *day,* is *1445 entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county ... of the state." (Italics added.)

The question put squarely before us is whether a Los Angeles County employee who is administratively determined to be entitled to disability retirement benefits is also entitled to interest under section 3287(a) on the amount owing to them retroactively, covering the period from the first day of eligibility to the date the Board determines the member is in fact eligible for disability benefits. Petitioners assert their petition states a cause of action because, citing section 3287(a), their right to retirement benefits vested on a particular day and the damages are in an amount certain. LACERA contends that under the authority of *AFL–CIO,* the retroactive lump-sum payments are not "damages" assessed in a civil action, but are benefits to which the Board administratively determined petitioners were entitled. To clarify, we are not addressing the power of the *trial court* to award interest under section 3287(a) *in a mandamus action* brought to recover disability benefits *wrongfully denied by the Board.* That is settled law. (*AFL–CIO, supra,* 13 Cal.4th at pp. 1022, 1032, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Rather, we address the authority of *administrative agencies,* such as the Board here, to award interest on benefits which have *not been denied,* but which represent the period before the Board made the eligibility determination, and which are designed to bring the disbursements current.

A. *The AFL–CIO decision is predicated on section 3287(a) and the Unemployment Insurance Code.*

The Supreme Court addressed this issue in *AFL–CIO* in the context of the Unemployment Insurance Code. There, the claimant sought to backdate her unemployment insurance claim to obtain benefits for an earlier period. The Employment Development Department (EDD) denied her request. Through an administrative appeal, the claimant established her entitlement to retroactive benefits for the 10–week period between the initial denial of eligibility and the later benefit award. The claimant then sought interest on that 10–week retroactive payment. (*AFL–CIO, supra,* 13 Cal.4th at p. 1028, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The Board denied the claimant's request on the ground neither it, nor an administrative law judge acting on its behalf, has the legal authority to award prejudgment interest under section 3287(a). The AFL–CIO, as an "interested party," filed a complaint for declaratory relief in the trial court challenging the Board's decision.

A majority of the Supreme Court reversed the court of appeal's decision that the administrative law judge could award prejudgment interest under *1446 section 3287(a) on retroactive benefit payments. In reaching its decision, the *AFL–CIO* court established at the outset "the settled principle" that " ... administrative agencies have only the powers conferred on them, either expressly or by implication, by Constitution or statute ... " and "must act within the powers conferred upon [them] by law and may not act in excess of those powers...." (*Id.,* at p. 1042, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Thus administrative law judges may not award interest "where the enabling statute does not authorize an award of interest." (*Id.,* at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Analyzing the Unemployment Insurance Code and section 3287(a), the Supreme Court held that neither "authorizes the Board, or administrative law judges acting on behalf of the EDD, to award interest ... on the Board's administrative eligibility determination that retroactive unemployment insurance benefits are due ...." (*AFL–CIO, supra,* 13 Cal.4th at pp. 1022–1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

In reaching this conclusion, the AFL–CIO court first observed section 3287(a) allows trial courts, as opposed to administrative law judges, to award prejudgment interest following a successful administrative mandamus action to recover wrongfully withheld benefits. (**773 *AFL–CIO, supra,* 13 Cal.4th at pp. 1022, 1032, 56 Cal.Rptr.2d 109, 920 P.2d 1314; *Tripp v. Swoap* (1976) 17 Cal.3d 671, 682–683, 131 Cal.Rptr. 789, 552 P.2d 749, overruled on other grounds in *Frink v. Prod* (1982) 31 Cal.3d 166, 180, 181 Cal.Rptr. 893, 643 P.2d 476; *Olson v. Cory* (1983) 35 Cal.3d 390, 402, 197 Cal.Rptr. 843, 673 P.2d 720; *Goldfarb v. Civil Service Com.* (1990) 225 Cal.App.3d 633, 636, 275 Cal.Rptr. 284; *Austin v. Board of Retirement,* supra, 209 Cal.App.3d at pp. 1532–1534, 258 Cal.Rptr. 106.)[2] Prejudgment interest is awarded for the purpose of compensating for the delay caused by the necessity of instigating a mandamus action in the trial court to vindicate the claimant's right to wrongfully withheld benefits. (*AFL–CIO, supra,* at p. 1034, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

Next, the *AFL–CIO* Court reviewed the Unemployment Insurance Code's framework and concluded it limits the

powers of administrative law judges to determining eligibility and computing benefits. (*Id.*, at p. 1039, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The statute's language contains no "express authority to award interest on an administrative benefit award." (*Id.*, at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Nor could the Supreme Court identify an implied power to award interest. (*Id.*, at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The Supreme Court explained its reading of the Unemployment Insurance Code thusly: "[T]he EDD has no underlying monetary obligation to the claimant until it determines the claimant is eligible for the benefits. [Citation.] Once eligibility has been determined, the right to receive benefits vests on the first ***1447** day of the claimant's entitlement, and the EDD must promptly pay benefits due, regardless of any appeal taken. [Citation.] " (*Ibid.*) Nowhere is the power to award prejudgment interest implicit in the Unemployment Insurance Code.

Synthesizing section 3287(a) with the Unemployment Insurance Code, the Supreme Court explained the result. Entitlement to prejudgment interest can only occur when the Board makes its final decision that the claimant is *not* entitled to the benefits. That determination could constitute a " 'wrongful withholding' " of benefits giving rise to a delay in receiving the money. Only then would the claimant have grounds for filing a mandamus action under section 1094.5 of the Code of Civil Procedure to challenge the Board's decision where he or she can establish damages capable of being made certain under section 3287(a). (See *AFL–CIO, supra,* 13 Cal.4th at p. 1027, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Stated in the inverse, "[b]ecause there is no potential 'wrongful withholding' of benefits if the Board determines the claimant is eligible for unemployment insurance benefits, there can be no grounds for filing a mandamus action under Code of Civil Procedure section 1094.5 challenging the Board's favorable decision, and no damages 'capable of being made certain' that would give rise to even an implied obligation to award interest on the benefits recovered during the administrative process." (*Id.*, at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314; italics added.) Therefore, the Unemployment Insurance Code does not implicitly or explicitly authorize the EDD or administrative law judges to award section 3287(a) prejudgment interest; only a court can award such interest. (*Ibid.*)

B. *The Government Code and LACERA's By-laws.*

[2] Clearly, section 3287(a) by itself does not authorize LACERA's Board to award interest. Hence, whether the Board has authority to award section 3287(a) interest on petitioners' retroactive benefit payments administratively awarded them depends on whether CERL implicitly or explicitly grants the Board such authority. We conclude CERL does not authorize the administrative award of prejudgment interest.

Turning to the Government Code and LACERA's by-laws, adopted pursuant to Government Code section 31525, a member of LACERA applies for service-connected disability retirement, inter alia, within four months of leaving work. (****774** Gov.Code, § 31722.) According to Government Code section 31724, the Board decides whether the applicant is permanently incapacitated for the performance of duty. If the Board denies the member's request for disability retirement, the member is entitled to an administrative hearing before the Board, or before a referee appointed by the Board. (***1448** Gov.Code, § 31533; LACERA Bylaws, art. VIII; LACERA Disability Retirement Hearing Procedures, rule 28.)[3]

Government Code section 31724 governs the Board's duties and the timing of allowances. That provision states in relevant part, "If the proof received, including any medical examination, shows to the satisfaction of the board that the member is permanently incapacitated physically or mentally for the performance of his duties in the service, it *shall* retire him *effective* on the expiration date of any leave of absence *with compensation to which he shall become entitled* .... His disability retirement allowance *shall be effective as of the date such application is filed with the board,* but not earlier than the day following the last day for which he received regular compensation." (Italics added.) Government Code section 31727.4, which sets the amount of benefit allowances, also states, inter alia, "*Upon retirement* of any member for service-connected disability, *he shall receive an annual retirement allowance payable in monthly installments.* ... " (Italics added.)

A review of CERL, together with LACERA's by-laws, reveals no explicit authorization, either during the application process or during the administrative appeal, to award section 3287(a) prejudgment interest administratively.

Nor do we discern an implicit power to grant prejudgment interest. Government Code sections 31724 and 31727.4 direct the Board to determine disability, i.e., eligibility, and to pay the benefits as of a specific date. The statute does no more and no less. The event which triggers retirement and the right to allowance payments is the disability determination by the Board. Until that time, the member is not retired, and LACERA has no monetary obligation to that member.

Once the member's eligibility for retirement is determined to the Board's satisfaction, CERL states the Board "shall" retire the member as of an earlier date certain. The statute then provides the "retirement allowance *shall be effective* as of the date ... application [for benefits] is filed" with the Board. (§ 31724, italics added.) By using the word "shall," the statute mandates that the right to the allowance becomes effective immediately upon the retirement; that is, as soon as the Board's decision is made, retirement and the right to payments vest. The requirement that the right to a benefit allowance commences retroactively to the date of application assures that the member receives the full amount of his or her benefit coverage. In that sense, CERL is structured similarly to the Unemployment Insurance ***1449** Code because once disability is demonstrated to the Board's satisfaction, the member's right to receive benefits vests retroactively to the date the application was filed.

Petitioners argue that implicit authority to award section 3287(a) interest is contained in Government Code section 31724's requirement that the disability retirement allowance "shall be effective" as of a date which precedes the eligibility determination. Such requirement, petitioners reason, constitutes a "statutory mandate" that beneficiaries be compensated with interest.

There is no mandated interest implied in the requirement that payment of benefits be retroactive to an earlier "effective" date. Petitioners point us to no authority for this proposition. As LACERA points out, while the Legislature included the payment of interest in the worker's compensation context, it did not do so in CERL. Section 5800 of the Labor Code provides, "All awards of the appeals board either for the payment of compensation or for the payment of death benefits, *shall carry interest at the same rate as judgments in civil actions on all due and unpaid payments* from the date of the making ****775** and filing of said award." (Italics added.) In the case of CERL, had the Legislature intended to impose a requirement that interest be paid on retroactive portion of a retirement benefit, it knew how and could have done so in Government Code section 31724, just as it did in the context of Worker's Compensation. The Legislature chose not to and we will not infer an intent to award interest that is not even impliedly included.

[3] Petitioners next argue "retroactive lump-sum payments of pension benefits constitute 'damages' under Civil Code section 3287(a)." For this proposition, petitioners cite *Olson v. Cory, supra,* 35 Cal.3d 390, 197 Cal.Rptr. 843, 673 P.2d 720, *Goldfarb v. Civil Service Com., supra,* 225 Cal.App.3d 633, 275 Cal.Rptr. 284, and *Austin v. Board of Retirement, supra,* 209 Cal.App.3d at p. 1532, 258 Cal.Rptr. 106. Petitioners misconstrue these cases. In each of these cases a *trial court in a mandamus action reversed an administrative decision wrongfully withholding benefits, and awarded* section 3287(a) interest. (*Olson, supra,* at p. 402, 197 Cal.Rptr. 843, 673 P.2d 720 [withheld back pay and pension]; *Goldfarb, supra,* at p. 636, 275 Cal.Rptr. 284 [wrongful demotion]; *Austin, supra,* at p. 1532, 258 Cal.Rptr. 106[4] [withheld disability retirement benefits].) As explained in these cases and elucidated in *AFL–CIO,* prejudgment interest under ***1450** section 3287(a) is designed to compensate for the lengthy delay resulting from the *mandamus action* made necessary to *vindicate* the claimant's rights following the Board's *wrongful denial of benefits.* (*AFL–CIO, supra,* 13 Cal.4th at pp. 1022, 1033–1034, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Petitioners here were *not denied* benefits and so they were not damaged. These cases are inapposite.

C. *The AFL–CIO decision is controlling.*

Petitioners' reliance on these cases merely begs the question finally decided in the negative in *AFL–CIO,* namely whether the Board, an administrative as opposed to a judicial body, had the statutory authority to award interest on retroactive lump-sum disbursements which were not wrongfully denied.[5] *AFL–CIO* explained the process: the EDD has no monetary obligation to the claimant until it decides the claimant is eligible for benefits. If eligibility is established, the right to receive benefits vests on the first day of the claimant's entitlement and the EDD must promptly pay benefits owed. If the EDD decides that the claimant is not entitled to benefits, that decision constitutes a "wrongful withholding" and a corresponding delay in receiving benefits, entitling the claimant to prejudgment interest. (*AFL–CIO, supra,* at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

Following the logic of *AFL–CIO,* under section 31724, the Board's obligation to pay does not arise until the Board is "satisfied" that the member is "permanently incapacitated" for the "performance of his duties." (Gov.Code, § 31724.) At that point, the member is retired and his or her right to the benefits vests as of the date of application for those benefits. The Board must then make the lump-sum payment to bring payments current. That the payment is retroactive *does not mean that the Board wrongfully denied benefits for that period.* (See, ****776** *AFL–CIO, supra,* 13 Cal.4th at p. 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Rather the retroactive allotment covers the period between application and the determination the member is in fact eligible. Only if the

Board had denied petitioners their benefits, forcing petitioners to bring an administrative mandamus action to vindicate their rights to benefits, would petitioners be able to establish their entitlement to prejudgment interest. Petitioners here are not entitled to interest under section 3287(a), exactly because (1) they were not denied benefits, (2) they did not file an administrative mandamus action in ***1451** the trial court in an effort to overturn a wrongful benefits-decision by the Board, and (3) under CERL, although there exists a waiting period between application and eligibility determination, there is no gap in time between the eligibility decision and the date the money statutorily becomes due. The statute provides that once the eligibility determination is made, the right to benefits vests immediately, effective retroactively.

Petitioners contend *AFL–CIO* is inapplicable because unlike unemployment insurance where no interest accrues until the administrative procedure is completed and the eligibility is established, a pension plan is a vested contractual right which accrues upon acceptance of employment. Because the pension plan is vested, petitioners argue, they are not mere "claimants" so much as beneficiaries of a trust and the Board is not only an administrative agency, but also a fiduciary. Further, petitioners argue, because the pension is vested, it " ... actually constitute[s] funds earned by [petitioners] and other members of LACERA, in which they have vested rights, subject only to determination of eligibility."

[4] There is no denying LACERA, as trustee administering the retirement benefits, is a fiduciary who must administer the trust in good faith and deal fairly with the members. (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 392, 216 Cal.Rptr. 733, 703 P.2d 73.) However, as petitioners themselves have stated it, their right to the benefits is *"subject only to determination of eligibility."* (Italics added.) Toward that end, the member seeking such benefits must apply (Gov.Code, § 31722), and carries the burden (*Rau v. Sacramento County Ret. Bd.* (1966) 247 Cal.App.2d 234, 238, 55 Cal.Rptr. 296) of demonstrating, to the Board's satisfaction (Gov.Code, § 31724), his or her eligibility for the benefits. (*Ibid.*) Until the member makes the necessary showing of eligibility, his or her right is merely inchoate. As soon as the Board is satisfied by the showing, the right to the benefit vests automatically, retroactive to the date the member applied for benefits. Where the Board or administrative law judge rules in favor of the member, there is no *withholding* of benefits such as would justify judicial action giving rise to "damages."

Petitioners next claim that the delay in determining eligibility under CERL is not comparable to the "inconsequential delay" the *AFL–CIO* court observed under the Unemployment Insurance Code. Petitioners focus on the *AFL–CIO* court's analysis of the structure of the Unemployment Insurance Code, and conclusion "[o]nce eligibility has been determined, the right to receive benefits vests on the first day of the claimant's entitlement, and the EDD must *promptly pay* benefits due, regardless of any appeal taken. [Citation.]" (*AFL–CIO, supra,* 13 Cal.4th at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.) By ***1452** contrast, petitioners explain, CERL's statutory structure contains no "prompt" payment requirement and thus no sufficient incentive to make the eligibility determination expeditiously.

We disagree with petitioners' analysis. A fair reading of CERL demonstrates it actually protects members by assuring the employee receives benefits for the entire period of eligibility, not just commencing as of the eligibility determination. Such statutory structure allows the Board to assure itself of the member's eligibility, while seeing that the member is paid for the entire period of disability. Pending determination of entitlement, the member may always apply for an allowance under Government Code section 31725.7, as Garnica did, to avoid penury while awaiting the eligibility determination.

[5] We recognize the system under CERL is unreasonably lengthy and onerous. Weber waited 59 months for her allowance ****777** and Garnica waited 43 months (although she did receive non-service connected payments in the interim). Nonetheless, the procedural delay does not constitute a wrongful denial of benefits (*AFL–CIO, supra,* at p. 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314), and cannot be read as implicit authority to grant prejudgment interest. Under section 3287(a) any change in the statutory framework must be done by the Legislature, not by judicial fiat. We suggest strongly that it is time for the Legislature to consider the burden on a member imposed by the lengthy process to determine eligibility.

CONCLUSION

To summarize, therefore, section 3287(a) does not authorize administrative award of prejudgment interest. It is settled law that administrative agencies, such as LACERA's Board, must have statutory power to award such interest. Just as the Unemployment Insurance Code provisions limit the powers of administrative law judges to determining eligibility and computing benefits (*AFL–CIO, supra,* at p. 1039, 56 Cal.Rptr.2d 109, 920 P.2d 1314), so too, CERL, Government Code section 31724, restricts the duties of the referee and Board to

determining to their satisfaction the member's permanent incapacity and paying disability benefits. The amount of the benefit allowance and the date payments commence are established by statute. Nowhere does Government Code section 31724 confer upon the Board the express or implied power to award prejudgment interest in a proceeding when it determines the claimant is in fact eligible for service-connected disability benefits. Under ***1453** the authority of *AFL–CIO,* the trial court here properly granted LACERA's motion for judgment on the pleadings.***

The judgment is affirmed. Costs are awarded to Respondent.

KLEIN, P.J., and CROSKEY, J., concur.

Parallel Citations

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DISPOSITION

Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of footnote 6.

** Kennard, J., dissented.

1 Hereinafter, Civil Code section 3287, subdivision (a) will be referred to as section 3287(a).

2 In this regard, the *AFL–CIO* court specifically reversed and disapproved *Knight v. McMahon* (1994) 26 Cal.App.4th 747, 31 Cal.Rptr.2d 832, concluding the *Knight* court erred in awarding interest as an additional benefit where the Board had not wrongfully withheld benefits. (*AFL–CIO,supra,* 13 Cal.4th at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

3 Any time after filing the application for disability retirement, the member may also apply for a service retirement allowance pending determination of his entitlement to disability retirement. (Gov.Code, § 31725.7.)

4 *Austin v. Bd. of Retirement, supra,* 209 Cal.App.3d at page 1533, 258 Cal.Rptr. 106, involved the determination of whether an award of section 3287(a) interest was proper in *the context of a mandamus action to recover benefits wrongfully withheld by the Board* (*id.* at pp. 1532–1534, 258 Cal.Rptr. 106), and so it does not inform our holding here. In *Austin,* we concluded the trial court should be allowed to award section 3287(a) ' ... damages within the meaning of these provisions. [Citations.] Interest is recoverable on each salary or pension payment from the date it fell due. [Citations.]' [Citation.]" (*Id.,* at p. 1532, 258 Cal.Rptr. 106, italics added.) We explained that there is nothing in the statutory scheme governing disability pension benefit suggesting a legislative intent to preclude recovery of interest on damages awarded as prejudgment interest from the date such benefits became due. We noted, "If Austin had not been wrongfully denied disability retirement benefits, he would have obtained the benefits of the moneys paid as of the date of accrual of each payment." (*Id.,* at p. 1534, 258 Cal.Rptr. 106.)

5 Until *AFL–CIO,* the Supreme Court had declined to address whether such interest was obtainable in the administrative process. (*Tripp v. Swoap, supra,* at p. 685, fn. 14, 131 Cal.Rptr. 789, 552 P.2d 749.)

*** See footnote *, *ante*.

End of Document

EXHIBIT 12

Yamaha Corp. of America v. State Bd. of Equalization
Supreme Court of California | August 27, 1998 | 19 Cal.4th 1 | 960 P.2d 1031

Yamaha Corp. of America v. State Bd. of Equalization

Supreme Court of California | August 27, 1998 | 19 Cal.4th 1 | 960 P.2d 1031

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Outline

19 Cal.4th 1
Supreme Court of California

YAMAHA CORPORATION OF AMERICA,
Plaintiff and Respondent,
v.
STATE BOARD OF EQUALIZATION, Defendant and Appellant.

No. S060145. | Aug. 27, 1998.

Seller of musical instruments sought refund of use taxes assessed on musical instruments that it purchased outside state, stored within state, and ultimately gave away as promotional gifts. The Superior Court, Los Angeles County, No. BC 079 444, Daniel A. Curry, J., ordered refund for gifts to out-of-state recipients, and State Board of Equalization appealed. The Court of Appeal reversed. The Supreme Court granted review, superseding opinion of Court of Appeal. The Supreme Court, Brown, J., held that Board's interpretation of sales and use tax statutes, set out in its Business Taxes Law Guide opinion summaries, were not entitled to degree of judicial deference given to quasi-legislative rules.

Reversed and remanded.

Mosk, J., filed concurring opinion, which George, C.J., and Werdegar, J., joined.

Opinion, 61 Cal.Rptr.2d 244, vacated.

West Headnotes (7)

[1] **Administrative Law and Procedure**
Law questions in general

15AAdministrative Law and Procedure
15AVJudicial Review of Administrative Decisions
15AV(E)Particular Questions, Review of
15Ak796Law questions in general

The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.

106 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Deference to agency in general

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak431Deference to agency in general
(Formerly 361k219(1))

Agency interpretation of a statute does not carry the same weight, and it is not reviewed under the same standard, as a quasi-legislative regulation; disapproving *Rizzo v. Board of Trustees*, 27 Cal.App.4th 853, 32 Cal.Rptr.2d 892; *DeYoung v. City of San Diego*, 147 Cal.App.3d 11, 194 Cal.Rptr. 722; *Rivera v. City of Fresno*, 6 Cal.3d 132, 98 Cal.Rptr. 281, 490 P.2d 793.

23 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Legislative questions; rule-making

15AAdministrative Law and Procedure
15AVJudicial Review of Administrative Decisions
15AV(E)Particular Questions, Review of
15Ak797Legislative questions; rule-making

When a court assesses the validity of quasi-legislative rules, the scope of its review is narrow; if the court is satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end.

42 Cases that cite this headnote

[4] **Administrative Law and Procedure**
Effect
Administrative Law and Procedure
Deference to agency in general

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak416Effect
15Ak416.1In general
15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak431Deference to agency in general

Because interpretation is an agency's legal opinion, however "expert," rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference than quasi-legislative rule.

72 Cases that cite this headnote

[5] **Administrative Law and Procedure**
Deference to agency in general

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak431Deference to agency in general
(Formerly 361k219(1))

Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent is fundamentally situational; court must consider complex factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command.

139 Cases that cite this headnote

[6] **Administrative Law and Procedure**
Deference to agency in general

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak431Deference to agency in general
(Formerly 15Ak416.1)

If an agency has adopted an interpretive rule in accordance with Administrative Procedure Act (APA) provisions, that circumstance weighs in favor of judicial deference; however, even formal interpretive rules do not command the same weight as quasi-legislative rules. 5 U.S.C.A. § 551 et seq.

123 Cases that cite this headnote

[7] **Taxation**
Actions

371Taxation
371IXSales, Use, Service, and Gross Receipts Taxes
371IX(H)Payment
371k3702Recovery of Taxes Paid
371k3704Actions
(Formerly 371k1336)

State Board of Equalization's interpretation of sales and use tax statutes, set out in its Business Taxes Law Guide opinion summaries, were entitled to some consideration by court in use tax refund case, but not degree of judicial deference given to quasi-legislative rules.

22 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

BROWN, Justice.

For more than 40 years, the State Board of Equalization (Board) has made available for publication as the Business Taxes Law Guide summaries of opinions by its attorneys of the business tax effects of a wide range of transactions. Known as "annotations," the summaries are prompted by actual requests for legal opinions by the Board, its field auditors, and businesses subject to statutes within its jurisdiction. The annotations are ***5** brief statements — often only a sentence or two — purporting to state definitively the tax consequences of specific hypothetical business transactions.[1] More extensive analyses, called "back-ups," are available to those who request them.

FACTS

The taxpayer here, Yamaha Corporation of America (Yamaha), sells musical instruments nationwide. It purchased a quantity of these outside California without paying tax ("extax"), stored them in its resale inventory in a California warehouse, and eventually gave them away to artists, musical equipment dealers and media representatives as promotional gifts. Delivery was made by shipping the instruments via common carrier, either inside or outside California. Yamaha made similar gifts of brochures and other advertising material. Following an audit, the Board determined Yamaha had used the musical instruments and promotional materials *in* California and was thus subject to the state's use tax, an impost levied as a percentage of the property's purchase price. (See Rev. & Tax.Code, § 6008 et seq.) Yamaha paid the taxes determined by the Board to be due (about $700,000) under protest and then brought this refund suit. Although it did not contest the tax assessed on property given to California residents, Yamaha contended no tax was due on the gifts to *out-of-state* recipients.

The superior court decided Yamaha's out-of-state gifts were excluded from California's use tax, and ordered a refund. That disposition, however, was overturned by the Court of Appeal. Casting the issue as whether Yamaha's promotional gifts had occurred in California or in the state of the donee, the Court of Appeal looked to an annotation in the Business Taxes Law Guide. According to the guide, gifts are subject to California's use tax ***6** "[w]hen the donor divests itself of control over the property in this state ..."[2] *****3** (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots., *supra,* Annot. No. 280.0040, p. 3731.) ****1033** Adopting that annotation as dispositive, the Court of Appeal reversed the judgment of the superior court and reinstated the Board's tax assessment. We granted Yamaha's petition for review and now reverse the Court of Appeal's judgment and order the matter returned to that court for further proceedings consistent with our opinion.

DISCUSSION

I

[1] The question is what legal effect courts must give to the Board's annotations when they are relied on as supporting its position in taxpayer litigation. In the broader context of administrative law generally, the question is what standard courts apply when reviewing an agency's *interpretation* of a statute. In effect, the Court of Appeal held the annotations were entitled to the same "weight" or "deference" as "quasi-legislative" rules.[3] The Court of Appeal adopted the following formulation: "[A] long-standing and consistent administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is either 'arbitrary, capricious or without rational basis' [citations], ***7** or is 'clearly erroneous or unauthorized.' [Citation.] Opinions of the administrative agency's counsel construing the statute," the court went on to say, "are likewise entitled to consideration. [Citations.] Especially where there has been acquiescence by persons having an interest in the matter," the court added, "courts will generally not depart from such an interpretation unless it is unreasonable or clearly erroneous." As this extract from the Court of Appeal opinion indicates, the court relied on a skein of cases as supporting these several, somewhat inconsistent, propositions of administrative law.

We reach a different conclusion. An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike

quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation. Justice Mosk may have provided the best description when he wrote in *Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th 559, 38 Cal.Rptr.2d 139, 888 P.2d 1268, that " 'The appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other.' [Citation.] Quasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum." ***4 **1034 (*Id.* at pp. 575–576, 38 Cal.Rptr.2d 139, 888 P.2d 1268; see also *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325–326, 109 P.2d 935 [An "administrative interpretation ... will be accorded great respect by the courts and will be followed if not clearly erroneous. [Citations.] But such a tentative ... interpretation makes no pretense at finality and it is the duty of this court ... to state the true meaning of the statute finally and conclusively, even though this requires the overthrow of an earlier erroneous administrative construction. [Citations.] The ultimate interpretation of a statute is an exercise of the judicial power ... conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body."].)

Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending ***8** on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. (See *Traverso v. People* ex rel. *Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206, 54 Cal.Rptr.2d 434.) Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, "The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action." (Judicial Review of Agency Action (Feb.1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81, italics added.)

II

[2] Here, the Court of Appeal relied on language from its prior cases suggesting broadly that an agency interpretation of a statute carries the *same* weight — that is, is reviewed under the same standard — as a quasi-legislative regulation. Unlike the annotations here, however, quasi-legislative rules are the substantive product of a delegated *legislative* power conferred on the agency. The formulation on which the Court of Appeal relied is thus apt to lead a court (as it led here) to abdicate a quintessential judicial duty — applying its independent judgment de novo to the merits of the *legal* issue before it. The fact that in this case the Court of Appeal determined Yamaha's tax liability by giving the Board's annotation a weight amounting to unquestioning acceptance only compounded the error.

We derive these conclusions from long-standing administrative law decisions of this court. Although the web making up that jurisprudence is not seamless, on the whole it is both logical and coherent. In *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 130 Cal.Rptr. 321, 550 P.2d 593 (*Culligan*), the taxpayer sued for a refund of sales and use taxes paid under protest on ion-exchange equipment used to condition water and leased to residential subscribers: Because it came from a service business rather than the rental of property, the taxpayer contended, the income was not subject to the Sales and Use Tax Law. In refund litigation, the Board relied on an affidavit of its assistant chief counsel characterizing the transactions as leases taxable under the Sales and Use Tax Law. The trial court rejected the Board's position, calling it an unwarranted extension of the words of the statute, and awarded judgment to the taxpayer. (17 Cal.3d at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.)

Justice Sullivan began his opinion for a unanimous court by asking what was "the appropriate standard of review applicable to the [use tax] assessment against" the taxpayer. (*Culligan, supra,* 17 Cal.3d at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) The Board ***9** contended its assessment was based on an "administrative classification" and could be judicially overturned only if it was "arbitrary, capricious or without rational basis." (*Ibid.*) Our opinion pointed out, however, that the basis

for the Board's tax assessment "was not embodied in any formal regulation or even interpretative ruling covering the water ***5 **1035 conditioning industry as a whole." (*Ibid.*) Instead, its basis "was nothing more than the Board auditor's interpretation of two existing regulations." (*Ibid.*) "If the Board had promulgated a formal regulation determining the proper classification of receipts derived from the rental of exchange units ... and the regulation had been challenged in the [refund] action," our *Culligan* opinion went on to say, "the proper scope of reviewing such regulation *would* be one of limited judicial review as urged by the Board. [Citations.]" (*Ibid.*, italics added.)

That was not the case in *Culligan,* however. Instead of adopting a formal regulation, the Board and its staff had considered the facts of the taxpayer's particular transactions, interpreted the statutes and regulations they deemed applicable, and "arrived at certain conclusions as to plaintiff's tax liability and assessed the tax accordingly." (17 Cal.3d at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) Far from being "the equivalent of a regulation or ruling of general application," the Board's argument was "merely its litigating position in this particular matter." (*Id.* at p. 93, 130 Cal.Rptr. 321, 550 P.2d 593.) In an important footnote to its opinion, the *Culligan* court disapproved language in several Court of Appeal decisions "indicating that the proper scope of review of such litigating positions of the Board (announced either in tax bulletins or merely as the result of an individual audit) is to determine whether the Board's assessment was arbitrary, capricious or had no reasonable or rational basis." (*Id.* at p. 93, fn. 4, 130 Cal.Rptr. 321, 550 P.2d 593.)

Although the Court of Appeal in this case cited *Culligan, supra,* 17 Cal.3d 86, 130 Cal.Rptr. 321, 550 P.2d 593, it regarded *American Hospital Supply Corp. v. State Bd. of Equalization* (1985) 169 Cal.App.3d 1088, 215 Cal.Rptr. 744 (*American Hospital*) as the decisive precedent. The question there was whether disposable paper menus, used for patients' meals in hospitals, were subject to the sales tax. In concluding they were, the Court of Appeal relied on a ruling of Board counsel interpreting a quasi-legislative regulation of the Board. "Interpretation of an administrative regulation," the court wrote, "like [the] interpretation of a statute, is a question of law which rests with the courts. However, the agency's own interpretation of its regulation is entitled to great weight." (*Id.* at p. 1092, 215 Cal.Rptr. 744.) The Board's interpretation could be overturned, the opinion went on to state, only if it was " 'arbitrary, capricious or without rational basis.' " (*Ibid.*)

The *American Hospital* opinion also rejected the taxpayer's contention that because the rule at issue was only an interpretation and not a quasi-legislative rule, it was not entitled to deference. *10 (*American Hospital, supra,* 169 Cal.App.3d at p. 1092, 215 Cal.Rptr. 744.) Instead, the court read *Culligan* as standing for the *opposite* proposition. Because we had said the rule at issue there did not cover an entire industry, the Court of Appeal reasoned *Culligan* had held in effect that it was nothing more than a " 'litigating position' " and could be ignored. (119 Cal.App.3d at p. 1093, 215 Cal.Rptr. 744.) On that basis, *American Hospital* concluded that because the Board's position on the taxability of paper menus *was* embodied in a "formal regulation" *and* covered the entire hospital industry, it was entitled to same deference as a quasi-legislative rule: "[It] must prevail because it is neither 'arbitrary, capricious or without rational basis' (*Culligan Water Conditioning v. State Bd. of Equalization, supra,* 17 Cal.3d 86, 92, 130 Cal.Rptr. 321, 550 P.2d 593) nor is it 'clearly erroneous or unauthorized' (*Rivera v. City of Fresno* [(1971)] 6 Cal.3d 132, 140, 98 Cal.Rptr. 281, 490 P.2d 793)." (*Ibid.*)

We think the Court of Appeal in *American Hospital, supra,* 169 Cal.App.3d 1088, 215 Cal.Rptr. 744, and the Court of Appeal in this case by relying on it, failed to distinguish between two classes of rules — quasi-legislative and interpretive — that, because of their differing legal sources, command significantly different degrees of deference by the courts. Moreover, *American Hospital* misread our opinion in *Culligan* when it identified the feature that distinguishes one kind of rule from the other. Although the Court of Appeal here did not rely on other prior cases as much as on *American Hospital,* it cited several that appear to perpetuate the same ***6 **1036 confusion. (See *Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853, 861, 32 Cal.Rptr.2d 892; *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18, 194 Cal.Rptr. 722; *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 140, 98 Cal.Rptr. 281, 490 P.2d 793.)

[3] It is a "black letter" proposition that there are two categories of administrative rules and that the distinction between them derives from their different sources and ultimately from the constitutional doctrine of the separation of powers. One kind — quasi-legislative rules — represents an authentic form of substantive lawmaking: Within its jurisdiction, the agency has been delegated the Legislature's lawmaking power. (See, e.g., 1 Davis & Pierce, Administrative Law, *supra,* § 6.3, at pp. 233–248; 1 Cooper, State Administrative Law (1965) Rule Making: Procedures, pp. 173–176; Bonfield, State Administrative Rulemaking (1986) Interpretive Rules, § 6.9.1, pp. 279–283; 9 Witkin, Cal. Procedure (4th ed.

1997) Administrative Proceedings, § 116, p. 1160 [collecting cases].) Because agencies granted such substantive rulemaking power are truly "making law," their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it ***11** is reasonably necessary to implement the purpose of the statute, judicial review is at an end.

We summarized this characteristic of quasi-legislative rules in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65, 219 Cal.Rptr. 142, 707 P.2d 204 (*Wallace Berrie*): " '[I]n reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is "within the scope of the authority conferred" [citation] and (2) is "reasonably necessary to effectuate the purpose of the statute" [citation].' [Citation.] 'These issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity....' [Citation.] Our inquiry necessarily is confined to the question whether the classification is 'arbitrary, capricious or [without] reasonable or rational basis.' (*Culligan, supra,* 17 Cal.3d at p. 93, fn. 4, 130 Cal.Rptr. 321, 550 P.2d 593 [citations].)"[4]

[4] It is the other class of administrative rules, those *interpreting* a statute, that is at issue in this case. Unlike quasi-legislative rules, an agency's interpretation does not implicate the exercise of a delegated lawmaking power; instead, it represents the agency's view of the statute's legal meaning and effect, questions lying within the constitutional domain of the courts. But because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with satellite legal and regulatory issues. It is this "expertise," expressed as an interpretation (whether in a regulation or less formally, as in the case of the Board's tax annotations), that is the source of the presumptive value of the agency's views. An important corollary of agency interpretations, however, is their diminished power to bind. Because an interpretation is an agency's *legal opinion,* however "expert," rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference. (*Bodinson Mfg. Co. v. Cal. Emp. Com., supra,* 17 Cal.2d at pp. 325–326, 109 P.2d 935.)

In *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 163 Cal.Rptr. 782, 609 P.2d 1, we contrasted *****7** ****1037** the narrow ***12** standard under which quasi-legislative rules are reviewed — " limited," we wrote, "to a determination whether the agency's action is arbitrary, capricious, lacking in evidentiary support, or contrary to procedures provided by law" (*id.* at p. 931, fn. 7, 163 Cal.Rptr. 782, 609 P.2d 1) — with the broader standard courts apply to interpretations. The quasi-legislative standard of review "is *inapplicable* when the agency is not exercising a discretionary rule-making power, but merely *construing* a controlling statute. The appropriate mode of review in such a case is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction. [Citation.]" (*Ibid.*, italics added; see also *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11, 270 Cal.Rptr. 796, 793 P.2d 2 ["courts are the ultimate arbiters of the construction of a statute"]; *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1389, 241 Cal.Rptr. 67, 743 P.2d 1323 ["The final meaning of a statute ... rests with the courts."]; *Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697 [" 'final responsibility for the interpretation of the law rests with the courts.' "].)

[5] Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent — the "weight" it should be given — is thus fundamentally *situational.* A court assessing the value of an interpretation must consider complex factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command. Professor Michael Asimow, an administrative law adviser to the California Law Revision Commission, has identified two broad categories of factors relevant to a court's assessment of the weight due an agency's interpretation: those "indicating that the agency has a comparative interpretive advantage over the courts," and those "indicating that the interpretation in question is probably correct." (Cal. Law Revision Com., Tent. Recommendation, Judicial Review of Agency Action (Aug.1995) p. 11 (Tentative Recommendation); see also Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L.Rev. 1157, 1192–1209.)

[6] In the first category are factors that "assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and

sensitive to the practical implications of one interpretation over another." (Tentative Recommendation, *supra,* at p. 11.) The second group of ***13** factors in the Asimow classification — those suggesting the agency's interpretation is likely to be correct — includes indications of careful consideration by senior agency officials ("an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than [one] contained in an advice letter prepared by a single staff member" (Tentative Recommendation, *supra,* at p. 11)), evidence that the agency "has consistently maintained the interpretation in question, especially if [it] is long-standing" (*ibid.*) ("[a] vacillating position ... is entitled to no deference" (*ibid.*)), and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted. If an agency has adopted an interpretive rule in accordance with Administrative Procedure Act provisions — which include procedures (e.g., notice to the public of the proposed rule and opportunity for public comment) that enhance the accuracy and reliability of the resulting administrative "product" — that circumstance weighs in favor of judicial deference. However, even formal interpretive rules do not command the same weight as quasi-legislative rules. Because " 'the ultimate resolution of ... legal questions rests with the courts' " (*Culligan, supra,* 17 Cal.3d at p. 93, 130 Cal.Rptr. 321, 550 P.2d 593), judges play a greater role when reviewing the persuasive value of interpretive rules than they do in determining the validity of quasi-legislative rules.

*****8 **1038** A valuable judicial account of the process by which courts reckon the weight of agency interpretations was provided by Justice Robert Jackson's opinion in *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (*Skidmore*), a case arising under the federal Fair Labor Standards Act. The question for the court was whether private firefighters' " waiting time" was countable as "working time" under the act and thus compensable. (323 U.S. at p. 136, 65 S.Ct. 161.) "Congress," the *sKidmore* opinion observed, "did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act." (*Id.* at p. 137, 65 S.Ct. 161.) "Instead, it put this responsibility on the courts. [Citation.] But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining [the issue in suit] and a knowledge of the customs prevailing in reference to their solution.... He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. [Citation.]" (*Id.* at pp. 137–138, 65 S.Ct. 161.)

***14** No statute prescribed the deference federal courts should give the administrator's interpretive bulletins and informal rulings, and they were "not reached as a result of ... adversary proceedings." (*Skidmore, supra,* 323 U.S. at p. 139, 65 S.Ct. 161.) Given those features, Justice Jackson concluded, the administrator's rulings "do not constitute an interpretation of the Act or a standard for judging factual situations which *binds* a ... court's processes, as an authoritative pronouncement of a higher court might do." (*Ibid.,* italics added.) Still, the court held, the fact that "the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect." (*Id.* at p. 140, 65 S.Ct. 161.) "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Ibid.*)

[7] The parallels between the statutory powers and administrative practice of the Board in interpreting the Sales and Use Tax Law, and those of the federal agency described in *Skidmore,* are extensive. As with Congress, our Legislature has not conferred adjudicatory powers on the Board as the means by which sales and use tax liabilities are determined; instead, the validity of those assessments is settled in tax refund litigation like this case. (Rev. & Tax.Code, § 6933.) Like the federal administrator in *Skidmore,* the Board has not adopted a formal regulation under its quasi-legislative rulemaking powers purporting to interpret the statute at issue here. As in *Skidmore,* however, the Board and its staff have accumulated a substantial "body of experience and informed judgment" in the administration of the business tax law "to which the courts and litigants may properly resort for guidance." (323 U.S. at p. 140, 65 S.Ct. 161.) Some of that experience and informed judgment takes the form of the annotations published in the Business Taxes Law Guide.

The opinion in the *Skidmore* case and Professor Asimow's account for the Law Revision Commission — together spanning a half-century of judicial and scholarly comment on the characteristics and role of administrative interpretations — accurately describe their value and the

criteria by which courts judge their weight. The deference due an agency interpretation — including the Board's annotations at issue here — turns on a legally informed, commonsense assessment of their contextual merit. "The weight of such a judgment in a particular case," to borrow again from Justice Jackson's opinion in *Skidmore,* "will depend upon *the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors* ***9** **1039** *which give it power to persuade, if lacking power* *15 *to control.*" (*Skidmore, supra,* 323 U.S. at p. 140, 65 S.Ct. 161, italics added.)

As we read the brief filed by the Attorney General, the Board does not contend for any greater judicial weight for its annotations. Its brief on the merits states that "Yamaha is correct that the annotations are not regulations, and they are not binding upon taxpayers, the Board itself, or the Court. Nevertheless, the annotations are digests of opinions written by the legal staff of the Board which are evidentiary of administrative interpretations made by the Board in the normal course of its administration of the Sales and Use Tax Law.... [T]he annotations have substantial precedential effect within the agency. [¶] The interpretation represented in [the] annotations is certainly entitled to some consideration by the Court."

We agree.

CONCLUSION

In deciding this case, the Court of Appeal gave greater weight to the Board's annotation than it warranted. Although the standard used by the Court of Appeal was not the correct one and prejudiced the taxpayer, regard for the structure of appellate decisionmaking suggests the case should be returned to the Court of Appeal. That court can then consider the merits of the use tax issue and the value of the Board's interpretation in light of the conclusions drawn here. To the extent language in *Rizzo v. Board of Trustees, supra,* 27 Cal.App.4th at page 861, 32 Cal.Rptr.2d 892, *DeYoung v. City of San Diego, supra,* 147 Cal.App.3d at page 18, 194 Cal.Rptr. 722, and *Rivera v. City of Fresno, supra,* 6 Cal.3d at page 140, 98 Cal.Rptr. 281, 490 P.2d 793, is inconsistent with the foregoing views, it is disapproved. We express no opinion on the merits of the underlying question of Yamaha's use tax liability.

DISPOSITION

The judgment of the Court of Appeal is reversed and the cause is remanded to that court for further proceedings consistent with this opinion.

GEORGE, C.J., and KENNARD, BAXTER and CHIN, JJ., concur.

MOSK, Justice, concurring.

I concur in the judgment of the majority that the Court of Appeal's formulation of the standard of review for tax annotations, the summaries of tax opinions of the State Board of Equalization's (Board) legal counsel published in the Business Taxes Law Guide, was not quite correct. Specifically the Court of Appeal erred in suggesting that it would defer to *16 the Board's or its legal counsel's rule unless that rule is "arbitrary and capricious." The majority do not purport to change the well-established, if not always consistently articulated, body of law pertaining to judicial review of administrative rulings, but merely attempt to clarify that law. I write separately to further clarify the relevant legal principles and their application to the present case.

The appropriate starting point of a discussion of judicial review of administrative regulations is an analysis of quasi-legislative regulations, those regulations formally adopted by an agency pursuant to the California Administrative Procedures Act (APA) and binding on the agency. "The proper scope of a court's review is determined by the *task* before it." (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 679, 170 Cal.Rptr. 484, 620 P.2d 1032, italics added.) In the case of quasi-legislative regulations, the court has essentially two tasks. The first duty is "to determine whether the [agency] exercised [its] quasi-legislative authority within the bounds of the statutory mandate." (*Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697 (*Morris*).) As the *Morris* court made clear, this is a matter for the independent judgment of the court. "While the construction of a statute by officials charged with its administration, including their interpretation of the authority invested in them to implement and carry out its provisions, is entitled to *great weight,* nevertheless 'Whatever the force of administrative construction ... *final responsibility for the interpretation of the law rests with the courts.*' [Citation.] Administrative regulations ***10** **1040** that alter or amend the statute or enlarge or impair

its scope are void and courts not only may, but it is their obligation to strike down such regulations. [Citations.]" (*Ibid.,* italics added.) This duty derives directly from statute. "Under Government Code[1] section 11373 [now § 11342.1], '[e]ach regulation adopted [by a state agency], to be effective, must be within the scope of authority conferred....' Whenever a state agency is authorized by statute 'to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, *no regulation adopted is valid or effective unless consistent and not in conflict with the statute....* ' ([§ 11342.2].)" (*Morris, supra,* 67 Cal.2d at p. 748, 63 Cal.Rptr. 689, 433 P.2d 697, fn. omitted, italics added by *Morris* court.)

The court's second task arises once it has completed the first. "If we conclude that the [agency] was empowered to adopt the regulations, we must also determine whether the regulations are 'reasonably necessary to effectuate the purpose of the statute.' [(§ 11342.2).] In making such a determination, the court will not 'superimpose its own policy judgment upon the ***17** agency in the absence of an arbitrary and capricious decision.' [Citations.]" (*Morris, supra,* 67 Cal.2d at pp. 748–749, 63 Cal.Rptr. 689, 433 P.2d 697.)

In *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11, 270 Cal.Rptr. 796, 793 P.2d 2 (*Rank*) we further clarified the two tasks and two distinct standards of review for courts scrutinizing agency regulations. We stated: "As we said in *Pitts v. Perluss* (1962) 58 Cal.2d 824[, 833, 27 Cal.Rptr. 19, 377 P.2d 83], '[a]s to quasi-legislative acts of administrative agencies, "judicial review is limited to an examination of the proceedings before the officer to determine whether his action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether he has failed to follow the procedure and give the notices required by law." ' [Citations.] When, however, a regulation is challenged as inconsistent with the terms or intent of the authorizing statute, the standard of review is different, because the courts are the ultimate arbiters of the construction of a statute. Thus, [the *Morris* court] in finding that the challenged regulations contravened legislative intent, rejected the agency's claim that the only issue for review was whether the regulations were arbitrary and capricious." (*Ibid.,* fn. omitted.) The *Rank* court then proceeded to reiterate the *Morris* formulation that " '[w]hile the construction of a statute by officials charged with its administration ... is entitled to great weight, ... final responsibility for the interpretation of the law rests with the courts.' " (*Ibid.*)[2] (We will henceforth refer to this standard as the "independent judgment/great weight standard.")

There is an important qualification to the independent judgment/great weight standard articulated above, when a court finds that the Legislature has *delegated* the task of interpreting or elaborating on a statute to an administrative agency. A court may find that the Legislature has intended to delegate this interpretive or gap-filling power when it employs open-ended statutory language that an agency is authorized to apply or "when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make." (Asimow, *The Scope of Judicial Review of Decisions of* ***18** *California Administrative Agencies* (1995) *****11** ****1041** 42 UCLA L.Rev. 1157, 1198–1199 (Asimow).) For example, in *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 9 Cal.Rptr.2d 358, 831 P.2d 798 (*Moore*), we reviewed a regulation by the Board of Accountancy, the agency statutorily chartered to regulate the accounting profession in this state. The regulation provided that those unlicensed by that board could not use the title "accountant," interpreting a statute, Business and Professions Code section 5058, that forbids use of titles "likely to be confused with" the titles of "certified public accountant" and "public accountant." (2 Cal.4th at p. 1011, 9 Cal.Rptr.2d 358, 831 P.2d 798.) As we stated, "the Legislature delegated to the Board the authority to determine whether a title or designation not identified in the statute is likely to confuse or mislead the public." (*Id.* at pp. 1013–1014, 9 Cal.Rptr.2d 358, 831 P.2d 798.)

Thus, the agency's interpretation of a statute may be subject to the most deferential "arbitrary and capricious" standard of review when the agency is expressly or impliedly delegated interpretive authority. Such delegation may often be implied when there are broadly worded statutes combined with an authorization of agency rulemaking power. But when the agency is called upon to enforce a detailed statutory scheme, discretion is as a rule correspondingly narrower. In other words, a court must always make an independent determination whether the agency regulation is "within the scope of the authority conferred," and that determination includes an inquiry into the extent to which the Legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing statute.

The above schema applies to so-called "interpretive" regulations as well as quasi-legislative regulations. As the majority observe, "administrative rules do not always fall neatly into one category or the other...." (Maj. opn., *ante,* at p. 3, fn. 3 of 78 Cal.Rptr.2d, at p. 1033, fn. 3 of 960 P.2d.) Indeed, regulations subject to the formal procedural requirements of the APA include those that "interpret" the

law enforced or administered by a government agency, as well as those that "implement" or "make specific" such law. (§ 11342, subd. (b).) As we recently stated: "A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially *legislative* in nature even if it merely *interprets* applicable law." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574–575, 59 Cal.Rptr.2d 186, 927 P.2d 296, italics added.)[3] Moreover, all regulations are "interpretive" to some extent, because all ***19** regulations implicitly or explicitly interpret "the authority invested in them to implement and carry out [statutory] provisions...." (*Morris, supra,* 67 Cal.2d at p. 748, 63 Cal.Rptr. 689, 433 P.2d 697.)

Of course, some regulations may be properly designated "interpretive" inasmuch as they have no purpose other than to interpret statutes. (See, e.g., *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 163 Cal.Rptr. 782, 609 P.2d 1.) In the case of such regulations, courts will be engaged only in the first of the two tasks discussed above, i.e., ensuring that the regulation is within the scope of the statutory authority conferred, employing the independent judgment/great weight test. (See *id.* at p. 931, fn. 7, 163 Cal.Rptr. 782, 609 P.2d 1.)

In sum, when reviewing a quasi-legislative regulation, courts consider whether the regulation is within the scope of the authority conferred, essentially a question of the validity of an agency's statutory interpretation, guided by the independent judgment/great weight standard. (*Rank, supra,* 51 Cal.3d at p. 11, 270 Cal.Rptr. 796, 793 P.2d 2.) This is in contrast to the second aspect of the inquiry, whether a regulation is "reasonably necessary *****12 **1042** to effectuate the statutory purpose," wherein courts "will not intervene in the absence of an arbitrary or capricious decision." (*Ibid.,* citing *Morris, supra,* 67 Cal.2d at p. 749, 63 Cal.Rptr. 689, 433 P.2d 697.) Courts may also employ the "arbitrary and capricious" standard in reviewing whether the agency's construction of a statute is correct if the court determines that the particular statutory scheme in question explicitly or implicitly delegates this interpretive or "gap-filling" authority to an administrative agency. (See *Moore v. California State Bd. of Accountancy, supra,* 2 Cal.4th at pp. 1013–1014, 9 Cal.Rptr.2d 358, 831 P.2d 798; Asimow, *supra,* 42 UCLA L.Rev. at p. 1198.)

What standard of review should be employed for administrative rulings that were not formally adopted under the APA? Such regulations fall generally into two categories. The first is the class of regulations that *should* have been formally adopted under the APA, but were not. In such cases, the law is clear that in order to effectuate the policies behind the APA courts are to give *no* weight to these interpretive regulations. (*Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th at p. 576, 59 Cal.Rptr.2d 186, 927 P.2d 296; *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204–205, 149 Cal.Rptr. 1, 583 P.2d 744.) To hold otherwise would help to perpetuate the problem of avoidance by administrative agencies of " 'the mandatory requirements of the [APA] of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the [California Code of Regulations].' " ***20** (*Armistead, supra,* 22 Cal.3d at p. 205, 149 Cal.Rptr. 1, 583 P.2d 744.) For these reasons, and quite apart from any expertise the agency may possess in interpreting and administering the statute, courts in effect ignore the agency's illegal regulation.

In the second category are those regulations that are not subject to the APA because they are expressly or implicitly exempted from or outside the scope of APA requirements. For such rulings, the standard of judicial review of agency interpretations of statutes is basically the same as for those rules adopted under the APA, i.e., the independent judgment/great weight standard. (See, e.g., *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 501, 138 Cal.Rptr. 696, 564 P.2d 848 [applying essentially this standard to a statutory interpretation arising within the context of the Workers' Compensation Appeals Board's decisional law]; see also Asimow, *supra,* 42 UCLA L.Rev. at pp. 1200–1201; Judicial Review of Agency Action (Feb.1997) 27 Cal. Law Revision Com. Rep. (1997) pp. 81–82 (Judicial Review of Agency Action).)

The Board counsel's legal ruling at issue in this case is an example of express exemption from the APA. Section 11342, subdivision (g), specifies that the term "regulation" for purposes of the APA does not include "legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization...." It is therefore evident that our decisions pertaining to regulations that fail to be approved according to required APA procedures are inapposite. It also appears evident that these rulings, as agency interpretations of statutory law, are also to be reviewed under the independent judgment/great weight standard.

But, as the majority point out, the precise weight to be accorded an agency interpretation varies depending on a number of factors. Professor Asimow states that deference is especially appropriate not only when an administrative agency has particular expertise, but also by virtue of its

specialization in administering a statute, which "gives [that agency] an intimate knowledge of the problems dealt with in the statute and the various administrative consequences arising from particular interpretations." (Asimow, *supra,* 42 UCLA L.Rev. at p. 1196.) Moreover, deference is more appropriate when, as in the present case, the agency is interpreting "the statute [it] enforces" rather than "some other statute, the common law, the [C]onstitution, or prior judicial precedents." (*Ibid.*)

Another important factor, as the majority recognize, is whether an administrative construction is consistent and of long standing. (Maj. opn., *ante,* at p. 7 of 78 Cal.Rptr.2d, at p. 1037 of 960 P.2d) This factor is particularly important for resolution of the present case because the tax annotation with which the case is principally concerned, ***21** Business *****13 **1043** Taxes Law Guide Annotation No. 280.0040, was first published in 1963, and *Yamaha Corp. of America* does not contest that it has represented the Board's position on the tax question at issue at least since that time. (See now 2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Annots. (1998) Annot. No. 280.0040, p. 3731 (hereafter Annotation No. 280.0040).)

As the Court of Appeal has stated: "Long-standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous." (*Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853, 861, 32 Cal.Rptr.2d 892). This principle has been affirmed on numerous occasions by this court and the Courts of Appeal. (See, e.g., *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18, 194 Cal.Rptr. 722; *Nelson v. Dean* (1946) 27 Cal.2d 873, 880–881, 168 P.2d 16; *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757, 151 P.2d 233; *Thornton v. Carlson* (1992) 4 Cal.App.4th 1249, 1256–1257, 6 Cal.Rptr.2d 375; *Lute v. Governing Board* (1988) 202 Cal.App.3d 1177, 1183, 249 Cal.Rptr. 161; *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 252, 239 Cal.Rptr. 395; *Horn v. Swoap* (1974) 41 Cal.App.3d 375, 382, 116 Cal.Rptr. 113.) Moreover, this principle applies to administrative practices embodied in staff attorney opinions and other expressions short of formal, quasi-legislative regulations. (See, e.g., *DeYoung, supra,* 147 Cal.App.3d 11, 19–21, 194 Cal.Rptr. 722 [long-standing interpretation of city charter provision embodied in city attorney's opinions]; *Napa Valley Educators' Assn., supra,* 194 Cal.App.3d at pp. 251–252, 239 Cal.Rptr. 395 [evidence in the record of the case, including a declaration by official with the State Department of Education, shows long-standing practice of following a certain interpretation of an Education Code provision].)

Two reasons have been advanced for this principle. First, "When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation." (*Whitcomb Hotel, Inc. v. Cal. Emp. Com., supra,* 24 Cal.2d at p. 757, 151 P.2d 233; see also *Nelson v. Dean, supra,* 27 Cal.2d at p. 881, 168 P.2d 16; *Rizzo v. Board of Trustees, supra,* 27 Cal.App.4th at p. 862, 32 Cal.Rptr.2d 892.)

Second, as we stated in *Moore, supra,* 2 Cal.4th at pages 1017–1018, 9 Cal.Rptr.2d 358, 831 P.2d 798, "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be ***22** presumed to know of it." As the Court of Appeal has further articulated: " '[L]awmakers are presumed to be aware of long-standing administrative practice and, thus, the reenactment of a provision, or the failure to substantially modify a provision, is a strong indication the administrative practice was consistent with underlying legislative intent.' " (*Rizzo v. Board of Trustees, supra,* 27 Cal.App.4th at p. 862, 32 Cal.Rptr.2d 892; see also *Thornton v. Carlson, supra,* 4 Cal.App.4th at p. 1257, 6 Cal.Rptr.2d 375; *Lute v. Governing Board, supra,* 202 Cal.App.3d at p. 1183, 249 Cal.Rptr. 161; *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist., supra,* 194 Cal.App.3d at p. 252, 239 Cal.Rptr. 395; *Horn v. Swoap, supra,* 41 Cal.App.3d at p. 382, 116 Cal.Rptr. 113.) I note that in the present case, the statute under consideration, Revenue and Taxation Code section 6009.1, has been amended twice since the issuance of Annotation No. 280.0040. (Stats.1965, ch. 1188, § 1, p. 3004; Stats.1980, ch. 546, § 1, p. 1503.)

To state the matter in other terms, courts often recognize the propriety of assigning great weight to administrative interpretations of law either by reference to an explicit or implicit delegation of power by the Legislature to an administrative agency (see *Moore, supra,* 2 Cal.4th at pp. 1013–1014, 9 Cal.Rptr.2d 358, 831 P.2d 798; Asimow, *supra,* 42 UCLA L.Rev. at pp. 1198–1199), or by noting the agency's specialization and expertise in interpreting the statutes it is *****14 **1044** charged with administering (see *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982, 8 Cal.Rptr.2d 565; Asimow, *supra,* 42 UCLA L.Rev. at pp. 1195–1196). But there is a third reason for paying special heed to an administrative interpretation: the reality

that the administrative agency — by virtue of the necessity of performing its administrative functions — creates a body of de facto law in the interstices of statutory law, which is relied on by the business community and the general public to order their affairs and, after a sufficient passage of time, is presumptively accepted by the Legislature. In the present case, this third rationale for according great weight to an administrative interpretation is particularly applicable. Thus, judicial deference in this case is owed not so much to the tax annotation per se but to a long-standing practice of enforcement and interpretation by Board staff of which the annotation is evidence.

There are also particularly sound reasons why the principle of giving especially greater weight to long-standing administrative practice should apply when, as in this case, that practice is embodied in a published ruling of the Board's legal counsel. These rulings have a special legal status. As noted, they have been specifically exempted from the APA by section 11342, subdivision (g). The purpose of this exemption was stated by the Franchise Tax Board staff in its enrolled bill report to the Governor immediately prior the enactment of the 1983 amendment containing the exemption, and its statement could be equally well applied to the Board of ***23** Equalization. "Department counsel issues a large number of legal rulings in several forms which address specific problems of taxpayers. While these opinions address specific problems, *they are intended to have general application to all taxpayers similarly situated.* This bill provides that such rulings are not regulations, and accordingly, not subject to the [Office of Administrative Law (OAL)] review process. This statutory determination will permit the department to continue to provide a valuable service to taxpayers. If rulings were deemed to be regulations, the service would have to be discontinued because of the administrative burdens created by the OAL review process." (Franchise Tax Bd. staff, Enrolled Bill Rep., Assem. Bill No. 227 (1983–1984 Reg. Sess.) Sept. 16, 1983, p. 3, italics added.)

Thus, the passage of the 1983 amendment to section 11342 was evidently designed for the benefit of taxpayers, so that they would continue to have information about the effective legal positions of the two tax boards. The complexity of tax law and its application to the manifold factual situations of individual taxpayers appears to far outpace an agency's capacity to promulgate and amend formal regulations. Given the importance of certainty in tax law, the Board has long engaged in the practice of issuing legal opinions to individual taxpayers. (See 1 Cal. Taxes (Cont., Ed., Bar Supp.1996) § 2.152, p. 347.) The Legislature recognized such practice, and recognized the propriety of taxpayer reliance on such rulings, in Revenue and Tax Code section 6596. That section provides that if a person's failure to make a timely payment or return "is due to the person's reasonable reliance on written advice from the [B]oard," that person would be relieved of certain payment obligations. The authorization in section 11342 to publish such individual rulings without following APA requirements is a further legislative means of facilitating business planning and increasing taxpayer certainty about tax law. Publication of this information allows taxpayers subject to the sales and use tax to structure their affairs accordingly, and, if they perceive the need, lobby the Board or the Legislature to overturn these legal rulings. As the Attorney General states in his brief, such rulings, while not binding on the agency, "have substantial precedential effect within the agency." There is accordingly no reason to decline to extend to such legal rulings, insofar as they embody the Board's long-standing interpretations of the sales and use tax statutes, the especially great weight accorded to other representations of long-standing administrative practice.[4]

*****15 **1045** Tax annotations representing the Board's long-standing position may usefully be contrasted to positions the Board might adopt in the context of ***24** litigation. In *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 130 Cal.Rptr. 321, 550 P.2d 593, we found that such litigating positions were not entitled to as great a level of deference as administrative rulings that were "embodied in formal regulation[s] or even interpretive ruling[s] covering the ... industry as a whole...." (*Id.* at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593).[5] The tax annotation at issue in this case, although originally addressing an individual taxpayer's query, was published and has represented the Board's categorical position regarding taxation of gifts originating from a California source. The annotation, therefore, being both an interpretive ruling of a general nature, and one of long standing, is deserving of significantly greater weight than if the Board had adopted its position only as part of the present litigation.[6]

It may be argued that regulations formally adopted in compliance with the APA should intrinsically be assigned greater weight than tax annotations, because the former are promulgated only after a notice and comment period, whereas the latter are devised by the Board's legal staff without public input. ***25** In the abstract, that argument is not without merit. But even if the statutory interpretations contained in tax annotations are not, *ab initio,* as reliable or worthy of deference as formally adopted regulations, the well-established California case law quoted above demonstrates that such reliability may be earned subsequently. Tax annotations that represent the Board's

administrative practices may, if they withstand the test of time, merit a weight that initially may not have been intrinsically warranted. Or in other words, while formal APA adoption is one factor in favor of giving greater weight to an agency construction of a statute, the fact that a rule is of long-standing and the statute it interprets has been reenacted are other such factors.

In sum, as the Attorney General correctly sets forth in his brief, the appropriate standard **1046 of review for Annotation No. 280. 0040 ***16 can be stated as follows: (1) the court should exercise its independent judgment to determine whether the Board's legal counsel correctly construed the statute; (2) the Board's construction of the statute is nonetheless entitled to "great weight"; (3) when, as here, the Board is construing a statute it is charged with administering and that statutory interpretation is long-standing and has been acquiesced in by persons interested in the matter, and by the Legislature, it is particularly appropriate to give these interpretations great weight. (*Rizzo v. Board of Trustees, supra,* 27 Cal.App.4th at p. 861, 32 Cal.Rptr.2d 892.)[7]

The Court of Appeal in this case, although it stated the standard of review nearly correctly, reflected some of the confusion found in our case law when it suggested that it would defer to the Board's annotation unless it was "arbitrary, capricious or without rational basis." It is therefore appropriate to remand to the Court of Appeal for reconsideration in light of the proper standard of review.

GEORGE, C.J., and WERDEGAR, J., concur.

Parallel Citations

19 Cal.4th 1, 960 P.2d 1031, 98 Cal. Daily Op. Serv. 6683, 98 Daily Journal D.A.R. 9211

Footnotes

1 Two examples, drawn at random, illustrate the annotation form: "Beer Can Openers, furnished by breweries to retailers with beer, are not regarded as 'self consumed' by the breweries. 10/2/50." (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots. (1998) Annot. No. 280.0160, p. 3731.) "Bookmarks Sold For $2.00 'Postage And Handling'. A taxpayer located in California offers a bookmark to customers for a $2.00 charge, designated as postage and handling. Most of the orders received for the bookmark are from out of state. [¶] Assuming that the charge for the bookmark is 50 percent or more of its cost, the taxpayer is considered to be selling the bookmarks rather than consuming them (Regulation 1670(b)). Accordingly, when a bookmark is sent to a California customer through the U.S. Mail, the amount of postage shown on the package is considered to be a nontaxable transportation charge. For example, when a bookmark is sent to a California customer, if the postage on the envelope is shown as 25 cents, then the taxable gross receipts from the transfer is $1.75. If the bookmark is mailed to a customer located outside California, tax does not apply to any of the $2.00 charge. 12/5/88." (*Id.,* Annot. No. 280.0185, pp. 3731–3732.)

2 The annotation on which the Board relied — Annotation No. 280.0040 — purports to interpret section 6009.1 of the Revenue and Taxation Code, excluding from the definition of storage and use "keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state." Captioned "Advertising Material — Gifts," the annotation provides that "Advertising or promotional material shipped or brought into the state and temporarily stored here prior to shipment outside state is subject to use tax when a gift of the material [is] made and title passes to the donee in this state. When the donor divests itself of control over the property in this state the gift is regarded as being a taxable use of the property. 10/11/63." (2A State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots., *supra,* Annot. No. 280.0040, p. 3731.)

3 Throughout, we use the terms "quasi-legislative" and "interpretive" in their traditional administrative law senses; i.e., as indicating both the constitutional source of a rule or regulation and the weight or judicial deference due it. (See, e.g., 1 Davis & Pierce, Administrative Law (3d ed. 1994) § 6.3, pp. 233–248.) Of course, administrative rules do not always fall neatly into one category or the other; the terms designate opposite ends of an administrative continuum, depending on the breadth of the authority delegated by the Legislature. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 575–576, 38 Cal.Rptr.2d 139, 888 P.2d 1268; cf. *Tidewater Marine Western , Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574–575, 59 Cal.Rptr.2d 186, 927 P.2d 296 [comparing the two kinds of rules and suggesting that while interpretive rules are not quasi-legislative in the traditional sense, "an agency would arguably still have to adopt these regulations in accordance with [Administrative Procedure Act rulemaking requirements]." The issue is not strictly presented by this case, however: Government Code section 11342, subdivision (g) declares that "[r]egulation" does not include "legal rulings of counsel issued by the ... State Board of Equalization."].)

4 In one respect, our opinion in *Wallace Berrie* may overstate the level of deference — even quasi-legislative rules are

reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has "final responsibility for the interpretation of the law" under which the regulation was issued. (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757, 151 P.2d 233; see cases cited, *post,* at p. 7 of 78 Cal.Rptr.2d, at p. 1037 of 960 P.2d; *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022, 50 Cal.Rptr.2d 892 [Standard of review of challenges to "fundamental legitimacy" of quasi-legislative regulation is " 'respectful nondeference.' "].)

1 All further statutory references are to the Government Code unless otherwise stated.

2 Certain of our own cases have confused the standards of review in this two-pronged test. For example, in *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65, 219 Cal.Rptr. 142, 707 P.2d 204, after stating the above two-pronged test, declared that neither prong " 'present[s] a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with [a] strong presumption of regularity....' [Citation.] Our inquiry necessarily is confined to the question whether the classification is ' arbitrary, capricious or [without] reasonable or rational basis.' [Citation.]" As the discussion of *Rank* and *Morris* above makes clear, the first prong of the inquiry — whether the regulation is "within the scope of the authority conferred" — is *not* limited to the "arbitrary and capricious" standard of review, but employs the independent judgment/great weight standard. (*Rank, supra,* 51 Cal.3d at p. 11, 270 Cal.Rptr. 796, 793 P.2d 2; *Morris, supra,* 67 Cal.2d at pp. 748–749, 63 Cal.Rptr. 689, 433 P.2d 697.) This confusion is in part responsible for the misstatements of the Court of Appeal in the present case.

3 I note that in federal law, by contrast, the term "interpretive rule" is given a particular significance and legal status. According to statute, "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency" are required to be published in the Federal Register. (5 U.S.C. § 552(a)(1)(D).) But such "interpretive rules," and "general statements of policy" are explicitly exempt from the notice and hearing provisions of the federal APA. (5 U.S.C. § 553(b)(3)(A).) No such distinction exists in California law.

4 Yamaha and amicus curiae claim that tax annotations are frequently inconsistent, and that the Board legal staff has been lax in purging the Business Taxes Law Guide of outdated annotations. Obviously, to extent that an old annotation does *not* represent the Board's long-standing, *consistent,* interpretation, it does not merit the same consideration. (See *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1125, 41 Cal.Rptr.2d 46.) In the present case, Yamaha does not contend that Annotation No. 280.0040 is inconsistent with other annotations, or with the Board's actual practice, since it was issued.

5 I note that some of the *Culligan* court's language may be open to misinterpretation. The Board in that case contended that the proper standard of review was whether its position was "arbitrary, capricious or without rational basis." (17 Cal.3d at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) The court disagreed, holding that " '[t]he interpretation of a regulation, like the interpretation of the statute, is, of course, a question of law [citations], and while an administrative agency's interpretation of its own regulation obviously deserves great weight [citations], the ultimate resolution of such legal questions rests with courts.' " (*Id.* at p. 93, 130 Cal.Rptr. 321, 550 P.2d 593.) In expressing its disagreement with the proposition that the Board's litigating position deserves the highest level of deference, the *Culligan* court differentiated such positions from "formal regulation" of a general nature, which, the court agreed, would be overturned only if arbitrary and capricious. (*Id.* at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) Perhaps because the *Culligan* court was focused on making a distinction between regulations of a general nature and litigating positions, it did not articulate the two-pronged judicial inquiry into the validity of quasi-legislative regulations as discussed above, nor did it specify that the arbitrary and capricious standard applied only to the *second* prong. Nonetheless, the *Culligan* court was correct in holding that statutory interpretations contained in formal regulations merit more deference, all other things being equal, than an agency's litigating positions.

6 Moreover, although the *Culligan* court referred to "litigating positions of the Board (announced either in tax bulletins or merely as the result of an individual audit)" (*Culligan Water Conditioning v. State Bd. of Equalization, supra,* 17 Cal.3d at p. 93, fn. 4, 130 Cal.Rptr. 321, 550 P.2d 593), it was not implying that all material contained in tax bulletins were "litigating positions." Indeed the *Culligan* court cited *Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization* (1973) 30 Cal.App.3d 1009, 106 Cal.Rptr. 867, as an example of a case typifying the limited judicial review appropriate for regulations of a general nature. (*Culligan, supra,* at p. 92, 130 Cal.Rptr. 321, 550 P.2d 593.) The court in *Henry's Restaurants* considered the Board's interpretation of a sales tax question issued in the form of a General Sales Tax Bulletin. (30 Cal.App.3d at p. 1014, 106 Cal.Rptr. 867.) The citation to *Henry's Restaurants* shows that the *Culligan* court's reference to "litigating positions of the Board ... announced ... in tax bulletins" was not to legal rulings of a general nature that might be contained in tax bulletins.

7 The majority quote at length from (*Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 65 S.Ct. 161) to describe the proper standard of judicial review of administrative rulings. I note that the United States Supreme Court has at least partly abandoned *Skidmore* 's open-ended formulation in favor of a more bright line one. (See *Chevron v. Natural Resources Defense Council* (1984) 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694.) In any case, I agree with the majority that many of the factors discussed in Justice Jackson's opinion in *Skidmore* are appropriate considerations under the governing California decisions, and that the discussion in *Skidmore* may be a useful guide to the extent it is consistent with the independent judgment/great weight test subsequently developed under California law.

End of Document

EXHIBIT 13

San Diego County Deputy Sheriffs Assn. v. San Diego County Sheriffs Dept.
Court of Appeal, Fourth District, Division 1, California. | December 23, 1998 | 68 Cal.App.4th 1084 | 80 Cal.Rptr.2d 712

San Diego County Deputy Sheriffs Assn. v. San Diego County Sheriffs Dept.

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Outline

68 Cal.App.4th 1084
Court of Appeal, Fourth District, Division 1, California.

SAN DIEGO COUNTY DEPUTY SHERIFFS ASSOCIATION et al., Plaintiffs and Appellants,
v.
SAN DIEGO COUNTY SHERIFFS DEPARTMENT et al., Defendants and Respondents.

No. D030717. | Dec. 23, 1998.

Deputy sheriffs association brought action against county sheriffs department seeking writ of mandate requiring payment of interest on backpay awards made to two deputies who were reinstated following administrative appeals of their terminations. The Superior Court, San Diego County, No. 713366, Judith D. McConnell, J., denied writs, and association appealed. The Court of Appeal, McDonald, J., held that, if county civil service commission were to find disciplinary action against deputies was wrongful, they were entitled to interest on backpay awards.

Reversed.

West Headnotes (7)

[1] **Counties**
Interest

104Counties
104XIClaims Against County
104k198Interest

If county civil service commission were to find disciplinary action against deputy sheriffs was wrongful, deputies were entitled to interest on their backpay awards made in administrative appeal of termination orders; deputies were vindicated in administrative proceeding and did not have to contest their employment termination in court. West's Ann.Cal.Civ.Code § 3287(a).

Cases that cite this headnote

[2] **Unemployment Compensation**
Payment of Benefits

392TUnemployment Compensation
392TXVIIPayment of Benefits
392Tk590In General
(Formerly 356Ak721)

Interest on unemployment insurance benefits is not available absent an agency decision or action which has resulted in wrongful withholding of, and corresponding delay in receiving, benefits to which the claimant is entitled. West's Ann.Cal.Civ.Code § 3287.

1 Cases that cite this headnote

[3] **Interest**
Particular Cases and Issues

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.20)Particular Cases and Issues

Until administrative steps are exhausted, there has been no "wrongful delay or action," triggering award of prejudgment interest to claimant; the claimant is not entitled to, and the agency is not obliged to pay, unemployment insurance benefits until the administrative process has been completed. West's Ann.Cal.Civ.Code § 3287.

2 Cases that cite this headnote

[4] **Interest**
Particular Cases and Issues

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.20)Particular Cases and Issues

When a claimant is found entitled to unemployment insurance benefits at an administrative level, there has been no "wrongful action" by the agency or "wrongful delay" in receiving benefits on which to predicate an award of prejudgment interest by the agency. West's Ann.Cal.Civ.Code § 3287.

2 Cases that cite this headnote

[5] **Counties**
Actions

104Counties
104IIIOfficers and Agents
104k68Compensation
104k75Allowance, Recovery, and Payment
104k75(3)Actions

When county civil service commission subsequently reverses the initial disciplinary action, it effectively determines that the employee's vested property interests were wrongfully withheld by the initial disciplinary action, which is not a decision giving rise to entitlement to benefits in the first instance but is instead a decision that salary was wrongfully withheld, and, thus, interest should be paid on the backpay. West's Ann.Cal.Civ.Code § 3287.

Cases that cite this headnote

[6] **Unemployment Compensation**
Payment of Benefits

392TUnemployment Compensation
392TXVIIPayment of Benefits
392Tk590In General
(Formerly 356Ak721)

Under administrative scheme in which claimants could not argue that their unemployment insurance benefits were wrongfully withheld until the administrative process was completed, only superior court in a mandamus action may award interest for the delayed disbursement, if it determines the benefits were wrongfully withheld. West's Ann.Cal.Civ.Code § 3287.

Cases that cite this headnote

[7] **Officers and Public Employees**
Determination and Disposition

283Officers and Public Employees
283IAppointment, Qualification, and Tenure
283I(H)Proceedings for Removal, Suspension, or Other Discipline
283I(H)2Administrative Review
283k72.33Determination and Disposition
283k72.33(1)In General

Under administrative scheme in which public employer's wrongful action and withholding of payment was the triggering event for commencing the administrative review process, the administrative law judge (ALJ), like the superior court in the mandamus action reviewing denial of unemployment benefits, reviews whether to uphold the wrongful action, as basis for award of prejudgment interest. West's Ann.Cal.Civ.Code § 3287.

Cases that cite this headnote

Attorneys and Law Firms

****713 *1085** Everett L. Bobbitt and Sanford A. Toyen, San Diego, for Plaintiffs and Appellants.

John J. Sansone, County Counsel, Diane Bardsley, Chief Deputy County Counsel, and Ralph W. Peters, Deputy County Counsel, for Defendants and Respondents.

Opinion

McDONALD, J.

In early 1997 the San Diego County Sheriffs Department terminated the employment of Deputy Sheriffs Chris Volmer and Barri Woods (together appellants). Appellants filed administrative appeals of the termination orders. The appeals were heard before hearing officers. In June 1997 the San Diego County Civil Service

Commission (Commission) adopted the hearing officers' recommendations and reversed the termination orders, reinstated appellants' employment and restored their backpay.

***1086** On July 24 appellants requested the Commission pay interest on the backpay awards pursuant to Civil Code[1] section 3287, subdivision (a). Commission deferred action on their requests. Appellants then filed the current action seeking a writ of mandate, arguing that under *Goldfarb v. Civil Service Com.* (1990) 225 Cal.App.3d 633, 275 Cal.Rptr. 284 (*Goldfarb*) Commission was obligated to pay interest on the backpay awards. The trial court concluded that *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 56 Cal.Rptr.2d 109, 920 P.2d 1314 (*AFL)* overruled *Goldfarb.* It construed *AFL* as holding that absent an express statutory authorization an administrative agency has no authority to award interest under section 3287, subdivision (a). The trial court accordingly denied the writ of mandate.

This appeal of the trial court's denial of the writ of mandate is on undisputed facts, presents questions of statutory and case law interpretation only, and is subject to our independent review. (*Scott v. Common Council* (1996) 44 Cal.App.4th 684, 689, 52 Cal.Rptr.2d 161.) We conclude that *AFL* did not overrule *Goldfarb* and that when an administrative agency determines an employee's employment was wrongfully terminated, and reinstates the employee's employment with backpay, the agency must pay interest on the wrongfully withheld backpay.

I

THE RELEVANT AUTHORITIES

A

The *Goldfarb* Decision

In *Goldfarb,* a demoted employee appealed the demotion to the Civil Service Commission ****714** (the CSC). The CSC rescinded the demotion and awarded the employee backpay. The CSC rejected the employee's demand for interest, and the employee petitioned for a writ of mandate. *Goldfarb* concluded the CSC had a duty under Civil Code section 3287, subdivision (a) to pay interest on the backpay award and reversed the trial court's denial of the writ of mandate. (225 Cal.App.3d at pp. 636–637, 275 Cal.Rptr. 284.)

Goldfarb noted that under section 3287, subdivision (a) when a person is entitled to recover damages certain, or capable of being made certain, and the right to recover is vested on a certain day, the person is also entitled to ***1087** interest on the damage award. *Goldfarb* then held that a backpay award qualifies as a damage award under section 3287, subdivision (a). (225 Cal.App.3d at pp. 634–635, 275 Cal.Rptr. 284.)

Goldfarb relied heavily on *Mass v. Board of Education* (1964) 61 Cal.2d 612, 39 Cal.Rptr. 739, 394 P.2d 579 (*Mass*). In *Mass,* the trial court ordered a school board to reinstate a suspended teacher and to pay him backpay with interest from the date of suspension under section 3287, subdivision (a). (*Id.* at pp. 617–624, 39 Cal.Rptr. 739, 394 P.2d 579.) The school board opposed the interest award, arguing that interest should accrue only from the date it had the legal duty to reinstate the teacher; until that date, it argued, the right to salary was not vested because he was legally suspended. Rejecting that argument, *Mass* observed at page 625, 39 Cal.Rptr. 739, 394 P.2d 579:

> "The Civil Code requires vesting, however, only in order to fix with sufficient certainty the time when the obligation accrues so that interest should not be awarded on an amount before it is due. Each salary payment in the instant case accrued on a date certain. *Unless the suspension itself can be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued.* If plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest." (Italics added.)

Goldfarb, citing the above quoted language from *Mass,* concluded the wrongfully demoted employee was also entitled to interest on each installment of back salary from the date it was due. (*Goldfarb, supra,* 225 Cal.App.3d at p. 636, 275 Cal.Rptr. 284.) In *Goldfarb,* the CSC attempted to distinguish *Mass* by arguing the *Mass* plaintiff obtained a court order for reinstatement and backpay plus interest in contrast to the *Goldfarb* plaintiff who sought a court order for only interest. *Goldfarb* rejected the argument because it could discern no reason to deny interest on backpay when the demotion was reversed in an administrative proceeding rather than in a later mandamus court proceeding. (*Ibid.*) In *Goldfarb,* the CSC also urged that the statutes governing claims against

counties do not provide for the payment of interest. *Goldfarb* rejected that argument, noting that *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 258 Cal.Rptr. 106 had rejected a similar argument because a specific statutory authorization of interest on claims against counties " '... would be redundant, as the Legislature provided elsewhere, and generally, in Civil Code section 3287 [ ], for the recovery of interest from a debtor, including "any county." ' " (*Goldfarb, supra,* 225 Cal.App.3d at p. 637, 275 Cal.Rptr. 284, quoting *Austin, supra,* at p. 1532, 258 Cal.Rptr. 106.)

***1088 B**

The *AFL* Decision

In *AFL,* the court concluded an administrative law judge (ALJ) could not award interest on a payment of retroactive unemployment insurance benefits. We set forth the factual background of AFL before examining the court's legal analysis.

1. The Background

In *AFL,* the claimant filed a claim for unemployment benefits and requested the claim be backdated to include a previous 10–week period. The Employment Development Department (EDD) denied the request. However, an ALJ reversed the EDD's denial and ordered the claim backdated to include the 10–week period. (*Matter of Toni Z.* ****715** *Kalem* (1993) Cal. Unemp. Ins.App. Bd. Precedent Benefit Dec. No. P–B–476.) The claimant then requested that interest be paid on the additional 10 weeks of benefits. The Unemployment Insurance Appeals Board (the Board) concluded that neither the Board nor the ALJ had authority to award section 3287, subdivision (a) interest to a successful claimant who is awarded benefits through the normal course of administrative review. (*AFL, supra,* 13 Cal.4th at p. 1028, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

On appeal, the Court of Appeal relied on *Knight v. McMahon* (1994) 26 Cal.App.4th 747, 31 Cal.Rptr.2d 832 (*Knight*) and held the ALJ can award section 3287, subdivision (a) interest on a retroactive award of unemployment insurance benefits. The Court of Appeal rejected the Board's assertion that by awarding interest an ALJ would be acting in contravention of the statutory scheme governing the unemployment insurance administrative process and beyond an ALJ's statutory authority. The Court of Appeal's opinion distinguished *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 241 Cal.Rptr. 67, 743 P.2d 1323 (*Dyna–Med*) and *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 276 Cal.Rptr. 114, 801 P.2d 357 (*Peralta*), both of which held that administrative agencies may not make monetary awards for elements of damage beyond those authorized by statute. (*AFL, supra,* 13 Cal.4th at p. 1029, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

2. The *AFL* Opinion

The *AFL* court concluded that the Court of Appeal's analysis "ignored the fact that section 3287(a) interest may only be awarded in a mandamus action following the Board's wrongful withholding of benefits." (*AFL, supra,* 13 Cal.4th at p. 1029, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) ***1089** The *AFL* COURT REVERSED THE Court of appeal, disaPproved *knight,* and held the alj could not award interest on a retroactive award of unemployment insurance benefits. (*Id.* at pp. 1041–1043, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

The *AFL* court prefaced its analysis with a comprehensive overview of the unemployment insurance benefits administrative process. It noted that benefits are not owed immediately after the claimant becomes unemployed. Instead, benefits become "due" only after there is an administrative determination of eligibility for benefits, and the administrative scheme contemplates three potential levels at which the agency could find a claimant eligible for benefits: the initial EDD level, the ALJ level, and the Board level. Once the claimant is found eligible for benefits at one of those levels of administrative review, benefits must be promptly paid regardless of any appeal by third parties. (*AFL, supra,* 13 Cal.4th at pp. 1024–1028, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The *AFL* court summarized at page 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314:

> "Thus ... the Unemployment Insurance Code allows the EDD, and unemployment insurance claimants, a reasonable time to process each legitimate claim. Benefits are not due immediately after a claim is filed following employment termination. Rather, they are due promptly only after a claimant has established benefit eligibility. [Citation.] The statutory scheme thus accounts for the fact

> that delays are inherent in the entitlement claim review process and are necessary to ensure [that] only those claimants who have established eligibility will receive benefits.... *The delays inherent in this system are not, however, tantamount to a 'wrongful withholding' of benefits giving rise to a right to section 3287(a) prejudgment interest once the Board rules in favor of the claimant.*" (Italics added.)

Within this administrative scheme the *AFL* court then analyzed the precise issue presented: whether the claimant the ALJ determines is eligible for retroactive benefits may also obtain interest on those benefits. The court's analysis was subdivided into several parts, three of which are germane here: (1) interest under section 3287, subdivision (a), (2) the import of *Dyna–Med* and *Peralta,* and (3) whether *Knight* was good law.

(a) Interest Under Section 3287

The *AFL* court first examined when interest was recoverable under ****716** section 3287, subdivision (a). The *AFL* court noted that *Tripp v. Swoap* (1976) 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749 (overruled on other grounds in *Frink v. Prod* (1982) 31 Cal.3d 166, 180, 181 Cal.Rptr. 893, 643 P.2d 476) concluded that interest under section 3287, subdivision (a) was payable on wrongfully withheld welfare benefits eventually awarded in a mandamus action. In *Tripp,* the plaintiff filed an administrative mandamus action for ***1090** benefits after the agency denied eligibility. (*Tripp, supra,* 17 Cal.3d at p. 675, 131 Cal.Rptr. 789, 552 P.2d 749.) After affirming the order to pay benefits retroactively, *Tripp* concluded the effective date of plaintiff's entitlement to benefits was "the first day of the month following the date of application" (*id.* at p. 678, 131 Cal.Rptr. 789, 552 P.2d 749), and it then turned to the issue of whether "the recipient of wrongfully withheld welfare benefits is entitled to prejudgment interest" (*ibid*). *Tripp* concluded the Legislature's not specifically providing for payment of interest following judicial review of benefit determinations was not determinative because the purpose of the statute providing for judicial review of administrative benefit decisions was to ensure access to judicial review rather than to define the extent of recovery. (*Tripp, supra,* 17 Cal.3d at p. 684, 131 Cal.Rptr. 789, 552 P.2d 749.) *Tripp* noted that section 3287, subdivision (a) "authorizes the recovery of interest on damages which are certain or capable of being made certain by calculation, where the right to recover has vested on a particular day." (*Id.* at p. 681, 131 Cal.Rptr. 789, 552 P.2d 749.) Because the right to benefit payments vested when the claimant established the facts entitling him or her to the benefits, *Tripp* upheld an interest award for the delay the agency caused by wrongfully withholding benefits after the hearing officer determined the claimant was entitled to them, "despite the absence of specific statutory authority" for the award under the welfare scheme. (*Id.* at pp. 682–683, 131 Cal.Rptr. 789, 552 P.2d 749.)

The *AFL* court cautioned that the award of interest upheld in *Tripp* was made by a court in a mandamus action, and that *Tripp* declined to decide whether it was discriminatory to award interest to welfare recipients who were denied benefits but who successfully obtained them by judicial review while denying interest to recipients who were denied benefits but who successfully obtained them by an administrative appeal. (*AFL, supra,* 13 Cal.4th at pp. 1031–1032, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The *AFL* court then cited four appellate decisions, including *Goldfarb* and *Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal.App.3d 239, 272 Cal.Rptr. 696, which "relied on the holding in *Tripp* to support an award of section 3287(a) interest for wrongfully withheld benefits in the context of a mandamus action." (*AFL, supra,* at p. 1032, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

The *AFL* opinion contains no further reference to *Goldfarb.* However, the *AFL* court extensively discussed *Aguilar.* In *Aguilar,* the claimants were originally denied unemployment insurance benefits in 1978 on the grounds the workers were involved in a trade dispute and were therefore ineligible for unemployment benefits. However, after the Board's decision was reversed and remanded to determine whether some of the claimants were eligible to receive benefits, the Board subsequently concluded some of the claimants were eligible for benefits. (*Aguilar, supra,* 223 Cal.App.3d at p. 241, 272 Cal.Rptr. 696.) The EDD paid the benefits to those ***1091** workers but refused to pay interest on the amounts owed. An ALJ reversed the EDD's decision and ordered the EDD to pay interest on the benefits, but the Board on administrative appeal found no authority for payment of interest in the Unemployment Insurance Code and reversed the ALJ's ruling. The workers then sought and obtained a writ of mandate from the superior court, directing the EDD to pay interest on the wrongfully withheld employment benefits. The EDD appealed the court's order, contending prejudgment interest was not payable. (*Ibid.*)

In *Aguilar,* this court affirmed the superior court's order

to pay interest. *Aguilar* noted a claimant's right to interest depends on whether he has satisfied the requirements of section 3287, subdivision (a). (223 Cal.App.3d at pp. 242–243, 272 Cal.Rptr. 696.) *Aguilar* concluded that interest was recoverable **717 because (1) it was a fixed monetary obligation; (2) the right to payment vested once the claimant established eligibility; and (3) the claimant could enforce the obligation by a mandamus action. (*Id.* at pp. 245–246, 272 Cal.Rptr. 696.) The *AFL* court interpreted *Aguilar* as "refus[ing] to address the question whether benefit claimants may seek interest for the time spent in the routine processing of their benefit eligibility claim, and in the absence of a wrongful denial of benefits by the Board. *Aguilar* simply observed that '... the EDD's appeal is from a superior court judgment directing the payment of interest. Plainly, under [*Tripp*] the superior court was empowered to order the agency to pay interest.' [*Aguilar, supra,* at p. 246, fn. 4, 272 Cal.Rptr. 696.]" (*AFL, supra,* 13 Cal.4th at p. 1033, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

Thus, the *AFL* court recognized that *Aguilar,* although not directly addressing the question whether the Board or ALJ's may award interest on benefits, held a claimant for unemployment insurance benefits may receive section 3287, subdivision (a) interest as part of the court's judgment on mandamus if the benefits had been wrongfully withheld. (*AFL, supra,* 13 Cal.4th at p. 1033, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The *AFL* court concluded that both *Tripp* and *Aguilar* awarded interest solely for the delay caused by the necessity of a mandamus action and that neither *Tripp* nor *Aguilar* supported an award of interest when benefits were granted during the original administrative proceedings. (*AFL, supra,* 13 Cal.4th at p. 1034, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

(b) The Import of *Dyna–Med* and *Peralta*

In *AFL,* the claimants argued that because a court in a mandamus action computes an interest award from the date the benefits should have been paid, entitlement to interest is automatic. The *AFL* claimants therefore argued that under *Knight* the ALJ is also authorized to award interest as an automatic *1092 component of the award. The *AFL* court, rejecting that argument, reasoned that *Dyna–Med* and *Peralta* held that an agency's authority to fashion an award is not necessarily coextensive with a court's authority but is instead limited by the particular statutory scheme giving rise to the particular agency's powers. Accordingly, the particular statutory scheme must be examined to determine the scope of the agency's authority. For example, the *AFL* court noted that *Dyna–Med* had construed the statutory scheme under the Fair Employment and Housing Act (FEHA) as denying the agency authority to award punitive damages even though in a civil action alleging similar conduct a court could award punitive damages. Similarly, the *AFL* court noted that *Peralta* had construed the FEHA as denying the agency authority to award noneconomic compensatory damages even though such damages were recoverable in a civil action alleging similar conduct. (*AFL, supra,* 13 Cal.4th at pp. 1035–1037, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

After summarizing *Dyna–Med* and *Peralta,* the *AFL* court stated:

> "Both *Dyna–Med* and *Peralta* are instructive, and their analyses of the restrictions on administrative agency power apply equally here. As the Board observes, the function of the administrative law judge in a proceeding to recover unemployment insurance benefits is simply to determine if claimants are eligible and then, if so, to calculate benefits owed based on length of employment. [Citation.] At the administrative level benefits are not calculated on the basis of wrongdoing or delay....
>
> "As we explained ..., the initial mandatory process the Unemployment Insurance Code created contemplates only an administrative determination of benefit eligibility that requires at least an initial application to the EDD and, in some cases, second review by an administrative law judge. Claimants may not argue that their benefits have been *wrongfully* withheld until the Board erroneously determines they are ineligible, requiring them to seek administrative mandamus review in superior court. Until then, no wrongful withholding of benefits or delay attributable to the administrative process occurs. The Unemployment Insurance Code does not give the Board or its administrative law judges the statutory authority to award interest on an **718 administrative award of benefits, and we cannot, by judicial fiat, create such authority." (*AFL, supra,* 13 Cal.4th at pp. 1036–1037, 56 Cal.Rptr.2d 109, 920 P.2d 1314, original italics.)

(c) *Knight* Disapproved

The *AFL* court finally examined whether *Knight* was good law. *Knight* relied on *Tripp* to conclude that an ALJ may award section 3287, subdivision (a) interest in the same proceeding in which he issues an award of *1093 retroactive in-home supportive services because the interest is SIMPLY "a part of the underlying benefit to which a recipient is entitled." (*Knight, supra,* 26 Cal.App.4th at p. 754, 31 Cal.Rptr.2d 832.) *Knight*

acknowledged that administrative agencies may exercise only those powers that the Constitution or statutes have conferred on them, but concluded that the agency's power to award benefits included the implied power to award prejudgment interest on those benefits. (*Ibid.*)

The *AFL* court concluded *Knight* misread *Tripp* because "*Tripp* simply directed the trial court in the mandamus proceeding to award the section 3287(a) interest after it determined that the [agency] had wrongfully withheld welfare benefits. [Citation.] ... Neither the *Tripp* court, nor any of its progeny (except *Knight*), considered whether administrative law judges have the authority to award section 3287(a) interest in the absence of wrongful action by the administrative agency." (*AFL, supra,* 13 Cal.4th at p. 1038, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

Finally, the *AFL* court noted that although an agency's powers may impliedly encompass unenumerated powers, it would not construe the Unemployment Insurance Code to include the power to award interest; that Code's provisions "strictly limit the powers of administrative law judges to determine eligibility and compute benefits. They do not grant either express or implied authority to award interest on benefit computations for the inconsequential delay that occurs when a claimant pursues entitlement benefits in the normal course of administrative review." (*AFL, supra,* 13 Cal.4th at p. 1039, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The *AFL* court therefore disapproved *Knight* and declined to construe the administrative scheme to "expand the powers of the EDD or administrative law judges charged only with determining eligibility and computing benefits under the Unemployment Insurance Code by finding an implied power to award section 3287(a) interest." (*Id.* at p. 1041, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

II

PARTIES' CONTENTIONS

Appellants argue *AFL* is expressly limited to the narrow question of the powers and functions of an ALJ in the unemployment insurance context and did not overrule *Goldfarb's* holding that an administrative agency must pay interest in the context of wrongfully withheld backpay. Commission argues *AFL* held that (1) an administrative agency has no power to award prejudgment interest absent express statutory authority, and (2) section 3287, subdivision (a) applies only to judicial awards and does not empower administrative ***1094** agencies to award interest. Accordingly, Commission ARGUES *afl* OVERRULED *goldfarb* sub silencio.[2]

III

GOLDFARB WAS NOT OVERRULED BY *AFL*

[1] We construe *AFL* to have addressed issues distinct from the issues addressed in *Goldfarb* and therefore *AFL* did not overrule *Goldfarb.*

We begin with the obvious: Although the *AFL* court was aware of *Goldfarb* and its analysis, *AFL* did not expressly overrule ****719** *Goldfarb.*[3] Moreover, *AFL* did not overrule or disapprove any of the cases on which *Goldfarb* relied. We must therefore distill the core of *AFL's* holding to determine whether it is so inconsistent with *Goldfarb's* analysis that it impliedly overruled *Goldfarb.*

[2] [3] [4] *AFL* recognized that section 3287, subdivision (a) interest is payable when in a mandamus action a court determines the agency wrongfully withheld benefits. The central theme of *AFL,* however, is that interest is not available absent an agency decision or action which has resulted in wrongful withholding of, and corresponding delay in receiving, benefits to which the claimant is entitled. (See *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440, 1450, 73 Cal.Rptr.2d 769.[4]) The *AFL* court extensively explained that the unemployment insurance scheme contemplates several ***1095** steps and inherently involves some minimal delay before there is a determination of eligibility for the benefit. Until these steps are exhausted there has been no wrongful delay or action because the claimant is not entitled to, and the agency is not obliged to pay, benefits until the administrative process has been completed. Accordingly, when a claimant is found entitled to benefits at one of the administrative levels, there has been no wrongful action by the agency or wrongful delay in receiving benefits on which to predicate an award of prejudgment interest by the agency. (*AFL, supra,* 13 Cal.4th at p. 1037, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

[5] In contrast to *AFL, Goldfarb* addresses the recoverability of interest in situations in which there has been a determination of wrongful action by an agency and wrongful withholding of funds to which the claimant was

entitled, prior to the completion of the administrative process. In *Goldfarb* and the present case, the initial disciplinary action deprived the employee of a fully vested right to his job and paycheck. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206–207, 124 Cal.Rptr. 14, 539 P.2d 774.) When Commission subsequently reverses the initial disciplinary action, it effectively determines that the employee's vested property interests were wrongfully withheld by the initial disciplinary action. This administrative decision, unlike the decision of the ALJ in *AFL,* is not a decision giving rise to entitlement to benefits in the first instance but is instead a decision that salary was wrongfully withheld. Under the rationale of *AFL,* which reasoned that the allowance of interest requires a wrongful withholding of benefits due, interest should be paid on the backpay.[5]

[6] [7] *AFL* evaluated an administrative scheme in which claimants could not argue that their benefits were wrongfully withheld until the administrative process was completed; "[u]ntil then, no wrongful withholding of ****720** benefits or delay attributable to the administrative process occurs." (*AFL, supra,* 13 Cal.4th at p. 1037, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Only the entity charged with subsequently reviewing that decision—the superior court in a mandamus action—may then award interest for the delayed disbursement if the court determines the benefits were wrongfully withheld. *Goldfarb,* however, evaluated an administrative scheme in which the wrongful action and withholding of payment was the triggering event for commencing the administrative review process, and the ***1096** ALJ (like the superior court in the mandamus action reviewing denial of unemployment benefits) reviews whether to uphold the wrongful action.

Commission's argument that *AFL* overruled *Goldfarb* is based solely on Commission's conclusion that *AFL* held an agency never has power to award interest absent express statutory authorization. However, we do not read *AFL* so expansively. *AFL* acknowledged that an agency can have powers not expressly granted if the statutory scheme can be construed to encompass unenumerated powers. *AFL* held that the statutory scheme of the Unemployment Insurance Code could not be construed to encompass the unexpressed power to award interest, because its provisions strictly limit the powers of ALJ's to determine benefit eligibility and amount, a process that includes some delay in the normal course of administrative review. The delays inherent in the system, however, do not result in any wrongful withholding of benefits on which to predicate an interest award, and therefore the *AFL* court refused to imply a power to award interest based on that delay. However, under statutory schemes where a claimant's benefits are wrongfully delayed, we believe *AFL's* analysis is inapplicable.

Because *Goldfarb* operates in an arena distinct from any of the types of statutory schemes evaluated by *AFL,* we conclude *AFL* does not overrule *Goldfarb.* Accordingly, if Commission finds the disciplinary action was wrongful, we agree with *Goldfarb* that there appears to be no reason to deny appellants interest on their backpay simply because they were vindicated in an administrative proceeding and did not have to contest their employment termination in court. (*Goldfarb, supra,* 225 Cal.App.3d at p. 636, 275 Cal.Rptr. 284.)

DISPOSITION

The order denying the petition for writ of mandate is reversed. The case is remanded with directions to grant the petition insofar as it seeks interest on appellants' backpay. Appellants are entitled to costs on appeal.

HALLER, Acting P.J., and McINTYRE, J., concur.

Parallel Citations

68 Cal.App.4th 1084, 98 Cal. Daily Op. Serv. 9348, 98 Daily Journal D.A.R. 13,001

Footnotes

1 All further statutory references are to the Civil Code unless otherwise specified.

2 Commission also argues that because appellants requested interest after Commission's decision to reinstate their employment became final, Commission lacked authority to modify or vacate the decision. However, appellants did not seek to amend or vacate the orders reinstating them or awarding them backpay, but instead sought new or supplemental orders awarding them additional amounts, and we are aware of no authority precluding Commission from making new or supplemental orders.

3 We acknowledge that *AFL* cited *Goldfarb* as supporting "... an award of section 3287(a) interest for wrongfully withheld benefits in the context of a mandamus action." (*AFL, supra,* 13 Cal.4th at p. 1032, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Although *Goldfarb* involved a mandamus action, it held that the agency should have awarded interest. We are therefore uncertain of the import of *AFL's* citation of *Goldfarb.*

4 *Weber* is the only court to have applied *AFL* to conclude an administrative agency lacked authority to award interest on a lump sum distribution. In *Weber,* the agency was charged with determining whether the employees were eligible for disability retirement benefits. Once there was an administrative determination that the employees were permanently incapacitated, they were entitled to the disability retirement allowance retroactive to the date the application for disability retirement was filed, and they could recover a lump sum distribution representing the retroactive benefits the agency awarded them. (*Id.* at pp. 1447–1450, 73 Cal.Rptr.2d 769.) *Weber* concluded interest could not be awarded on this lump sum because there was no explicit statutory authority for the agency to make an interest award. *Weber* also held there was no implicit power to award interest because, as in *AFL,* there could be no "wrongful withholding" of benefits until there was an obligation to pay and no obligation arose until the agency made the disability determination. (*Id.* at pp. 1448–1451, 73 Cal.Rptr.2d 769.)

5 Both *Mass* and *Goldfarb* concluded interest was recoverable on salary payments from the date the salary accrued, not from the date the employer had the legal duty to reinstate the employee, *because* "[e]ach salary payment ... accrued on a date certain [and unless] the suspension itself can be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued." (*Mass v. Board of Education, supra,* 61 Cal.2d at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579.)

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EXHIBIT 14

Currie v. Workers' Comp. Appeals Bd.
Supreme Court of California | February 26, 2001 | 24 Cal.4th 1109 | 17 P.3d 749

Currie v. Workers' Comp. Appeals Bd.

Supreme Court of California | February 26, 2001 | 24 Cal.4th 1109 | 17 P.3d 749

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Outline

24 Cal.4th 1109
Supreme Court of California

Lorne CURRIE, Petitioner,
v.
WORKERS' COMPENSATION APPEALS BOARD and Los Angeles County Metropolitan Transportation Authority, Respondents.

No. S085652. | Feb. 26, 2001.

Bus driver filed workers' compensation action alleging that transportation authority failed to reinstate him after he was cleared for regular work without restrictions. The Workers' Compensation Appeals Board (WCAB) awarded bus driver lost wages and work benefits, postjudgment interest, and prejudgment interest, but on reconsideration, denied prejudgment interest. Bus driver filed petition for writ of review. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal. The Supreme Court, Werdegar, J., held that: (1) backpay awarded to driver was not "compensation" within meaning of Labor Code provision that precluded inclusion of prejudgment interest in "compensation" for industrial injuries; (2) statute that provided prejudgment interest on "damages" awards applied to backpay award; (3) application of statutory provision for reimbursement was left to broad equitable discretion of WCAB, and award of prejudgment interest was consistent with remedial purpose of statute; (4) inclusion of interest in backpay award did not violate principle that administrative agency could not create remedy that legislature withheld; and (5) failure to preserve issue regarding vesting of driver's damages for appeal did not preclude consideration of issue on remand.

Remanded.

Brown, J., filed dissenting opinion.

West Headnotes (16)

[1] **Interest**
Labor relations and employment

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor relations and employment

Backpay awarded to bus driver under Labor Code, upon determination that transportation authority failed to reinstate driver after recovery from industrial injury, was not "compensation" within meaning of separate Labor Code provision that precluded inclusion of prejudgment interest in "compensation" for industrial injuries, and thus driver was entitled to prejudgment interest from date on which wages would have been paid, had driver been reinstated. West's Ann.Cal.Labor Code §§ 132a, 3207, 5800.

2 Cases that cite this headnote

[2] **Workers' Compensation**
Exclusiveness of Remedies Afforded by Acts

413Workers' Compensation
413XXEffect of Act on Other Statutory or Common-Law Rights of Action and Defenses
413XX(A)Between Employer and Employee
413XX(A)1Exclusiveness of Remedies Afforded by Acts
413k2084In general

Plain language of the exclusive remedy provisions of the workers' compensation law apparently limits application of those provisions to remedies provided in the same statutory division as the exclusive remedy provisions, and remedies that the legislature placed in other divisions of the Labor Code are simply not subject to the exclusive remedy provisions. West's Ann.Cal.Labor Code §§ 3600, 3602.

2 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Labor, employment, and public officials
Workers' Compensation

Construction and Operation of Statutes in General

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak438Particular Statutes and Contexts
15Ak438(15)Labor, employment, and public officials (Formerly 361k219(1))
413Workers' Compensation
413INature and Grounds of Employer's Liability
413k44Construction and Operation of Statutes in General
413k45In general
(Formerly 361k219(1))

On appeal of decision of the Workers' Compensation Appeals Board (WCAB), interpretation of statute by the WCAB was entitled to consideration and respect by courts, but courts had to independently judge text of statute, and agency interpretations were not binding or necessarily even authoritative.

1 Cases that cite this headnote

[4] **Workers' Compensation**
Basis for Determination of Amount

413Workers' Compensation
413IXAmount and Period of Compensation
413IX(A)Basis for Determination of Amount
413k801In general

"Compensation" of an employee in the form of wages or salary for services performed, does not have the same meaning as the word "compensation" in the Workmen's Compensation Act, in light of fact that the former is remuneration for work done, and the latter is indemnification for injury sustained.

Cases that cite this headnote

[5] **Interest**
Labor relations and employment

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor relations and employment

Civil Code provision of prejudgment interest on "damages" awards applied to backpay award made upon wrongful failure to reinstate bus driver after doctor cleared him for unrestricted work after recovery from industrial injury, even though backpay was awarded by administrative agency. West's Ann.Cal.Civ.Code § 3287(a); West's Ann.Cal.Labor Code § 132a.

2 Cases that cite this headnote

[6] **Interest**
Labor relations and employment

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor relations and employment

Amounts recoverable as wrongfully withheld payments of salary or pensions are "damages" within the meaning of Civil Code provision for prejudgment interest, and such interest is recoverable on each salary or pension payment from the date it fell due. West's Ann.Cal.Civ.Code § 3287(a).

4 Cases that cite this headnote

[7] **Interest**
Labor relations and employment

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor relations and employment

Once an obligation to pay retroactive wages is established, prejudgment interest accompanies reinstatement and a backpay award in order to

make the employee whole. West's Ann.Cal.Civ.Code § 3287(a).

1 Cases that cite this headnote

[8] **Interest**
Labor relations and employment

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor relations and employment

Awards of backpay for wrongful failure to reinstate a workers' compensation claimant generally are "damages," for purposes statute providing for prejudgment interest awards, even though prejudgment interest is not specifically provided for in statute governing backpay, in light of fact that such provision would be redundant, and fact that employee would not be fully reimbursed without prejudgment interest. West's Ann.Cal.Civ.Code § 3287(a); West's Ann.Cal.Labor Code § 132a.

4 Cases that cite this headnote

[9] **Interest**
Labor relations and employment

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor relations and employment

Terms "benefits" and "damages" are not mutually exclusive, in light of fact that "damages," for purposes of Civil Code provision for prejudgment interest are simply the monetary relief a person is entitled to recover in compensation for detriment from the unlawful act or omission of another. West's Ann.Cal.Civ.Code §§ 3281, 3287(a).

2 Cases that cite this headnote

[10] **Interest**
Prejudgment Interest in General

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.6)In general

Backpay awarded by an administrative agency may be considered "damages" for purposes of statutory mandate of prejudgment interest. West's Ann.Cal.Civ.Code § 3287.

1 Cases that cite this headnote

[11] **Workers' Compensation**
Purpose of legislation

413Workers' Compensation
413INature and Grounds of Employer's Liability
413k11Purpose of legislation

Labor Code provision allowing awards of backpay for wrongful failure to reinstate a workers' compensation claimant is construed as serving, in part, a remedial function, by providing some compensation to the aggrieved worker for discrimination incurred as the result of his injury. West's Ann.Cal.Labor Code § 132a.

Cases that cite this headnote

[12] **Interest**
Labor relations and employment

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor relations and employment

Application of statutory provision for reimbursement was left to broad equitable

discretion of Workers' Compensation Appeals Board (WCAB), and award of prejudgment interest was consistent with remedial purpose of statute, in light of fact that legislature clearly intended that employee victims of discrimination with regard to workers' compensation claims would be made whole, at least to extent of lost wages, and fact that without prejudgment interest, backpay remedy might lose significant portion of value and employee might be left less than fully reimbursed for lost wages. West's Ann.Cal.Civ.Code § 3287(a); West's Ann.Cal.Labor Code § 132a.

4 Cases that cite this headnote

[13] **Workers' Compensation**
Interest

413Workers' Compensation
413XPayment of Compensation and Compliance with Award
413X(C)Enforcement of Payment or Compliance
413k1041Interest

Inclusion of interest in backpay award to bus driver who was wrongfully not reinstated after recovery from industrial injury by Workers' Compensation Appeals Board (WCAB) did not violate principle that administrative agency could not create remedy that legislature withheld, where WCAB was expressly authorized to award reimbursement for lost wages, and inclusion of prejudgment interest in such backpay award was mandated by Civil Code. West's Ann.Cal.Civ.Code § 3287(a); West's Ann.Cal.Labor Code § 132a.

6 Cases that cite this headnote

[14] **Interest**
Labor relations and employment

219Interest
219IIITime and Computation
219k39Time from Which Interest Runs in General
219k39(2.5)Prejudgment Interest in General
219k39(2.40)Labor relations and employment

That prejudgment interest may be awarded to ensure the employee victimized by discrimination with regard to workers' compensation claim receives full reimbursement for backpay, undiminished in value by the employer's failure to pay the wages at the times due, does not suggest the Workers' Compensation Appeals Board (WCAB) has the authority to award damages of types not mentioned in Labor Code and generally reserved to the judicial power, such as punitive damages or damages for emotional distress. West's Ann.Cal.Civ.Code § 3287(a); West's Ann.Cal.Labor Code § 132a.

2 Cases that cite this headnote

[15] **Workers' Compensation**
Briefs

413Workers' Compensation
413XVIProceedings to Secure Compensation
413XVI(T)Review by Court
413XVI(T)10Assignments of Error and Briefs
413k1907Briefs

Transit authority waived argument on appeal of judgment in favor of bus driver who was wrongfully not reinstated after recovering from industrial injury, that even if prejudgment interest could be included in backpay awards, it would not properly be awarded to bus driver, when factual disputes concerning date upon which driver was entitled to reinstatement made vesting of damages too uncertain, where transit authority failed to raise issue in appellate brief. West's Ann.Cal.Civ.Code § 3287(a); West's Ann.Cal.Labor Code § 132a.

1 Cases that cite this headnote

[16] **Workers' Compensation**
Further proceedings before board, commission, or trial court

413Workers' Compensation

413XVIProceedings to Secure Compensation
413XVI(T)Review by Court
413XVI(T)13Determination and Disposition of Proceeding
413k1951Further proceedings before board, commission, or trial court

Failure to preserve issue of whether factual disputes as to vesting of damages due to bus driver, who was wrongfully denied reinstatement following filing of workers' compensation claim, precluded award of prejudgment interest, for appeal, did not preclude consideration of issue on remand. West's Ann.Cal.Civ.Code § 3287(a); West's Ann.Cal.Labor Code § 132a.

Cases that cite this headnote

Attorneys and Law Firms

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Tobin Lucks, Benjamin R. Herschbein, Dan Tobin and Alan J. Beardsley, Sherman Oaks, for Respondent Los Angeles County Metropolitan Transportation Authority.

No appearance for Respondent Workers' Compensation Appeals Board.

Opinion

WERDEGAR, J.

In making an award of backpay under Labor Code section 132a[1] to an employee wrongfully denied reinstatement because of an industrial injury, may the Workers' Compensation Appeals Board (WCAB) include prejudgment interest on the lost wages so awarded? Harmonizing the Civil Code's mandate of entitlement to prejudgment interest on damages due on a particular day (Civ.Code, § 3287, subd. (a)) with the provisions of the Labor Code governing WCAB awards, we conclude such an award is permitted, and indeed required, when the criteria of Civil Code section 3287 are met.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Lorne Currie, a bus driver employed by respondent Los Angeles County Metropolitan Transportation Authority (LACMTA), suffered industrial injuries in 1990 and 1991. He was on medical leave from September 25, 1991, to September 25, 1992, on which date his employment was terminated for exceeding the leave permitted under his union contract. Although he had been medically unable to return to his regular work before his termination, his treating physician reported him cleared for regular work without any restrictions on December 10, 1992.

In a decision dated June 25, 1997, the WCAB found that petitioner's termination did not violate section 132a, but that LACMTA's refusal to reinstate him after December 10, 1992, did violate that statute.[2] Petitioner **752 was awarded, inter alia, "lost wages and work benefits." On October 14, 1998, the WCAB awarded petitioner backpay of around $200,000, with interest from the date of the June 25, 1997, decision. In a later decision, the *1112 workers' compensation judge also awarded prejudgment interest, payable from the dates of accrual of the lost wages, noting that "defendant has had the use of applicant's unpaid wages for a period of between 1 and 6 years." On reconsideration, however, the WCAB found, relying on section 5800, that only *post*judgment interest was allowable on section 132a awards.

On Currie's petition for writ of review (see § 5950), the Court of Appeal agreed with the WCAB that the board could not award prejudgment interest. The appellate court denied the petition summarily, but briefly stated its reasons: "Section 132a provides for a comprehensive remedy, which does not include interest.... Interest is specifically governed by section 5800, and alleged equitable powers cannot override the expressed intent of the Legislature. [¶] Furthermore, the Civil Code, civil law and damages are distinguishable from workers' compensation."

We granted Currie's petition for review and issued a writ of review returnable before this court.

DISCUSSION

Section 132a, paragraph (1) states: "Any employer who

discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she ***396** has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer." Section 132a is located in division 1 of the Labor Code, titled "Department of Industrial Relations."

Section 5800 provides in pertinent part: "All awards of the appeals board either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil actions on all due and unpaid payments from the date of the making and filing of said award." Section 5800 is located in division 4 of the Labor Code, titled "Workers' Compensation and Insurance."

Section 3207, also located in division 4 of the Labor Code, states: " 'Compensation' means compensation under Division 4 and includes every benefit or payment conferred by Division 4 upon an injured employee, *1113 including vocational rehabilitation, or in the event of his death, upon his dependents, without regard to negligence."

The question is whether these and/or other statutory provisions authorize or prohibit the WCAB's award of prejudgment interest on backpay awards.

Section 5800

[1] The WCAB and the Court of Appeal relied on section 5800 's specification of *post*judgment interest as an implied exclusion of the authority to award *pre* judgment interest. Their reliance was misplaced, however, because section 5800 does not apply to awards of backpay under section 132a. The "reimbursement for lost wages" provided for under section 132a is not "payment of compensation or ... payment of death benefits" governed by section 5800.

[2] In *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 77 Cal.Rptr.2d 445, 959 P.2d 752, we held section 132a did not provide the exclusive remedy for employment discrimination based on a disability arising from an industrial injury. We observed that sections 3600 and 3602, which set forth the exclusivity of the workers' compensation remedy as against an employer, apply **753 only to "[l]iability for the compensation provided by this division" (§ 3600, subd. (a)), i.e., division 4 of the Labor Code, and that "compensation" was further defined in section 3207 as "compensation under Division 4," while section 132a is in division 1 of the code. (*City of Moorpark v. Superior Court, supra,* at pp. 1154–1155, 77 Cal.Rptr.2d 445, 959 P.2d 752.) "Thus, the plain language of the exclusive remedy provisions of the workers' compensation law apparently limits those provisions to division 4 remedies. Remedies that the Legislature placed in other divisions of the Labor Code are simply not subject to the workers' compensation exclusive remedy provisions." (*Id.* at p. 1155, 77 Cal.Rptr.2d 445, 959 P.2d 752.)

The same reasoning dictates the conclusion that section 132a backpay is not subject to any limitation on interest implicit in section 5800. The subject matter of section 5800 is "awards of the appeals board either for the payment of compensation or for the payment of death benefits." Obviously, an award of backpay under section 132a is not a death benefit. Nor is it "compensation" within the meaning of section 5800, because that term, according to section 3207, "means compensation under Division 4." Section 132a 's authorization of "reimbursement for lost wages and work benefits" to a victim of discriminatory action appears in division 1 of the Labor Code and is separate and distinct from the ***397** compensation for industrial injuries provided for in division 4. Section 5800 simply does not apply here.

[3] ***1114** The WCAB's contrary interpretation of sections 132a and 5800 "is entitled to consideration and respect by the courts." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) As we further explained in that case, however, "[c]ourts must ... independently judge the text of the statute," (*ibid.*) and "agency interpretations are not binding or necessarily even authoritative" (*id.* at p. 8, 78 Cal.Rptr.2d 1, 960 P.2d 1031). Here the WCAB reasoned that "Labor Code section 5800 clearly and explicitly sets forth the interest that is allowable on compensation payments. Interest runs from the date of making and filing an award." Thus, the board read section 5800 as disallowing prejudgment interest on payments of "compensation," a category the board took to include section 132a backpay awards. In categorizing section 132a as a "compensation" provision, however, the WCAB failed to consider either section 3207, which defines "compensation" as the benefits available under division 4 of the Labor Code, a division *not* including section 132a,

or this court's decision in *City of Moorpark v. Superior Court, supra,* 18 Cal.4th 1143, 77 Cal.Rptr.2d 445, 959 P.2d 752, in which we held the remedies provided in section 132a for employment discrimination and retaliation were not "compensation" as defined in section 3207 and as that term is used in division 4 of the code. On independent review, therefore, the WCAB's interpretation of section 5800 is seen to be erroneous, despite the judicial respect and consideration it commanded.

[4] The dissent takes the view that the reference to division 4 of the Labor Code in section 3207 's definition of compensation "was clearly not meant to be restrictive" because section 3207 also includes as compensation a type of benefits, vocational rehabilitation, that is not authorized by division 4. (Dis. opn., *post,* 104 Cal.Rptr.2d at p. 402, 17 P.3d at p. 758.) Interpreting section 3207 according to its terms, however, we must disagree. That the Legislature *expressly* included vocational rehabilitation benefits within the definition of compensation does not indicate an intent to *impliedly* include any other type of non-division-4 payments, such as backpay ordered under section 132a. Moreover, vocational rehabilitation and backpay ordered under section 132a are not functionally comparable. The former, like division 4's permanent and temporary disability benefits, compensates the employee for an industrial injury; the latter remedies discriminatory or retaliatory termination. " 'Compensation' of an employee in the form of wages or salary for services performed, does not have the same meaning as the word 'compensation' in the Workmen's Compensation Act. The former is remuneration for work done; the latter is indemnification for injury sustained." ****754** (*Hawthorn v. City of Beverly Hills* (1952) 111 Cal.App.2d 723, 728, 245 P.2d 352, fn. omitted; accord, *Mannetter v. County of Marin* (1976) 62 Cal.App.3d 518, 521–522, 133 Cal.Rptr. 119.)

***1115 Civil Code Section 3287**

[5] Petitioner and an amicus curiae, the California Applicants' Attorneys Association, rely on Civil Code section 3287, subdivision (a) as authority for the award of prejudgment interest. That statute provides, in pertinent part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day...." For reasons given below, we agree that Civil Code section 3287, subdivision (a) applies to backpay awards made under Labor Code section 132a.

[6] [7] [8] "Amounts recoverable as wrongfully withheld payments of salary or pensions are damages within the meaning of [Civil Code section 3287, subdivision (a)]. *****398** [Citations.] Interest is recoverable on each salary or pension payment from the date it fell due. [Citation .]" (*Olson v. Cory* (1983) 35 Cal.3d 390, 402, 197 Cal.Rptr. 843, 673 P.2d 720; see also *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 262, 90 Cal.Rptr. 169, 475 P.2d 201 ["action to recover retroactive pay increases is an action for damages within the meaning of section 3287 of the Civil Code"].) As we explained in *Mass v. Board of Education* (1964) 61 Cal.2d 612, 39 Cal.Rptr. 739, 394 P.2d 579, involving a wrongfully suspended public schoolteacher, once the obligation to pay retroactive wages is established, interest under Civil Code section 3287 properly accompanies reinstatement and a backpay award in order to make the employee whole: "Each salary payment in the instant case accrued on a date certain. Unless the suspension itself can be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If plaintiff had not been wrongfully suspended, he would have obtained the benefit of the moneys paid as of those dates; he has thus lost the natural growth and productivity of the withheld salary in the form of interest." (*Mass v. Board of Education, supra,* at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579.) Awards of backpay generally, then, are damages for purposes of Civil Code section 3287. We still must ask, however, whether the statute applies to an award made by an administrative agency, here the WCAB, and whether anything in Labor Code section 132a was intended to preclude such interest.

[9] [10] Civil Code section 3287 has frequently been applied to administrative agencies' retroactive awards of government assistance, wages, or retirement benefits, whether the awards were made initially by the agency or ordered by writ of mandate by a court. (See, e.g., *Tripp v. Swoap* (1976) 17 Cal.3d 671, 675, 678–685, 131 Cal.Rptr. 789, 552 P.2d 749 [state agency properly ordered to pay applicant wrongfully denied welfare benefits retroactively, ***1116** with interest from date they should have begun]; *San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.* (1998) 68 Cal.App.4th 1084, 1086, 80 Cal.Rptr.2d 712 [under Civ.Code, § 3287, "when an administrative agency determines an employee's employment was wrongfully terminated, and reinstates the employee's employment with backpay, the agency must include interest in the award of wrongfully withheld backpay"]; *Goldfarb v. Civil Service Com.* (1990) 225 Cal.App.3d 633, 635–637, 275 Cal.Rptr. 284 [civil service commission must pay interest, under Civ.Code, § 3287, on backpay awarded to wrongfully demoted county employee]; *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 1531–1534, 258 Cal.Rptr. 106 [county retirement board was properly

ordered to award retroactive retirement benefits with interest from last day of service].)[3] Backpay awarded by an administrative agency, therefore, may be considered damages for purposes **755 of Civil Code section 3287 's mandate of interest.

WCAB awards of prejudgment interest under Civil Code section 3287 are consistent with both the letter and the spirit of Labor Code section 132a. Nothing in section 132a expressly or impliedly precludes such an award. Indeed, the statute's authorization of "reimbursement for lost wages" could reasonably be understood as impliedly authorizing accompanying interest, since without such interest the employee will not be fully reimbursed for the value of the lost wages. ***399 (*Mass v. Board of Education, supra,* 61 Cal.2d at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579.) The lack of express authorization for interest in section 132a is not significant. "Such a provision would be redundant, as the Legislature provided elsewhere, and generally, in Civil Code section 3287 ..., for the recovery of interest ..., the right to recover which is vested in the claimant on a particular day." (*Austin v. Board of Retirement, supra,* 209 Cal.App.3d at p. 1532, 258 Cal.Rptr. 106; accord, *Goldfarb v. Civil Service Com., supra,* 225 Cal.App.3d at p. 637, 275 Cal.Rptr. 284.)

[11] [12] As to spirit, we observe that Labor Code section 132a itself declares it is the "policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." Adhering to that statement of legislative policy, we have construed the statute as serving, in part, "a remedial function, by providing some compensation to the aggrieved worker for discrimination incurred as the result of his injury." *1117 (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 668, 150 Cal.Rptr. 250, 586 P.2d 564; see also *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1385, 28 Cal.Rptr.2d 30 [concluding § 132a 's "provision for reimbursement is remedial in character"].) The Legislature clearly intended that employee victims of discrimination would be made whole at least to the extent of their lost wages. Within that limit, "the Legislature left application of the provision for reimbursement to the broad equitable discretion of the WCAB." (*Dyer v. Workers' Comp. Appeals Bd., supra,* at p. 1385, 28 Cal.Rptr.2d 30.) An award of interest under Civil Code section 3287 is consistent with this remedial purpose. Indeed, as we have already noted, without prejudgment interest the backpay remedy may lose a significant portion of its value, and the employee left less than fully "reimburse[d]" (§ 132a, par. (1)) for his or her lost wages.

[13] [14] Because the WCAB is expressly authorized to award "reimbursement for lost wages" under Labor Code section 132a, and because the inclusion of prejudgment interest in such a backpay award is mandated by Civil Code section 3287, inclusion of interest in the backpay award does not violate the principle that an administrative agency cannot create a remedy the Legislature has withheld. (See *Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1389, 241 Cal.Rptr. 67, 743 P.2d 1323.) Contrary to the warning LACMTA tries to sound, our decision here, recognizing that the WCAB must sometimes include prejudgment interest in its backpay awards under section 132a, will not open the door to WCAB awards of punitive damages or damages for emotional distress. That prejudgment interest may be awarded to ensure the employee victimized by discrimination receives full "reimbursement" for backpay, undiminished in value by the employer's failure to pay the wages at the times due, does not suggest the WCAB has the authority to award damages of types not mentioned in section 132a and generally reserved to the judicial power. (See *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 262, 284 Cal.Rptr. 718, 814 P.2d 704 [distinguishing between " 'restitutive' " damages such as backpay, which are commonly and permissibly placed within the statutory authority of administrative agencies, and "nonquantifiable compensatory" and punitive damages, which are ordinarily and traditionally reserved to the courts]; see also *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177, 96 Cal.Rptr.2d 518, 999 P.2d 706 [although included as damages under the Civil Code, backpay is also an authorized equitable remedy for illegal withholding of wages under the unfair competition law].)

**756 Finally, respondent LACMTA contends this court's decision in *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 56 Cal.Rptr.2d 109, 920 P.2d 1314 (*AFL*) indicates the WCAB may not award prejudgment ***400 interest on backpay awards. We disagree. *AFL* did *1118 not decide or discuss any question regarding the statutory authority of the WCAB; it decided only the "narrow question" (*id.* at p. 1021, 56 Cal.Rptr.2d 109, 920 P.2d 1314) of whether an administrative law judge acting on behalf of the Unemployment Insurance Appeals Board may award interest on unemployment benefits previously denied by the Employment Development Department. As we have just seen, inclusion of Civil Code section 3287 interest in backpay awards under Labor Code section 132a is within the WCAB's statutory authority to ensure full reimbursement of lost wages to employees discriminatorily denied payment at the time the wages were due. *AFL,* concerned as it was with the very

different statutory scheme governing unemployment insurance benefits, is not apposite on this central point.

In holding interest was not authorized either under the unemployment insurance laws or under Civil Code section 3287, the *AFL* majority emphasized that certain delays were inherent in the administrative process, but concluded these delays "are not ... tantamount to a 'wrongful withholding' of benefits giving rise to a right to section 3287(a) prejudgment interest once the Board rules in favor of the claimant." (*AFL, supra,* 13 Cal.4th at p. 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Thus, "[t]he central theme of *AFL* ... is that interest is not available absent an agency decision or action which has resulted in wrongful withholding of, and corresponding delay in receiving, benefits to which the claimant is entitled. (See *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440, 1450 [73 Cal.Rptr.2d 769].) The *AFL* court extensively explained that the unemployment insurance scheme contemplates several steps and inherently involves some minimal delay before there is a determination of eligibility for the benefit.... Accordingly, when a claimant is found entitled to benefits at one of the administrative levels, there has been no wrongful delay or action in receiving benefits on which to predicate an award of prejudgment interest by the agency. (*AFL, supra,* 13 Cal.4th at p. 1037, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)" (*San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com., supra,* 68 Cal.App.4th at pp. 1094–1095, 80 Cal.Rptr.2d 712, fn. omitted.)

Here we are concerned not with an inherent administrative delay in providing government benefits, but with wages withheld from an employee in violation of Labor Code section 132a. The WCAB determined this legal violation began in December 1992, when petitioner should have been, but was not, reinstated to his previous position. The wages wrongfully withheld from that point on, until reinstatement and backpay were ordered in June 1997, came due on the dates they would have been paid had petitioner been reinstated. (*Mass v. Board of Education, supra,* 61 Cal.2d at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579.) Petitioner seeks interest under Civil Code section 3287, not to make up for the delay inherent in an administrative process, as in *AFL,* ***1119** *supra*, 13 Cal.4th 1017, 56 Cal.Rptr.2d 109, 920 P.2d 1314, but to make up for the lost use of his wages wrongfully withheld between 1992 and 1997.

[15] [16] In summary, although Labor Code section 132a does not itself expressly authorize the addition of prejudgment interest to an award of backpay to a victim of discrimination, Civil Code section 3287 requires such interest on damages due on a particular date, including awards of backpay, when they are certain or capable of being made certain by calculation. Neither section 5800 nor any other provision of the Labor Code cited to us or discovered in our research precludes addition of interest to a backpay award, and addition of interest would serve the remedial purpose of section 132a. Harmonizing the provisions of the Labor and Civil Codes to further the overall legislative goals, therefore, we conclude the WCAB may and must, when the criteria of ***401** Civil Code section 3287 are met, add to its awards reimbursing employees for lost wages and work benefits interest from the dates such wages and benefits would have become due had the employer not acted in violation of section 132a. Because the **757 WCAB denied petitioner interest in the belief such an award was unauthorized, it must reconsider its award in this case.[4]

DISPOSITION

The matter is remanded to the WCAB for further proceedings consistent with our opinion. (See § 5953.)

GEORGE, C.J., MOSK, J., KENNARD, J., BAXTER, J., and CHIN, J., concur.

Dissenting Opinion by BROWN, J.

I respectfully dissent.

"An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts...." (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (*Yamaha*).) Here, the Workers' Compensation Appeals Board (WCAB) has interpreted Labor Code section 132a[1] as creating a right to workers' compensation *benefits,* not civil damages, even if the award at issue is for backpay. The WCAB found "no authority" allowing it to award prejudgment interest on workers' compensation benefits, and neither do I.

***1120** Civil Code section 3287, subdivision (a), on which the majority relies, applies only to "person[s] ... entitled to recover *damages* " (italics added), and the Civil Code defines damages much more broadly than the benefits available under Labor Code section 132a. For example, Civil Code section 3333 provides that "the measure of

damages ... is the amount that will compensate for all the detriment proximately caused ... whether it could have been anticipated or not." Labor Code section 132a, by comparison, only permits an award of backpay and a 50 percent increase in compensation benefits otherwise payable on account of the worker's injury. In short, nothing in Civil Code section 3287 permits an award of prejudgment interest on workers' compensation *benefits,* and nothing in Labor Code section 132a suggests that the Civil Code provisions relating to damages apply.

Moreover, the WCAB's interpretation of section 132a is confirmed by several Court of Appeal decisions that describe section 132a as creating a right to a " 'class of benefits.' " (E.g., *Burton v. Workers' Comp. Appeals Bd.* (1980) 112 Cal.App.3d 85, 91, 169 Cal.Rptr. 72.) I can find no case that makes reference to "section 132a damages." Of course, the same discriminatory act that is the subject of a section 132a petition may, in some cases, also give rise to a claim for damages under the California Fair Employment and Housing Act (Gov.Code, § 12900 et seq.) or the common law (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1148, 77 Cal.Rptr.2d 445, 959 P.2d 752), but under section 132a, damages are simply not available. Because this case involves an administrative agency's award of benefits, not civil damages, I see no basis for distinguishing our decision in *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 56 Cal.Rptr.2d 109, 920 P.2d 1314, which precluded ***402** an award of interest in an analogous context.

In addition, section 5800 implicitly precludes prejudgment interest on WCAB awards by explicitly authorizing postjudgment interest only. Section 5800 provides in pertinent part: "All awards of the appeals board either for the payment of compensation or for the payment of death benefits, shall carry interest at the same rate as judgments in civil actions on all due and unpaid payments from the date of the making and filing of said award." The majority stresses that section 5800 applies only to awards " 'for the payment of compensation or **758 ... death benefits,' and argues that section 3207 defines "compensation" as " 'compensation under Division 4' "; whereas, section 132a falls in division 1 of the Labor Code. (Maj. opn., *ante,* 104 Cal.Rptr.2d at p. 397, 17 P.3d at p. 753.) But section 3207 expressly states that "compensation under Division 4" includes "vocational rehabilitation," which, like backpay under section 132a, is a benefit conferred by division 1 of the Labor Code. (See § 139.5.) Therefore, section 3207 's reference to division 4 was clearly not meant to be restrictive.

***1121** Furthermore, as noted, the WCAB's interpretation of sections 132a, 3207, and 5800 is entitled to "consideration and respect" (*Yamaha, supra,* 19 Cal.4th at p. 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031), and a fair application of the factors we articulated in *Yamaha* militates our deference to the WCAB in this instance. While we acknowledged in *Yamaha* that deference to administrative interpretations is always "situational" (*id.* at p. 12, 78 Cal.Rptr.2d 1, 960 P.2d 1031, italics omitted) and depends on "a complex of factors" (*ibid.*), we also emphasized that where the agency has special expertise (*ibid.*) and its decision is "careful[ly] consider[ed] by senior agency officials" (*id.* at p. 13, 78 Cal.Rptr.2d 1, 960 P.2d 1031), it is entitled to correspondingly greater weight. (*Id.* at pp. 12–15, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) I believe the WCAB's familiarity with sections 132a, 3207, and 5800, as well as the entire scheme of the workers' compensation law it enforces, renders its interpretation of those provisions presumptively correct, and in this case the interpretation comes from the highest policymaking level of the agency. Accordingly, I consider this case to be one in which deference is appropriate.

As this case involves an administrative agency's award of benefits, not civil damages, I see no basis for applying Civil Code section 3287, subdivision (a), or for distinguishing our decision in *American Federation of Labor v. Unemployment Ins. Appeals Bd. supra,* 13 Cal.4th 1017, 56 Cal.Rptr.2d 109, 920 P.2d 1314. Moreover, I would interpret Labor Code section 5800 as applying to awards of backpay under Labor Code section 132a and precluding prejudgment interest. Accordingly, I would uphold the decision of the WCAB.

Parallel Citations

24 Cal.4th 1109, 17 P.3d 749, 66 Cal. Comp. Cases 208, 01 Cal. Daily Op. Serv. 1545, 2001 Daily Journal D.A.R. 1977

Footnotes

1 Unless otherwise specified, all further statutory references are to the Labor Code.

2 The WCAB, citing a dictum regarding reinstatement rights in *Jordan v. Workers' Comp. Appeals Bd.* (1985) 175

Cal.App.3d 162, 166, 220 Cal.Rptr. 554, found the refusal to reinstate violated section 132a because LACMTA "failed to show a business necessity for its refusal to reinstate applicant in December 1992." LACMTA did not seek judicial review of this finding, the correctness of which is therefore not before us.

3 As these cases indicate, and contrary to the dissent's apparent assumption (see dis. opn., *post,* 104 Cal.Rptr.2d at p. 401, 17 P.3d at p. 757.), the terms "benefits" and "damages" are not mutually exclusive. Welfare and retirement payments, for example, can be referred to as benefits or, when awarded in relief of a legal claim, as damages. "Damages," for purposes of Civil Code section 3287, are simply the monetary relief a person is entitled to recover in "compensation" for "detriment from the unlawful act or omission of another." (Civ.Code, § 3281.)

4 In its answer brief in the Court of Appeal and its answer to the petition for review, LACMTA argued, in the alternative, that even if prejudgment interest could be included in Labor Code section 132a awards, it would not properly be awarded in this case under Civil Code section 3287 because factual disputes concerning the date upon which Currie was entitled to reinstatement made vesting of the damages too uncertain. That issue was not discussed by the Court of Appeal, nor has LACMTA raised the issue in its sole brief on the merits filed herein, an answer brief to an amicus curiae brief. We decline to address the issue in the first instance, but our decision does not preclude the WCAB from doing so on remand.

1 Further statutory references are to the Labor Code unless otherwise indicated.

End of Document

EXHIBIT 15

Kaiser Foundation Health Plan, Inc. v. Zingale
Court of Appeal, Third District, California. | June 27, 2002 | 99 Cal.App.4th 1018 | 121 Cal.Rptr.2d 741

Kaiser Foundation Health Plan, Inc. v. Zingale

Court of Appeal, Third District, California. | June 27, 2002 | 99 Cal.App.4th 1018 | 121 Cal.Rptr.2d 741

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Outline

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99 Cal.App.4th 1018
Court of Appeal, Third District, California.

KAISER FOUNDATION HEALTH PLAN, INC.,
Plaintiff and Respondent,
v.
Daniel ZINGALE, as Director, etc., Defendant and Appellant.

No. C039437. | June 27, 2002.

Health care service plan provider petitioned for a writ of administrative mandamus, requiring Department of Managed Health Care to approve plan amendment discontinuing coverage of prescription drugs to treat sexual dysfunction. The Superior Court, Sacramento County, No. 00CS01460, Lloyd G. Connelly, J., granted writ. Department appealed. The Court of Appeal, Nicholson, J., held that Department lacked statutory authority to disapprove proposed amendment.

Affirmed.

West Headnotes (13)

[1] **Insurance**
State Agencies and Regulation

217Insurance
217IIRegulation in General
217II(C)State Agencies and Regulation
217k1022In general

Department of Managed Health Care lacked statutory authority to disapprove proposed amendment to health care service plan discontinuing coverage of prescription drugs to treat sexual dysfunction. West's Ann.Cal.Health & Safety Code § 1340 et seq.

Cases that cite this headnote

[2] **Appeal and Error**
Review where facts are not disputed

30Appeal and Error
30XVIReview
30XVI(A)Scope, Standards, and Extent, in General
30k838Questions Considered
30k841Review where facts are not disputed

When the facts are not at issue but only statutory interpretation remains, the Court of Appeal applies its independent judgment.

Cases that cite this headnote

[3] **Statutes**
Plain language; plain, ordinary, common, or literal meaning

361Statutes
361IIIConstruction
361III(C)Clarity and Ambiguity; Multiple Meanings
361k1107Absence of Ambiguity; Application of Clear or Unambiguous Statute or Language
361k1111Plain language; plain, ordinary, common, or literal meaning
(Formerly 361k188)

In interpreting a statute where the language is clear, courts must follow its plain meaning.

Cases that cite this headnote

[4] **Statutes**
Extrinsic Aids to Construction

361Statutes
361IIIConstruction
361III(F)Extrinsic Aids to Construction
361k1171In general
(Formerly 361k214)

If statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.

Cases that cite this headnote

[5] **Statutes**
Purpose and intent
Statutes
Unintended or unreasonable results; absurdity

361Statutes
361IIIConstruction
361III(A)In General
361k1074Purpose
361k1076Purpose and intent
(Formerly 361k184)
361Statutes
361IVOperation and Effect
361k1402Construction in View of Effects, Consequences, or Results
361k1404Unintended or unreasonable results; absurdity
(Formerly 361k184, 361k181(2))

In interpreting a statute, courts must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.

1 Cases that cite this headnote

[6] **Administrative Law and Procedure**
Statutory basis and limitation

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A)In General
15Ak303Powers in General
15Ak305Statutory basis and limitation

If a state agency was created by statute, the agency's authority is circumscribed by the relevant legislation.

Cases that cite this headnote

[7] **Administrative Law and Procedure**
Statutory basis and limitation

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A)In General
15Ak303Powers in General
15Ak305Statutory basis and limitation

The powers of public agencies are derived from the statutes which create them and define their functions.

Cases that cite this headnote

[8] **Administrative Law and Procedure**
Statutory limitation

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak385Power to Make
15Ak387Statutory limitation

Administrative regulations may not exceed the scope of authority conferred by the Legislature.

Cases that cite this headnote

[9] **Administrative Law and Procedure**
Statutory basis and limitation

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A)In General
15Ak303Powers in General
15Ak305Statutory basis and limitation

Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void.

Cases that cite this headnote

[10] **Insurance**
Drugs and Medicines

217Insurance
217XXCoverage—Health and Accident Insurance
217XX(B)Medical Insurance
217k2510Drugs and Medicines
217k2511In general

Provision of the Knox-Keene Health Service Plan Act of 1975 requiring a health care service plan to maintain an expeditious process by which prescribing medical providers may obtain authorization for a medically necessary nonformulary prescription drug does not require the prescription drug benefit of a health care service plan to cover prescription drugs for the treatment of every medical condition. West's Ann.Cal.Health & Safety Code § 1367.24.

1 Cases that cite this headnote

[11] **Insurance**
Drugs and Medicines

217Insurance
217XXCoverage—Health and Accident Insurance
217XX(B)Medical Insurance
217k2510Drugs and Medicines
217k2511In general

Under the Knox-Keene Health Service Plan Act of 1975, the Legislature intended to allow health care service plans to limit the medical conditions for which prescription drugs are covered. West's Ann.Cal.Health & Safety Code § 1340 et seq.

2 Cases that cite this headnote

[12] **Administrative Law and Procedure**
Deference to agency in general

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak431Deference to agency in general
(Formerly 15Ak416.1)

The interpretations and opinions of an agency administrator, while not controlling upon the courts, constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Cases that cite this headnote

[13] **Administrative Law and Procedure**
Deference to agency in general
Administrative Law and Procedure
Legislative questions; rule-making

15AAdministrative Law and Procedure
15AIVPowers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C)Rules, Regulations, and Other Policymaking
15Ak428Administrative Construction of Statutes
15Ak431Deference to agency in general
15AAdministrative Law and Procedure
15AVJudicial Review of Administrative Decisions
15AV(E)Particular Questions, Review of
15Ak797Legislative questions; rule-making

A court does not defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature; the court, not the agency, has final responsibility for the interpretation of the law under which the regulation was issued.

1 Cases that cite this headnote

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Opinion

NICHOLSON, J.

The California Department of Managed Health Care (Department) ordered Kaiser Foundation Health Plan, Inc. (Kaiser) to continue providing coverage for prescription drugs, such as Viagra, to treat sexual dysfunction. Kaiser petitioned for a writ of administrative mandamus, and the trial court determined that such compulsion is beyond the Department's statutory authority. The Department appeals. We also conclude the Department does not have authority to compel Kaiser to continue covering prescription drugs to treat sexual dysfunction.

*1021 THE KNOX–KEENE HEALTH SERVICE PLAN ACT

The Knox–Keene Health Service Plan Act of 1975(Act) was enacted, and amended through the years, "to promote the delivery of health and medical care to the people of the State of California who enroll in, or subscribe for the services rendered by, a health care service plan...." (Health & Saf.Code, § 1342; hereafter, unspecified statutory references are to the Health and Safety Code.) Among the stated goals of the Act are (1) " [e]nsuring the continued role of the professional as the determiner of the patient's health needs which fosters the traditional relationship of trust and confidence between the patient and the professional" (§ 1342, subd. (a)) and (2) " [e]nsuring that subscribers and enrollees receive available and accessible health and medical services rendered in a manner providing continuity of care" (§ 1342, subd. (g)).

Under the Act, a health care service plan must provide all "basic health care services." (§ 1367, subd. (i).) However, "basic health care services" does not include prescription drug benefits. (See § 1345, subd. (b) [defining "basic health care services"].) Each health care service plan must be fair, reasonable, and consistent with the Act. (§ 1367, subd. (h)(1).)

In article 5 of the Act, the Legislature imposes standards on health care service plans. From a provision requiring all health care facilities utilized by the plan to be licensed by the Department of Health Services (§ 1367, subd. (a)) to a requirement that plans establish and implement a procedure for a patient needing continuing care to receive a standing referral to a specialist (§ 1374.16, subd. (a)), article 5 contains more than 100 code sections full of standards a health care service plan must abide by to do business in California. The standards cover a broad range of activities and reflect the public policy of California with respect to health care service plans.

The Department was created in 2000, with a director, appointed by the governor, as chief officer to succeed the Department of Corporations in regulating health care service plans. (§ 1341; Stats.1999, ch. 525, §§ 1, 214.) The statute establishing the Department, section 1341, gives the Department "charge of the execution of the laws of this state relating to health care service plans and the health care service plan business including, but not limited to, those laws directing the department to ensure that health care service plans provide enrollees with access to quality health care services and protect and promote the interests of enrollees." (*Id.*, subd. (a).) The director has power to "[p]romote and establish standards of ethical conduct ***1022** for the administration of plans and undertake activities to encourage responsibility ****744** in the promotion and sale of plan contracts and the enrollment of subscribers or enrollees in the plans." (§ 1346, subd. (a)(9).)

In article 3 of the Act, concerning licensing of health care service plans and fees to be paid by those plans, the Legislature requires a health care service plan to file notice with the Department before taking specified actions. (§ 1352.1.) Subdivision (a) of section 1352.1 provides: " [N]o plan shall enter into any new or modified plan contract ... unless (1) a true copy thereof has first been filed with the director, at least 30 days prior to any such use, or any shorter period as the director by rule or order may allow, and (2) the director by notice has not found the plan contract, disclosure form, or evidence of coverage, wholly or in part, to be untrue, misleading, deceptive, or otherwise not in compliance with this chapter or the rules thereunder, and specified the deficiencies, within at least 30 days or any shorter time as the director by rule or order may allow."

FACTS AND PROCEDURE

In 1998, Kaiser, a health care service plan provider in California, submitted a proposed plan amendment to the Department of Corporations for approval. Kaiser's health care service plan includes an outpatient prescription drug benefit. The proposed amendment would exclude prescription drugs for the treatment of sexual dysfunction.

The Commissioner of Corporations determined the

proposed amendment did not comply with the Act and, therefore, disapproved the proposed amendment, stating that it was his policy to forbid exclusion of any class of prescription drugs. Kaiser requested an administrative hearing on the issue. It was presented to an administrative law judge, who issued a proposed decision finding the Act did not give the Department of Corporations the authority to disapprove Kaiser's proposed plan amendment for the reason given.

In 2000, the Department of Managed Health Care, succeeding the Department of Corporations under amendments to the Act, rejected the decision of the administrative law judge and upheld the earlier action of the Department of Corporations. Director Daniel Zingale issued a decision finding Kaiser's proposed plan amendment violated the Act. The decision based disapproval of the proposed plan amendment on the Department's belief that it could require a health care service plan to cover all medically necessary prescription drugs if the plan chose to offer any prescription drug coverage at all. The decision did not find Kaiser violated the Act in the manner of giving notice of the proposed amendment. (See § 1352.1.)

***1023** Kaiser filed a petition for writ of administrative mandamus in the trial court. In a complete and well-reasoned ruling, the trial court concluded that the Department did not have statutory authority to disapprove Kaiser's plan amendment simply because the proposed plan did not cover prescription drugs for the treatment of sexual dysfunction. The court ordered issuance of a writ of mandate requiring the Department to set aside its disapproval of Kaiser's proposed amendment and to approve the amendment. The Department appeals.

DISCUSSION

[1] The Department argues that it has authority to regulate prescription drug coverage when that coverage is offered as part of a health care service plan. Kaiser does not dispute this point. Indeed, that point was never in dispute. Kaiser recognized the Department's authority by submitting the proposed amendment to the Department's predecessor as required under ****745** the Act. (See § 1352.1, subd. (a).) Accordingly, we begin with the premise that the Department has regulatory authority over the proposed amendment to Kaiser's health care service plan. The disputed issue is whether, under the circumstances of this case, the Department had authority to disapprove the proposed amendment.

[2] [3] [4] [5] The trial court found the Act does not give the Department the power it seeks here to exercise. When, as here, the facts are not at issue but only statutory interpretation remains, we apply our independent judgment. (*City of Poway v. City of San Diego* (1991) 229 Cal.App.3d 847, 859, 280 Cal.Rptr. 368.) "In interpreting a statute where the language is clear, courts must follow its plain meaning. [Citation.] However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. [Citation.] In the end, we ' "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' [Citation.] " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003, 111 Cal.Rptr.2d 564, 30 P.3d 57.)

[6] [7] [8] [9] If a state agency was created by statute, the agency's authority is circumscribed by the relevant legislation. (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299–300, 105 Cal.Rptr.2d 636, 20 P.3d 533.) " '[T]he powers of public [agencies] are derived from the ***1024** statutes which create them and define their functions. [Citation.]' " (*Imperial Irrigation Dist. v. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 567, 275 Cal.Rptr. 250.) " [A]dministrative regulations may not exceed the scope of authority conferred by the Legislature." (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 750, 16 Cal.Rptr.2d 727.) "Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391, 211 Cal.Rptr. 758, 696 P.2d 150.) Here, the Department was created and empowered by the Act. The Department, therefore, has only the power delegated to it in the Act.

On its face, the Act simply does not authorize the Department to assert the power it here seeks to assert. If the Legislature had intended to require every health care service plan that offers a prescription drug benefit to cover all medically necessary prescription drugs or to allow the Department to impose that requirement, it would have been simple for the Legislature to say so. The Department promulgated a regulation purporting to exercise that power. Discussed below, the regulation states: "Every health care service plan that provides prescription drug benefits shall provide coverage for all medically necessary outpatient prescription drugs."

(Cal.Code Regs., tit. 28, § 1300.67.24, subd. (a).) The Legislature, however, has not enacted this requirement and has not indicated the Department may do so. Nonetheless, the Department asserts its authority to impose this requirement can be found in the Act. It urges us to find the Act gives it "general regulatory discretion" and allows it to require Kaiser to cover prescriptions drugs for sexual dysfunction. Even assuming there is some ambiguity in the Act concerning the powers of the Department, we conclude that resort to principles of statutory construction **746 still do not lead to an interpretation favorable to the Department's position.

The Department asserts the Legislature intended to require a prescription drug benefit offered as part of a health care service plan to include all medically necessary prescription drugs. This intent, the Department claims, appears in section 1367.24, which requires the plan to "maintain an expeditious process by which prescribing providers may obtain authorization for a medically necessary nonformulary prescription drug." (§ 1367.24, subd. (a).) The Department argues the word authorization refers to payment for the prescription drug, while Kaiser contends the word "authorization" refers only to use of a non-formulary prescription drug in the place of a formulary drug and has nothing to do with whether the drug is covered under the prescription drug benefit. A review of the legislative history of section 1367.24 and placement of this provision in the context of the Act, as a whole, support Kaiser's view.

*1025 A formulary is a list of prescription drugs approved by the health care service plan. (American Medical Association, Council on Ethical and Judicial Affairs, *Managed Care Cost Containment Involving Prescription Drugs* (1998) 53 Food Drug L.J. 25.) Under section 1367.24, a physician may obtain authorization to prescribe a drug that is not on the formulary. Although there may be a preferred drug on the formulary for treatment of the specific condition, the physician can obtain authorization for a drug not on the formulary if it is medically necessary to do so.

An Assembly committee report concerning section 1367.24 states: "According to the author, this bill will ensure that financial incentives and penalties do not improperly influence decisions regarding prescription drug benefits provided to health maintenance organization (HMO) patients. The author is primarily concerned with overly restrictive drug formularies and drug switching programs that steer patients towards cheaper drugs. The author asserts that patients, doctors, and pharmacists are complaining that HMO medication decisions are being driven by cost savings rather than sound medical judgment. According to the author, research indicates that this drug cost-cutting practice actually results in higher long-term costs associated with extended illnesses, more visits to doctors and emergency rooms, and greater overall drug use." (Assem. Com. on Health, Rep. on Sen Bill No. 625 (1997–1998 Reg. Sess.) as amended July 10, 1997, p. 3.)

[10] This legislative history shows the Legislature was not attempting to prohibit health care service plans from limiting the conditions for which the plan would cover prescription drugs. Instead, the Legislature intended only to protect patients from "overly restrictive drug formularies and drug switching programs that steer patients towards cheaper drugs." Section 1367.24, therefore, does not require the prescription drug benefit of a health care service plan to cover prescription drugs for the treatment of every medical condition. Instead, it has the effect of preventing a health care service plan from steering patients toward cheaper drugs, even when the physician deems it medically necessary to prescribe the more expensive drug.

[11] Section 1367.24 does not endow the Department with authority to require Kaiser to cover prescription drugs for sexual dysfunction. Instead, consideration of the Act, as a whole, leads to the conclusion the Legislature intended to allow health care service plans to limit the medical conditions for which prescription drugs are covered.

**747 Of particular interest, the Act contains several provisions requiring health care service plans to cover prescription drugs to treat specific conditions. *1026 The Act requires a health care service plan to provide coverage for pain medication for the terminally ill (§ 1367.215), contraceptives for women (§ 1367.25), an AIDS vaccine (§ 1367.45), and insulin for diabetics (§ 1367.51). The act also prohibits plans from excluding from coverage a drug on the basis that it was prescribed for a use different from the use for which the drug was approved by the Food and Drug Administration. (§ 1367.21.) The Act does not contain a similar provision requiring a health care service plan to provide coverage for prescription drugs to treat sexual dysfunction.

If we were to adopt the Department's proposed interpretation of section 1367.24, requiring plans to cover all medically necessary prescription drugs, the provisions of the Act requiring plans to provide coverage for drugs for the treatment of specific conditions, such as AIDS and diabetes, would be superfluous. We cannot adopt the Department's interpretation because it violates the rule of statutory construction prohibiting an interpretation that renders a provision superfluous. (*Dix v. Superior Court*

(1991) 53 Cal.3d 442, 459, 279 Cal.Rptr. 834, 807 P.2d 1063.) On the other hand, the interpretation of section 1367.24 proposed by Kaiser is consistent with the legislative intent as seen in the legislative history and by reading the Act as a whole.

Another provision of the Act is evidence of the Legislature's intent not to require prescription drug benefits to cover all medically necessary prescription drugs. Subdivision (a) of section 1367.22 provides: "A health care service plan contract ... that covers prescription drug benefits shall not limit or exclude coverage for a drug for an enrollee if the drug previously had been approved for coverage by the plan for a medical condition of the enrollee and the plan's prescribing provider continues to prescribe the drug for the medical condition...."

Similar to the statutes mandating coverage of prescription drugs for specific conditions such as diabetes and AIDS, section 1367.22 requires a health care service plan to continue covering a prescription for an enrollee that has been taking the medication and continues to need it. This requirement is an exception to the Legislature's implicit intent *not* to mandate coverage of medically necessary prescription drugs. If the Legislature had intended to mandate coverage of all medically necessary prescription drugs, there would be no need for the exception stated in section 1367.22, just as there would be no need to enact statutes requiring health care service plans to cover prescription drugs to treat specific conditions, such as AIDS and diabetes.

***1027** Attempting to apply the maxim that "the more specific provision ... takes precedence over the more general one" (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 857, 39 Cal.Rptr.2d 21, 890 P.2d 43; see also Civ.Code, § 3534), the Department argues that, even though section 1367.22, requiring continued coverage of a drug already prescribed, appears to be an exception to a general rule that a health care service plan need not cover all medically necessary prescription drugs, the Department still has "general jurisdiction ... to regulate all medically necessary prescription drugs." (See § 1367.22, subd. (c) [nothing in section restricts or impairs application of other provisions].) As noted above, however, even if the Department has general regulatory jurisdiction over health care service plans, the Act does not give the Department the authority to compel a plan to ****748** cover all medically necessary prescription drugs. To the contrary, the clear implication in the Act's provisions is that a health care service plan that includes coverage for prescription drugs need not cover any particular prescription drug except under the circumstances or for the conditions we have noted. If the Legislature intended to require the prescription drug benefit to include all medically necessary prescription drugs, subdivision (a) of section 1367.22 is superfluous. We, however, adopt the interpretation that gives each provision meaning. (See *Dix v. Superior Court, supra,* 53 Cal.3d at p. 459, 279 Cal.Rptr. 834, 807 P.2d 1063.)

The Department's regulatory authority over health care service plans, though it may be characterized as general, does not exceed the scope of authority granted by the Legislature in the Act. To the extent any departmental action exceeds the power delegated by the Legislature, the action is void. (See *Association for Retarded Citizens v. Department of Developmental Services, supra,* 38 Cal.3d at p. 391, 211 Cal.Rptr. 758, 696 P.2d 150.) While there is no express provision of the Act giving, or taking away from, the Department authority to compel a health care service plan to cover all medically necessary prescription drugs if the plan provides prescription drug coverage at all, the unmistakable intent of the Legislature from a reading of the Act, as a whole, is that the Department does not have such power. Therefore, the order disapproving the amendment to Kaiser's health care service plan simply because it would not cover prescription drugs for sexual dysfunction when medically necessary was beyond the scope of the Department's authority and is void.

On November 3, 2000, the department promulgated section 1300.67.24 of the California Code of Regulations as an emergency regulation operative immediately. The regulation, promulgated the same day Kaiser filed its petition for writ of administrative mandamus in the trial court, expresses the Department's interpretation of section 1367.24, subdivision (a): "Every health care service plan that provides prescription drug benefits shall provide ***1028** coverage for all medically necessary outpatient prescription drugs." (Cal.Code Regs., tit. 28, § 1300.67.24, subd. (a).)

[12] "The interpretations and opinions of an agency administrator, while not controlling upon the courts, constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. (*Yamaha Corp. of America v. State Bd. of Equalization* [*Yamaha*] (1998) 19 Cal.4th 1, 14, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) '[B]ecause the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with satellite legal and regulatory issues. It is this 'expertise,' expressed as an interpretation ... that is the source of the presumptive value of the agency's views.' (*Id.* at p. 11, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)" (*Exxon Mobil Corp. v.*

County of Santa Barbara (2001) 92 Cal.App.4th 1347, 1357, 112 Cal.Rptr.2d 751.)

[13] The Department, citing *Yamaha, supra,* 19 Cal.4th at pages 6 and 7, 78 Cal.Rptr.2d 1, 960 P.2d 1031, asserts its interpretation of a statute within the Act is "entitled to judicial consideration and respect." Kaiser responds that the general rule of deference to interpretations of statutes subject to the regulatory jurisdiction of agencies does not apply when the issue is the scope of the agency's jurisdiction. Kaiser's position is correct. As noted in a footnote in *Yamaha:* "[Q]uasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's **749 view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued." (19 Cal.4th at p. 11, fn. 4, 78 Cal.Rptr.2d 1, 960 P.2d 1031; see also *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1022, 50 Cal.Rptr.2d 892 [standard of review of challenges to "fundamental legitimacy" of quasi-legislative regulation is " 'respectful nondeference' "].)

Accordingly, we conclude section 1367.24 does not require health care service plans to provide coverage for all medically necessary outpatient prescription drugs, despite the Department's attempt to impose that requirement in California Code of Regulations, title 28, section 1300.67.24. Given this conclusion, we need not analyze the timing of the Department's promulgation of this regulation or the fact it was promulgated as an emergency regulation.

*1029 DISPOSITION

The order granting Kaiser's petition for a writ of administrative mandamus is affirmed.

We concur: SCOTLAND, P.J., and MORRISON, J.

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