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August 25, 2015

BY EMAIL, FAX, AND BY U.S. MAIL

Anthony Martin, Regulation Coordinator
California Public Employees' Retirement System
P.O. Box 942702
Sacramento, CA 94229-2702

Re: Proposed Regulation 555.5 – Written Comments

Dear Mr. Martin:

Since the public comments has re-opened, I submit additional written comments about proposed regulation 555.5, including how it is unnecessary and inconsistent with existing law.

On July 15, 2015, the California Supreme Court granted review of the Fourth District Court of Appeal's decision in *Flethez v. San Bernardino Cnty. Employees Ret. Ass.*, (2015) 189 Cal.Rptr.3d 823.

In *Flethez*, the Supreme Court is reviewing whether and to what extent a retirement system owes interest under *Civil Code* section 3287(a) on payments of disability and industrial disability benefits in the time period before the disability "eligibility" was determined. *Flethez* explicitly cites *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440 which is one of the cases specifically referenced in the language of the proposed Regulation 555.5.

I submit these written comments and incorporate into my written comments the words in the pleadings filed before the Supreme Court in *Flethez*. I am attaching and incorporating herein as written comment:

- (1) the Court of Appeal opinion in *Flethez*,
- (2) the *Petition for Review* filed by counsel for plaintiff Frank Flethez,
- (3) the *Answer to the Petition for Review* filed by the retirement system,
- (4) the *Reply to the Answer* filed by counsel for Flethez, and
- (5) the Supreme Court's *Summary of Cases Accepted and Related Actions During Week of July 13, 2015*.

As you will see after reading the incorporated comments, the proposed regulation 555.5 is inconsistent with both of the parties arguments presented to the Supreme Court. Please address the comments and arguments presented in *Flethez*.

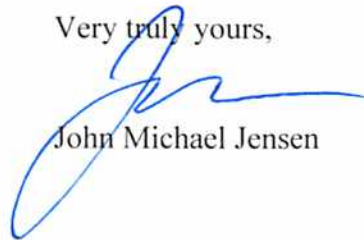
It would be inappropriate for CalPERS to move forward on proposed Regulation 555.5 (which is based in part on a recital of *Weber* as addressed in *Flethez*) at least until after the Supreme Court issues a final opinion on *Flethez*.

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Additionally, I believe that the change from 90 days to 45 days is a major change that requires CalPERS to publish the amended regulation language again and provide a new 45 days mote for comment. I request a public hearing.

Should you have any questions or need clarification, please do not hesitate to contact me.

Very truly yours,



John Michael Jensen

JMJ:gm

cc: Terence Hawley, Reed Smith

Exhibit 1

352 P.3d 391
Supreme Court of California

FLETHEZ
v.
SAN BERNARDINO COUNTY EMPLOYEES
RETIREMENT ASSOCIATION.

No. S226779. | July 15, 2015.

Opinion

Petition for review granted.

CANTIL-SAKAUYE, C.J., WERDEGAR, CHIN,
CORRIGAN, LIU, CUÉLLAR and KRUGER, JJ., concur.

All Citations

352 P.3d 391, 189 Cal.Rptr.3d 823 (Mem)

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Review Granted and Opinion Superseded by *Flethez v. San Bernardino County Employees Retirement Assn.*, Cal., July 15, 2015

236 Cal.App.4th 65

Review Granted

(Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 8.1105 and 8.1110)

Court of Appeal,

Fourth District, Division 1, California.

Frank FLETHEZ, Plaintiff and Respondent,

v.

SAN BERNARDINO COUNTY

EMPLOYEES RETIREMENT

ASSOCIATION, Defendant and Appellant.

Do66959 | Filed April 22, 2015

Synopsis

Background: Former county employee filed a petition for writ of mandamus seeking retroactive disability retirement. The Superior Court, San Bernardino County, No. CIVDS1212542, David Cohn, J., granted petition and awarded prejudgment interest. County employees' retirement association appealed.

[Holding:] The Court of Appeal, McDonald, J., held that trial court could not award prejudgment interest on retroactive disability benefits for a period before employee proved his right to the benefits.

Affirmed in part, reversed in part, and remanded for further proceedings.

West Headnotes (7)

[1] Counties

↔ Pensions and benefits

104 Counties

104III Officers and Agents

104k68 Compensation

104k69.2 Pensions and benefits

The burden of proof is on a county employees' retirement association member applying for disability retirement benefits to show he or she is permanently incapacitated as a result of performing his or her job duties. Cal. Gov't Code §§ 31724, 31725.

Cases that cite this headnote

[2] Counties

↔ Pensions and benefits

104 Counties

104III Officers and Agents

104k68 Compensation

104k69.2 Pensions and benefits

A county retirement board is required to administer the retirement system in a manner to best provide benefits to the participants of the plan; it cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them. Cal. Gov't Code §§ 31725, 31725.7, 31725.8.

Cases that cite this headnote

[3] Counties

↔ Pensions and benefits

104 Counties

104III Officers and Agents

104k68 Compensation

104k69.2 Pensions and benefits

A county retirement board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant. Cal. Gov't Code §§ 31725, 31725.7, 31725.8.

Cases that cite this headnote

[4] Interest

↔ Labor relations and employment

219 Interest

219III Time and Computation

219k39 Time 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 meaning of statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in him upon a particular date, is entitled also to recover interest thereon from that day, and interest is recoverable on each salary or pension payment from date it fell due. Cal. Civ. Code § 3287(a).

Cases that cite this headnote

[5] Interest

↔ Labor relations and employment

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in General

219k39(2.5) Prejudgment Interest in General

219k39(2.40) Labor relations and employment

To recover interest under statute providing that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and right to recover which is vested in the person upon a particular date, is entitled also to recover interest thereon from that day in a mandamus action to recover disability retirement benefits from a county employees' retirement association, the claimant must show: (1) an underlying monetary obligation, (2) damages which are certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. Cal. Civ. Code § 3287(a).

Cases that cite this headnote

[6] Interest

↔ Labor relations and employment

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in General

219k39(2.5) Prejudgment Interest in General

219k39(2.40) Labor relations and employment

Trial court could not award former county employee prejudgment interest on his retroactive

disability benefits for a period after his last day of receiving regular compensation but before he proved his right to recover retroactive disability retirement payments, since during that period payment of the benefits was not yet due and employee's right to recover those payments was not yet vested. Cal. Civ. Code § 3287(a); Cal. Gov't Code §§ 31721(a), 31724.

Cases that cite this headnote

[7] Counties

↔ Pensions and benefits

104 Counties

104III Officers and Agents

104k68 Compensation

104k69 2 Pensions and benefits

Under County Employees Retirement Law (CERL), it is not until the retiring member establishes his or her entitlement to retroactive benefit payments that the right to such payments becomes vested; prior to such proof, the retiring member's right to such retroactive benefit payments is merely inchoate. Cal. Civ. Code § 3287(a); Cal. Gov't Code § 31724.

See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 888 et seq.

Cases that cite this headnote

****277 APPEAL** from a judgment of the Superior Court of San Bernardino County, David Cohn, Judge. Affirmed in part; reversed in part and remanded for further proceedings. (Super. Ct. No. CIVDS1212542)

Attorneys and Law Firms

Arias & Lockwood and Christopher D. Lockwood, for Defendant and Appellant.

Faunce, Singer & Oatman, Mark Ellis Singer and Edward L. Faunce, for Plaintiff and Respondent.

Opinion

McDONALD, J.

*68 On February 1, 2000, following his last day of work as an employee of San Bernardino County (County), Frank Flethez underwent surgery for a work-related spinal injury he suffered in 1998. In 2008, he filed an application with the San Bernardino County Employees Retirement Association (SBCERA) for work-related disability retirements benefits. SBCERA granted his request for disability benefits, beginning as of 2008, but did not grant him retroactive benefits for the period before the date of his application. Flethez filed a petition for writ of mandamus seeking retroactive disability retirement benefits beginning July 15, 2000. The trial court issued a judgment granting his petition and awarding him Civil Code section 3287, subdivision (a),¹ (§ 3287(a)) prejudgment interest on the retroactive benefits to which the judgment provided he was entitled. On appeal, SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest on his retroactive benefits beginning July 15, 2000, because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits in 2008. Based on our interpretation of section 3287(a) and consideration of relevant case law and the facts in this case as discussed below, we conclude the trial court erred by awarding Flethez prejudgment interest on his retroactive disability benefits before payments of those benefits were due and before his right to recover those payments became vested under section 3287(a).

*69 FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Flethez became an employee of County. He worked as an equipment operator from 1991 until 2000. In 1998, he was injured while performing his job duties. After his last day of work on January 28, 2000, he underwent spinal surgery for that 1998 injury. He underwent additional surgeries in 2001 and 2002 and received physical therapy through 2004.

**278 On June 12, 2008, Flethez filed an application with SBCERA for disability retirements benefits, but it was rejected for omission of a signed medical records authorization. On July 16, 2009, he filed a complete application, including a signed medical records authorization and a supporting physician's report. On August 5, 2010, based on its staff's recommendation, SBCERA granted Flethez's application for disability retirement benefits, effective as of the date of his initial application in 2008. Flethez requested

a formal administrative hearing limited to the issue of the appropriate starting date for his retirement benefits. On December 15, 2011, the administrative hearing was held and the hearing officer subsequently issued proposed findings of fact, conclusions of law, and a recommended decision. On October 4, 2012, SBCERA adopted the hearing officer's proposed decision and maintained the effective date of June 12, 2008, for the beginning of Flethez's disability retirement benefits.

Flethez filed the instant petition for writ of mandamus pursuant to Code of Civil Procedure section 1094.5, seeking a writ ordering SBCERA to set aside its decision and grant him service-connected disability retirement benefits effective as of July 15, 2000, with interest at the legal rate on all retroactive amounts. On November 21, 2013, the trial court entered a judgment granting Flethez's petition, stating that a peremptory writ of mandate had been issued by the court commanding SBCERA to grant him service-connected disability retirement benefits retroactive to July 15, 2000, the day after the last day he received regular compensation pursuant to Government Code section 31724. The judgment also ordered "payment of interest at the legal rate on all retroactive amounts. Those interest payments total \$132,865.37." SBCERA timely filed a notice of appeal "limited to the issue of interest."

DISCUSSION

I

Standard of Review

The interpretation of a statute is a question of law that an appellate court determines de novo independently of the trial court's interpretation. (**70 Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531, 85 Cal.Rptr.2d 257, 976 P.2d 808; *Riehl v. Hauck* (2014) 224 Cal.App.4th 695, 699, 168 Cal.Rptr.3d 795.) Furthermore, the application of a statute to undisputed facts is also reviewed de novo. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191, 151 Cal.Rptr.3d 827, 292 P.3d 871; *Cuiellente v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765, 123 Cal.Rptr.3d 562.)

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective

of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] ‘In determining intent, we look first to the language of the statute, giving effect to its “plain meaning.” ’ [Citations.] Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the Legislature. [Citation.] Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.” (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562, 7 Cal.Rptr.2d 531, 828 P.2d 672.)

II

Disability Retirement Benefits for County Employees under CERL

The retirement benefits for county employees are generally set forth in the ****279** County Employees Retirement Law of 1937 (Gov. Code, §§ 31450 et seq.) (CERL). County employees may be entitled to disability retirement benefits regardless of their age if they have become permanently incapacitated as a result of injury or disease substantially arising out of and in the course of their employment. (Gov. Code, §§ 31720, 31720.1.)

To obtain disability retirement benefits, a county employee (or his or her employer, the retirement board, or another person on his or her behalf) must file an application for disability retirement benefits. (Gov. Code, § 31721, subd. (a) [“A member may be retired for disability upon the application of the member....”].) An application for disability retirement benefits “shall be made while the member [i.e., employee who is part of a county retirement system] is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties.” (Gov. Code, § 31722.) The county retirement board [e.g., SBCERA] “may require such proof, including a medical examination at the ***71** expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability.” (Gov. Code, § 31723.)

[1] Importantly for this case, Government Code section 31724 provides:

“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 [or her] duties in the service, it shall retire him [or her] effective on the expiration date of any leave of absence with compensation to which he [or she] shall become entitled ... or effective on the occasion of the member’s consent to retirement prior to the expiration of such leave of absence with compensation. His [or her] *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 [or she] received regular compensation....

“*When it has been demonstrated to the satisfaction of the board that the filing of the member’s application was delayed by administrative oversight or by inability to ascertain the permanency of the member’s incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.*” (Italics added.)

The retirement board shall determine whether the member is permanently incapacitated for the performance of his or her job duties. (Gov. Code, § 31725.) The burden of proof is on the member applying for disability retirement benefits to show he or she is permanently incapacitated as a result of performing his or her job duties. (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 46, 37 Cal.Rptr.2d 860; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337, 263 Cal.Rptr. 224; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691, 133 Cal.Rptr. 154.)

[2] [3] “Board members ‘are entrusted by statute with the exclusive authority to determine the factual issues whether a member is permanently incapacitated for duty [citation] and whether the disability is service connected [citation].’ [Citation.] The Board is therefore required to administer ****280** the retirement system ‘in a manner to best provide benefits to the participants of the plan.’ [Citations.] It cannot fulfill this mandate unless it investigates applications and pays benefits only to those members who are eligible for them. [Citations.] ... [¶] ... The Board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant.” (*McIntyre v. Santa Barbara County Employees’ Retirement System* (2001) 91 Cal.App.4th 730, 734–735, 110 Cal.Rptr.2d 565.)

*72 III

*Prejudgment Interest on Flethez's
Retroactive Disability Retirement Benefit*

SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest from July 15, 2000, on his retroactive disability retirement benefits because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits. It asserts prejudgment interest could not apply to retroactive benefits before payments of those benefits were due and before Flethez's right to recover those payments became vested under section 3287(a), which SBCERA contends did not occur until December 15, 2011, the date of the administrative hearing at which disability benefits to Flethez were denied.

A

Section 3287(a) provides:

“A 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 the person upon a particular day*, is *entitled also to recover interest thereon from that day*, except when the debtor is prevented by law, or by the act of the creditor from paying the debt....” (Italics added.)

“There is scant pertinent legislative history, but [section 3287(a) 's] meaning is clear. Section 3287(a) allows parties to recover prejudgment interest in damage actions based on a general underlying monetary obligation, including the obligation of a governmental entity determined by way of mandamus.” (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1030, 56 Cal.Rptr.2d 109, 920 P.2d 1314 (*AFL*).)

[4] In the context of employees' salary and benefits, “[a]mounts recoverable as *wrongfully withheld payments of salary or pensions* are damages within the meaning of [section 3287(a)]. [Citations.] *Interest is recoverable on each salary or pension payment from the date it fell due.*” (*Olson v. Cory* (1983) 35 Cal.3d 390, 402, 197 Cal.Rptr. 843, 673 P.2d 720, italics added.) “[P]ursuant to [section 3287(a)], courts have awarded prejudgment interest on a trial court

judgment following a successful administrative mandamus action to recover *wrongfully withheld* benefits. [Citations.] Interest may be awarded in the mandamus action because the requirements for the additional award of interest are met once the court determines the Board wrongfully denied benefits.” (*AFL, supra*. 13 Cal.4th at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)

[5] “[T]o recover section 3287(a) interest in the mandamus action, the claimant must show: (1) an underlying monetary obligation, (2) damages which are *73 certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. [Citation.] The rationale for the mandamus interest award **281 is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board's denial.” (*AFL, supra*. 13 Cal.4th at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) In the context of unemployment benefits, the California Supreme Court in *AFL* reasoned that the Employment Development Department (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 day of the claimant's entitlement, and the EDD must promptly pay benefits due*, regardless of any appeal taken. [Citations.] Hence, a ‘*wrongful withholding*’ of benefits, and the corresponding delay in receiving benefits, cannot have legal significance entitling the claimant to prejudgment interest until the Board makes its final decision that the claimant is not entitled to the benefits.” (*Id.* at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.) *AFL* alternatively explained: “*Benefits ... are due promptly only after a claimant has established benefit eligibility.* [Citation.] ... The delays inherent in this system [for determining eligibility for unemployment benefits] are not, however, tantamount to a ‘wrongful withholding’ of benefits giving rise to a right to section 3287(a) prejudgment interest....” (*Id.* at p. 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.) However, if the EDD denies eligibility, the employee may file a petition for writ of administrative mandate in the trial court. (*Ibid.*) If the court then exercises its independent judgment and finds the EDD “has *wrongfully withheld* benefits, ‘a claimant has met all requirements of the act, and all contingencies have taken place under its terms, [the claimant] then has a statutory right to a fixed or definitely ascertainable sum of money. [Citations.]’ [Citation.] At this point, the claimant has met the requirements of section

3287(a), and may seek prejudgment interest on the mandamus judgment for the delay caused by the [EDD] Board's wrongful denial of benefits."² (*AFL, supra*, 13 Cal.4th at p. 1027, 56 Cal.Rptr.2d 109, 920 P.2d 1314; cf. *Currie v. Workers' Comp. Appeals Bd.* (2001) 24 Cal.4th 1109, 1118–1119, 104 Cal.Rptr.2d 392, 17 P.3d 749 [§ 3287(a) prejudgment interest must be awarded by WCAB on retroactive wages from the date employee should have been reinstated and paid those wages for employer's violation of Lab. Code, § 132a].) In *San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.* (1998) 68 Cal.App.4th 1084, 1094, 80 Cal.Rptr.2d 712, we observed: "The central theme of *AFL* ... is that [prejudgment] interest is not available absent *74 an agency decision or action which has resulted in *wrongful withholding of, and corresponding delay in receiving, benefits* to which the claimant is entitled." (Italics added.)

In *Tripp v. Swoap* (1976) 17 Cal.3d 671, 131 Cal.Rptr. 789, 552 P.2d 749 (*Tripp*), the California Supreme Court held that if the Director of the former Department of Social Welfare wrongfully denies a claimant's application for welfare disability benefits, the claimant may file a petition for writ of administrative mandamus for an order directing the Director to pay the **282 claimant benefits retroactively from the date of his or her application. (*Id.* at pp. 675–676, 131 Cal.Rptr. 789, 552 P.2d 749.) In the circumstances of that case, *Tripp* concluded "the effective date of [the claimant's] entitlement to benefits" was the "first day of the month following the date of application [for benefits]." (*Id.* at p. 678, 131 Cal.Rptr. 789, 552 P.2d 749.) Citing section 3287(a)'s language, *Tripp* stated: "[F]or purposes of ordering retroactive payments, the right to receive benefits vests in the recipient on the first date of his [or her] entitlement." (*Tripp*, at p. 683, 131 Cal.Rptr. 789, 552 P.2d 749.) *Tripp* concluded the claimant was entitled to prejudgment interest on benefits wrongfully withheld from the claimant based on section 3287(a)'s language and the delay caused by the claimant's need to vindicate his or her entitlement to benefits. (*Id.* at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749.) The court held: "[W]here a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest at the legal rate *from the time each payment becomes due.*" (*Id.* at p. 685, 131 Cal.Rptr. 789, 552 P.2d 749, italics added.) Interpreting *Tripp*, *AFL* subsequently stated that *Tripp* held "interest awarded in mandamus actions vests on the date the claimant was entitled to receive payment of unemployment insurance [benefits]." (*AFL, supra*, 13

Cal.4th at p. 1034, 56 Cal.Rptr.2d 109, 920 P.2d 1314, italics added.)

In *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440, 73 Cal.Rptr.2d 769 (*Weber*), the court addressed the question of whether administrative agencies (e.g., retirement boards) have the authority "to award interest on benefits which have *not been denied*, but ... represent the period before the Board made the eligibility determination, and ... are designed to bring the disbursements current." (*Id.* at p. 1445, 73 Cal.Rptr.2d 769.) *Weber* stated: "*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 [the retirement system] has no monetary obligation to that member.*" (*Id.* at p. 1448, 73 Cal.Rptr.2d 769, italics added.) "[O]nce disability is demonstrated to the Board's satisfaction, the member's right to receive benefits vests retroactively to the date the application was filed." (*Id.* at p. 1449, 73 Cal.Rptr.2d 769.) Alternatively stated, "[Government Code section 31724] provides that once the eligibility determination is made, the right to benefits vests immediately, effective retroactively." (*Id.* at p. 1451.) *Weber* explained:

"[T]he member seeking [disability retirement] benefits must apply [citation], and carries the burden [citation] of demonstrating, to the Board's satisfaction [citation], his or her eligibility for *75 the benefits. [Citation.] *Until the member makes the necessary showing of eligibility, his or her right is merely inchoate.*" (*Weber, supra*, 62 Cal.App.4th at p. 1451, 73 Cal.Rptr.2d 769, italics added.)

Weber concluded neither the CERL nor section 3287(a) authorized an administrative award of prejudgment interest. (*Weber, supra*, at p. 1452, 73 Cal.Rptr.2d 769.)

In *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528, 258 Cal.Rptr. 106 (*Austin*), the court addressed the question of whether the trial court erred by finding an employee was entitled to interest from the last day of service on the retroactive portion of his award of disability retirement benefits. (*Id.* at pp. 1530–1531, 258 Cal.Rptr. 106.) In that case, the employee applied for disability retirement benefits in 1985, which application was initially denied, and, following an administrative hearing, the retirement board denied his **283 application in 1987 on finding he was

not disabled. (*Id.* at p. 1531, 258 Cal.Rptr. 106.) In 1988, the trial court granted the employee's petition for writ of mandate and issued a writ directing the retirement board to grant him disability retirement benefits retroactive to his last day of service with interest at the legal rate on the amount of the pension that was retroactive (i.e., presumably for payments for the period from 1985 through 1988). (*Ibid.*) *Austin* initially concluded the statutory scheme governing disability pension benefits did not preclude recovery of section 3287(a) interest on "damages awarded as prejudgment benefits from the date such benefits became due." (*Austin*, at p. 1533, 258 Cal.Rptr. 106, italics added.) The court stated: "[Section 3287(a)] 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.*" (*Id.* at p. 1533, 258 Cal.Rptr. 106, quoting *Mass v. Board of Education* (1964) 61 Cal.2d 612, 625, 39 Cal.Rptr. 739, 394 P.2d 579, italics added.) Accordingly, *Austin* rejected the retirement board's argument that section 3287(a) interest could not accrue on the amount of retroactive benefits for the period prior to its completion of the administrative process in deciding the employee's application. (*Austin*, at pp. 1532–1534, 258 Cal.Rptr. 106.) The court reasoned: "If [the employee] 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.) Therefore, *Austin* affirmed the judgment awarding the employee section 3287(a) prejudgment interest. (*Austin*, at p. 1536, 258 Cal.Rptr. 106.)

B

[6] [7] Based on our interpretation of the language of section 3287(a) and that statute's apparent underlying legislative intent, we conclude an award of section 3287(a) prejudgment interest cannot, and should not, be made for retroactive disability retirement benefit payments for the period prior to the date those payments became due. Section 3287(a) provides: "A 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 the person upon a *76 particular day, is entitled also to recover interest thereon from that day...*" (Italics added.) Paraphrasing that statute, we conclude, in the context of disability retirement benefits, a retiring member is entitled to recover section 3287(a) prejudgment interest on a court award of disability retirement benefits from the day on which

his or her right to recover those benefit payments became vested. However, it is important to distinguish between the retroactive date from which benefits are awarded and the date on which the retiring member becomes entitled to recover those retroactive benefit payments. It is not until the retiring member establishes his or her entitlement to retroactive benefit payments that the right to such payments becomes vested. Prior to such proof, the retiring member's right to such retroactive benefit payments is merely inchoate. (*Weber*, *supra*, 62 Cal.App.4th at p. 1451, 73 Cal.Rptr.2d 769.) Furthermore, until the retiring member proves his or her right to recover retroactive disability retirement payments, there is *no underlying monetary obligation* (i.e., damages) on which to award section 3287(a) prejudgment interest. (Cf. *AFL*, *supra*, 13 Cal.4th at p. 1023, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) It is only on the date that a retiring member proves entitlement to retroactive benefit payments that those payments become due **284 and the right to recover those payments becomes vested within the meaning of section 3287(a). (*Olson v. Cory*, *supra*, 35 Cal.3d at p. 402, 197 Cal.Rptr. 843, 673 P.2d 720 [regarding salary and pension payments]; *Weber*, at p. 1451, 73 Cal.Rptr.2d 769 [regarding disability retirement benefits]; cf. *AFL*, at pp. 1023, 1026, 56 Cal.Rptr.2d 109, 920 P.2d 1314 [regarding unemployment benefits]; *Tripp*, *supra*, 17 Cal.3d at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749 [regarding welfare disability benefits]; *Mass v. Board of Education*, *supra*, 61 Cal.2d at p. 625, 39 Cal.Rptr. 739, 394 P.2d 579 [§ 3287(a) interest should not be awarded on an amount before it is due].)

In the context of disability retirement benefits under the CERL, a retiring member generally is not entitled to payment of disability retirement benefits until such time he or she files an application for such benefits. (Gov. Code, § 31721, subd. (a) ["A member may be retired for disability upon the application of the member..."].) Furthermore, the burden of proof is on the retiring member to show he or she is permanently incapacitated and that such incapacity substantially was the result of performing his or her job duties. (Gov. Code, §§ 31723, 31725; *Masters v. San Bernardino County Employees Retirement Assn.*, *supra*, 32 Cal.App.4th at p. 46, 37 Cal.Rptr.2d 860; *Glover v. Board of Retirement*, *supra*, 214 Cal.App.3d at p. 1337, 263 Cal.Rptr. 224; *Harnion v. Board of Retirement*, *supra*, 62 Cal.App.3d at p. 691, 133 Cal.Rptr. 154.) The retirement board has the constitutional and statutory duty to manage the retirement fund and, in so doing, to determine whether the fund is obligated to pay benefits to any particular applicant. (*McIntyre v. Santa Barbara County Employees' Retirement System*, *supra*, 91

Cal.App.4th at pp. 734–735, 110 Cal.Rptr.2d 565.) Until such time as the retiring member submits an application for disability retirement benefits and submits proof that he or she is permanently incapacitated substantially as a result of performing his or her job duties, the retirement board has no obligation to pay *77 such benefits to that member. Therefore, a retiring member has no “vested” right to recover disability retirement benefit payments, whether retroactive or prospective, and thus no “damages,” or underlying monetary obligation, within the meaning of section 3287(a) until such time as he or she files an application for such benefit payments and proves entitlement thereto. It is only on that particular day section 3287(a) interest begins to accrue on benefit payments that are then due.

Our interpretation of section 3287(a) in this context is supported by its apparent underlying legislative intent, implicitly recognized by the California Supreme Court. In both *Tripp* and *AFL*, the court explained section 3287(a) prejudgment interest was intended to compensate the claimant for the *delay* in receiving payment of benefits caused by the *wrongful* denial or withholding of those benefits. (*Tripp, supra*, 17 Cal.3d at pp. 683, 685, 131 Cal.Rptr. 789, 552 P.2d 749; *AFL, supra*, 13 Cal.4th at pp. 1022–1023, 1027, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) The California Supreme Court stated: “The rationale for the [section 3287(a)] mandamus interest award is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board’s denial.” (*AFL*, at p. 1022, 56 Cal.Rptr.2d 109, 920 P.2d 1314.) Absent any wrongful denial or wrongful withholding of benefits and the delay in receiving benefit payments caused thereby (e.g., by requiring the retiring member to file a petition for writ of mandate to obtain such benefit payments), there is no justification **285 for an award of section 3287(a) prejudgment interest. Until such time a retiring member has filed an application for disability retirement benefits and proves entitlement thereto, the retirement board has neither wrongfully withheld payment of those benefits nor caused any delay in the member’s receipt of those payments and therefore no section 3287(a) prejudgment interest should accrue on any retroactive benefits ultimately awarded to the member attributable to the time period before that application and proof.

C

Applying our interpretation of section 3287(a) to the undisputed facts in this case, we conclude, as SBCERA asserts, the trial court erred by awarding Flethez section 3287(a) prejudgment interest on those retroactive disability benefit payments attributable to the period before he filed his application for, and proved his entitlement to, the disability benefits. To the extent *Austin, supra*, 209 Cal.App.3d 1528, 258 Cal.Rptr. 106, held to the contrary as Flethez asserts, we disagree with, and decline to follow, its holding.³ Although the trial court in this case properly found, and SBCERA does not contest on *78 appeal, Flethez was entitled to retroactive disability retirement benefits from the day following the last day he received regular compensation (i.e., July 15, 2000), it erred by awarding him section 3287(a) interest on those retroactive benefit payments attributable to the period from July 15, 2000, through the time he applied for, and proved his right to receive, such payments.⁴ However, based on the record on appeal, we cannot conclude with certainty on what date Flethez, in fact, established his right to receive retroactive disability retirement benefit payments pursuant to Government Code section 31724. SBCERA asserts that date was December 15, 2011, the date of the administrative hearing. However, the parties’ briefing and evidence in the record cited on that issue is insufficient for us to make that factual finding on appeal. On remand the court is directed to conduct further proceedings to determine that question of fact and then award Flethez the appropriate amount of section 3287(a) prejudgment interest from that date.

DISPOSITION

The judgment is reversed to the extent it awarded Flethez section 3287(a) prejudgment interest on all retroactive disability retirement benefits. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

WE CONCUR:

NARES, Acting P.J.

McINTYRE, J.

All Citations

236 Cal.App.4th 65, 186 Cal.Rptr.3d 276, 15 Cal. Daily Op. Serv. 3880

Footnotes

- 1 All statutory references are to the Civil Code unless otherwise specified.
- 2 *AFL* concluded that because “only a court may award prejudgment interest on its judgment following a mandamus action to recover benefits wrongfully withheld by Board,” administrative law judges do not have statutory authority to award interest on awards of retroactive unemployment insurance benefit payments. (*AFL, supra*, 13 Cal.4th at p. 1043, 56 Cal.Rptr.2d 109, 920 P.2d 1314.)
- 3 It is not clear from the opinion in *Austin* when the retiring member filed his application for, and proved his entitlement to, disability retirement benefits. If, in fact, his last day of service was on or after June 11, 1985, and he met his burden to prove his right to benefits on the date he filed his application (i.e., June 11, 1985), then the result in *Austin* is entirely consistent with our interpretation. (*Austin, supra*, 209 Cal.App.3d at pp. 1530–1531, 1536, 258 Cal.Rptr. 106.)
- 4 In resolving this appeal on this ground, we need not, and do not, address SBCERA's alternative contention that section 3287(a) prejudgment interest does not accrue during such time as Flethez's acts, or inactions (i.e., his prolonged delay in filing his application and proving his entitlement to benefits), “prevented” it from paying his retroactive disability retirement payments, or its “debt,” within the meaning of section 3287(a).

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Exhibit 2

Supreme Court No. _____

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

FRANK FLETHEZ,
Plaintiff and Respondent,

v.

**SAN BERNARDINO COUNTY EMPLOYEES
RETIREMENT ASSOCIATION,**
Defendant and Appellant.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two
Case No. E06044

PETITION FOR REVIEW

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Supreme Court No. _____

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No. _____

SUPREME COURT OF THE STATE OF CALIFORNIA

FRANK FLETHEZ,)	No. _____
)	
Plaintiff and Respondent,)	
)	
vs.)	
)	
SAN BERNARDINO COUNTY)	
EMPLOYEES RETIREMENT)	
ASSOCIATION,)	[San Bernardino Co.
)	Super. Ct No. CIVDS
Defendant and Appellant.)	1212542; 4th Civil No.
_____)	E06044]

ISSUE PRESENTED

Do retroactive disability retirement payments made to a county employee become vested within the meaning of section 3287(a) of the California Civil Code¹ at the time that they accrue and therefore bear prejudgment interest from the dates they accrue, as this Court has long held,

¹ Cal. Civ. Code § 3287(a) (West) [hereinafter section 3287(a) or § 3287(a)].

or do retroactive disability retirement payments not vest and not qualify the retiring county employee to prejudgment interest thereon until the employee proves his or her entitlement to them, as the schismatic opinion of the Court of Appeal declares?

WHY REVIEW SHOULD BE GRANTED

This Court may order review of a decision by the Court of Appeal “[w]hen necessary to secure uniformity of decision or to settle important questions of law”. Cal. R. Ct. 8.500(b)(1). In this case review is acutely necessary to secure both vertical and horizontal uniformity of decision, and in any event the issue presented is inherently important.

As to vertical uniformity, the decision of the Court of Appeal is at war with long established precedents of this Court. These precedents declare that for purposes of awarding statutory prejudgment interest on wrongfully withheld payments to an aggrieved party, the payments vest when they accrue.

That is, “[t]he Civil Code requires vesting . . . 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”. Mass v. Bd. of Educ., 61 Cal. 2d 612, 625, 324 P.2d 579, 588, 39 Cal. Rptr. 739, 748

(1964). Thus, in this case each retirement payment accrued on a date certain. Consequently, unless Plaintiff-Respondent Frank Flethez (Plaintiff Flethez) is not entitled to any disability retirement after all and Defendant-Appellant San Bernardino County Employees Retirement Association (SBCERA) therefore owes him neither principal nor interest, as a matter of law his retirement "payments became vested as of the dates they accrued".

Id.

Through the last half century this Court has interpreted vesting in various contexts to mean precisely what Mass say that it does. See Currie v. WCAB (L.A. Cnty. Metro. Transp. Auth.), 24 Cal. 4th 1109, 1114, 12 P.3d 749, 754, 204 Cal. Rptr. 2d 392, 398 (2001) ("Interest is recoverable on each salary or pension payment from the date it fell due.") (citing Mass) (backpay awarded to a bus driver); Olson v. Cory, 35 Cal. 3d 390, 402, 873 P.2d 720, 728, 197 Cal. Rptr. 843, 851 (1983) ("Interest is recoverable on each . . . pension payment from the date it fell due.") (citing Mass) (salary and pension increases due to judges and judicial pensioners); Tripp v. Swoap, 17 Cal. 3d 671, 683, 552 P.2d 749, 757, 131 Cal. Rptr. 789, 797 (1976) ("For purposes of awarding interest, each payment of benefits . . . should be viewed as vesting on the date it becomes due.") (citing Mass) (welfare benefits), implicitly overruled on other grounds, AFL-CIO v.

Unempl. Ins. Appeals Bd., 23 Cal. 4th 1017, 1042-43, 920 P.2d 1314, 1329, 56 Cal. Rptr. 2d 109, 124 (1996), and explicitly overruled on other grounds, Frink v. Prod., 31 Cal. 3d 166, 180, 643 P.2d 476, 484, 181 Cal. Rptr. 893, 901 (1982); Sanders v. City of L.A., 3 Cal. 3d 252, 262-63, 475 P.2d 201, 208, 90 Cal. Rptr. 169, 176 (1970) (“The wrongful withholding of past due pension payments . . . fall[s] within the definition of damages . . . and represent[s] obligations on which interest will run.”) (upholding an award of prejudgment interest on retroactive payments of salaries and wages that “were capable of being made certain and were made certain”).

In contrast, the Court of Appeal declares that the right to prejudgment interest pursuant to section 3287(a) on retroactive payments of disability retirement benefits arises only on the date that a retiring employee proves his or her entitlement to those payments. (See Slip Op. at 14, Flethez v. San Bernardino Cnty. Empls. Ret. Ass’n, No. D066959 (Cal. App. Apr. 22, 2015) (Fourth District, Division One) (Designated for Publication) (Exhibit A hereto pursuant to Cal. R. Ct. 8.504(b)(4) [hereinafter Slip Op.].) Only then does the “right to such payments becomes vested”. (Id.) “It is only on the date that a retiring [employee] proves entitlement to retroactive benefit payments that those payments become due and the right to recover those payments becomes vested within

the meaning of section 3287(a)” of the Civil Code. (Slip Op. at 14.)

The opinion of the Court of Appeal, notwithstanding its veneer of merely applying existing law, misreads² the cases decided by this Court articulating the meaning of vesting vis-a-vis section 3287(a). Review by this Court is therefore necessary in order to maintain vertical uniformity of decision, that is, consistency between the law declared by this Court and that declared by the Court of Appeal.

This Court should grant review in order to maintain horizontal uniformity of decision as well. Heretofore, prejudgment interest on retroactive disability retirement payments was granted as a matter of course. See Austin v. Bd. of Ret., 209 Cal. App. 3d 1528, 1533-34, 258 Cal. Rptr. 106, 109 (1989); see also Goldfarb v. Civ. Serv. Comm’n, 225 Cal. App. 3d 633, 636, 275 Cal. Rptr. 284, 286 (1990) (holding that a wrongfully demoted clinical psychologist was “entitled to interest on each installment of back salary from the day it fell due”); Aguilar v. Cal. Unempl. Ins. Appeals Bd. (Empl. Dev. Dep’t), 223 Cal. App. 3d 239, 245-46, 272 Cal. Rptr. 696, 701 (1990) (“For purposes of awarding interest, each payment of

² Of the primary cases cited herein, the Court of Appeal discusses AFL-CIO, Olsen, Tripp, Weber, Currie and Mass but misses the point of all of them. Plaintiff Flethez is at a loss to understand this failure of comprehension.

benefits should be viewed as vesting on the date it becomes due.”) (internal quotation omitted). Following Mass faithfully, Austin unequivocally states that pension payments become vested “as of the dates they accrued”. Id. at 1529, 258 Cal. Rptr. at 109. Herein, however, the Court of Appeal is adamant that “not until the retiring [employee] establishes his or her entitlement to retroactive benefit payments [does] the right to such payments become vested”. (Slip Op. at 14.) The two cases³ are at loggerheads on this issue, and the trial courts are therefore left adrift. See Auto Equity Sales v. Superior Court (Hesenflow), 57 Cal. 2d 450, 457, 369 P.2d 937, 941, 20 Cal. Rptr. 321, 325 (1962) (stating that the trial courts must choose between conflicting decisions of the Court of Appeal).

The conflict is palpable, (see Slip Op. at 17 (declining to follow Austin); see also id. n.3 (attempting to distinguish Austin without much success)), and this case squarely presents the issue of the meaning of

³ Another case, Weber v. Bd. of Ret., 52 Cal. App. 4th 1440, 73 Cal. Rptr. 2d 969 (1998), although technically decided on other grounds, is irreconcilable in principle with the opinion of the Court of Appeal. Compare Weber, 52 Cal. App. 4th at 1449, 73 Cal. Rptr. 2d at 774 (“once disability is demonstrated . . . the [employee’s] right to receive benefits vests retroactively to the date the application was filed”), with Slip Op. at 14 (“It is only on the date that a retiring [employee] proves entitlement to retroactive benefit payments that those payments become due and the right to receive those payments becomes vested withing the meaning of section 3287(a).”).

vesting in the context of section 3287(a), if any ever does. The record is adequate, and the issue is one of law needing but sparse factual development anyway. Nothing would be gained by permitting this issue to percolate among the lower courts, who in the meantime would risk entering incorrect and unjust judgments every time they either do or do not include or uphold prejudgment interest on an award of retroactive disability retirement payments.

In any event, the issue of law presented is of great importance viewed from any perspective. The issue is narrow, but that narrowness belies its significance.

First, the issue is important because the analytic framework employed by the Court of Appeal could be and no doubt will be used to challenge awards of prejudgment interest in contexts far from the subject of disability retirement pensions. Thus, backpay awards to those who labor in our fields and factories (Currie), salaries that for one reason or another have not been paid to those who labor in our modern bureaucracies (Olson); welfare benefits in whatever future form they may take (Tripp), and backpay that becomes due as localities experiment with living wage schemes in various forms (Sanders) will all be at risk as defendants argue a la Flethez that the right to this multitude of benefits has not vested.

Virtually any monetary obligation in the State could potentially be affected by the possible loss of prejudgment interest.

Further, even if the impact of Flethez is ultimately confined to the subject of retroactive pension benefit payments, the already overburdened panels of the Court of Appeal will be peppered with cases seeking to thrash out the issues opened up by this opinion. But this Court could close these doorways by granting review and definitely resolving the meaning of vesting.

From a practical perspective, the issue is important as well. The purpose of the disability retirement system is "to make certain that . . . employees who after long and faithful service become incapacitated by age or physical disabilities . . . will be replaced by more capable employees for the betterment of the public service without undue hardship to the employees removed." Pathe v. City of Bakersfield, 255 Cal. App. 2d 409, 415, 63 Cal. Rptr. 220, 223 (1967). **Without undue hardship.** The retroactive implementation of disability retirements ensures that the employee will transition from that state to retiree without loss of the pension benefit he or she has earned. But to the extent that the employee is not granted prejudgment interest on his or her retroactive benefit that purpose is frustrated. See Austin, 209 Cal. App. 3d at 1534, 258 Cal. Rptr.

at 109 (observing that, absent interest, the claimant loses “the natural growth and productivity” of the withheld payments). This Court therefore should intervene (grant review) in order to assess the propriety of the interest denial worked by the decision of the Court of Appeal.

Finally, the sheer number of employees potentially impacted by the decision of the Court of Appeal renders the decision important in its own right. There are more than a million public employees eligible for disability retirement, perhaps as many as a million and a half. Each of these employees could find himself or herself in the shoes of Plaintiff Flethez, owed a substantial sum of prejudgment interest. This Court consequently should grant review and determine who is entitled to these sums.

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STATEMENT OF THE CASE

STATEMENT OF THE RELEVANT FACTS

AND PROCEDURAL HISTORY⁴

In 1990 Plaintiff Flethez became an employee of the County of San Bernardino, working as an equipment operator from 1991 until 2000. In 1998 Plaintiff Flethez was injured while performing his job duties and consequently underwent spinal surgery for that 1998 injury. Plaintiff Flethez underwent additional surgeries in 2001 and 2002 and received physical therapy through 2004.

On 12 June 2008 Plaintiff Flethez filed an application with SBCERA for disability retirement benefits, but it was rejected because for personal reasons not in the record no signed medical records authorization was submitted. On 16 July 2009 after communication with SBCERA staff concerning the matter Plaintiff Flethez filed a complete application, including a signed medical records authorization and a supporting physician's report. On 5 August 2010 SBCERA granted Plaintiff Flethez's application for disability retirement benefits based on its staff

⁴ Because the historical facts and events are undisputed, Plaintiff Flethez has adopted the summary thereof generated by the Court of Appeal. (See Slip Op. at 2-4.) All statements of fact not otherwise attributed are taken from this source.

recommendation, effective as of the date of his initial application in 2008. Plaintiff Flethez requested a formal administrative hearing limited to the issue of the appropriate starting date for his retirement benefits. On 15 December 2011 the administrative hearing was held, and the hearing officer subsequently issued proposed findings of fact, conclusions of law, and a recommended decision. On 4 October 2012 SBCERA adopted the hearing officer's proposed decision and maintained the effective date of 12 June 2008 for the commencement of Plaintiff Flethez's disability retirement benefits.

Plaintiff Flethez filed a petition for a writ of mandamus pursuant to Code of Civil Procedure section 1094.5⁵ seeking a writ ordering SBCERA to set aside its decision and grant him service-connected disability retirement benefits effective as of 15 July 2000 with interest at the legal rate on all retroactive amounts. On 21 November 2013 the Superior Court entered a judgment granting Plaintiff Flethez's petition and stating that a peremptory writ of mandate had been issued by the court commanding SBCERA to grant him service-connected disability retirement benefits retroactive to 15 July 2000, the date after the last day he received regular

⁵ Cal. Civ. Proc. Code § 1094.5 (West).

compensation, pursuant to Government Code section 31724.⁶ (See J. Granting Peremp. Writ of Mandate para. 1, at 2; Appellant's App. 127.) "The [Superior] Court order[ed] payment of interest at the legal rate on all retroactive amounts. Those interest payment total \$132,865.37." (Id. para. 2, at 2; Appellant's App. 127.)

SBCERA then appealed but limited the scope of its appeal to the issue of interest. (See Notice of Appeal at 1; Appellant's App. 131.) In all other respects SBCERA complied with the judgment, including payment of the retroactive pension benefits to which Plaintiff Flethez had been found by the Superior Court to be entitled. (See Return to Writ of Mandate at 2; Appellant's App. 61.)

The Court of Appeal reversed the judgment "to the extent that it awarded [Plaintiff] Flethez section 3287(a) prejudgment interest on all retroactive disability retirement benefits". (Slip Op. at 18.) After reviewing the operation of the retirement system with regard to granting disability pensions and determining their effective date, (see id. at 5-7), the opinion of the Court of Appeal then surveys the case law regarding the application of section 3287(a), (see Slip Op. at 7-13), and concludes that retirement

⁶ Cal. Gov't Code § 31724 (West) [hereinafter section 31724 or § 31724].

payments, albeit retroactive, do not become vested and therefore do not generate interest pursuant to that statute until the date that the retiring employee “establishes his or her entitlement to retroactive benefit payments”, (id. at 14). Applying this interpretation of section 3287(a) to the undisputed facts of the case, the Court of Appeal concludes that Plaintiff Flethez is not entitled to section 3287(a) prejudgment interest on his retroactive benefits attributable to the period from 15 July 2000 through the time that he proved his right to receive such payments. (See Slip Op. at 17.) The case was remanded to the Superior Court to determine just when the latter date might be and to then award Plaintiff Flethez prejudgment interest calculated from that date, but the judgment was otherwise affirmed. (See id. at 17-18.)

No petition for rehearing was filed. Plaintiff Flethez now petitions this Court to review and reverse.

STANDARDS OF REVIEW

Plaintiff Flethez agrees that the Court of Appeal applied the correct standards of review.

The interpretation of a statute is a question of law that an appellate court determines de novo independently of the trial court’s interpretation. Regents of the Univ. of Cal. v. Superior Court (Molloy), 20 Cal. 4th 509, 531, 976 P.2d 808,

821, 85 Cal. Rptr. 2d 257, 270 (1999); Riehl v. Hauck, 224 Cal. App. 4th 695, 699, 168 Cal. Rptr. 2d 795, 798 (2014). Furthermore, the application of a statute to undisputed facts is also reviewed de novo. Aryeh v. Canon Bus. Solutions, 55 Cal. 4th 1185, 1191, 292 P.3d 871, 874, 151 Cal. Rptr. 3d 827, 831 (2013); Cuiellette v. City of L.A., 194 Cal. App. 4th 757, 765, 123 Cal. Rptr. 3d 562, 568 (2011).

(Slip Op. at 4 (citations altered).)

THE STATUTE IN QUESTION

Section 3287(a) of the California Civil Code reads in its entirety as follows:

A 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 the person upon a particular day, is entitled also to recover interest thereon from that day, except when 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 debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any subdivision of the state.

ARGUMENT

PREFACE

The opinion of the Court of Appeal herein virtually bans awards of prejudgment interest to public employees who are forced to resort to the courts in order to establish their right to disability pension benefits. The

decision bluntly declares that “no section 3287(a) prejudgment interest should accrue on any retroactive benefits ultimately awarded to [an employee] attributable to the time period before” the actual submission of his retirement application and proof of his entitlement. (Slip Op. at 16.) In so doing the decision plays havoc with the established practices and procedures of the system for the administration of the public employee disability retirement system, misconstrues opinions of this Court, contradicts opinions previously issued by other panels of the Court of Appeal, and ignores pertinent principles of statutory construction. This Court consequently should review and reverse this decision.

**BECAUSE PLAINTIFF FLETCHER WAS ENTITLED TO
PREJUDGMENT INTEREST ON HIS RETROACTIVE
DISABILITY RETIREMENT PAYMENTS UNDER WELL
ESTABLISHED AND CONCEPTUALLY SOUND LAW, THIS
COURT SHOULD REVIEW AND REVERSE THE OPINION OF
THE COURT OF APPEAL.**

Section 3287(a) provides in general for the recovery of prejudgment interest under certain circumstances. See, e.g., Martin v. Ede, 103 Cal. 152, 162, 37 P. 199, 201 (1894) (“Plaintiff’s demand . . . was capable of being

made certain by computation. It therefore drew interest under section 3287 of the Civil Code.”). Under that statute a claimant must satisfy three conditions for the recovery of prejudgment interest in a mandamus action against a public entity. See Tripp, 17 Cal. 3d at 682, 552 P.2d at 797, 131 Cal. Rptr. at 757. “(1) There must be an underlying monetary obligation, (2) the recovery must be certain or capable of being made certain by calculation, and (3) the right to recover must vest on a particular day.” Id.

Until the decision of the Court of Appeal the power of the Superior Court to award prejudgment interest pursuant to section 3287(a) in a mandamus action brought to recover disability retirement benefits wrongfully denied by the Board of Retirement was beyond cavil, it was “settled law”. Weber, 62 Cal. App. 4th at 1445, 73 Cal. Rptr. 2d at 772. As this Court recognized, “prejudgment interest is payable on an award of wrongfully withheld disability retirement benefits”. AFL-CIO, 23 Cal. 3d at 1031, 920 P.2d at 1322, 56 Cal. Rptr. 2d at 117.

The question remains, however, when does prejudgment interest begin to run? The Court of Appeal concludes that the payments do not become vested and consequently do not bear prejudgment interest until the employee becomes entitled to retroactive pension benefit payments. (See Slip Op. at 14 (“It is only on the date that a retiring [employee] proves

entitlement to retroactive benefit payments that those payments become due[,] and the right to recover these payments becomes vested within the meaning of section 3287(a).”). In other words, the employee is entitled to prejudgment interest only when he wins his case. Prejudgment interest thus is transformed into postjudgment interest.

But this Court has long since rejected this sort of sleight of hand. When confronted with a similar claim that interest accrued only from the date when a school board bore the legal duty to reinstate a suspended teacher because until that time the right to recover did not vest in him and that until then he was legally suspended, see Austin, 209 Cal. App. 3d at 1533, 209 Cal. Rptr. 3d at 109, this Court was not swayed by such facile reasoning. Section 3287(a) requires vesting ““only in order to fix with sufficient certainty the time the obligation accrues so that interest should not be awarded before it is due””. Austin, 209 Cal. App. 3d at 1533, 209 Cal. Rptr. 3d at 109 (quoting Mass, 61 Cal. 2d at 626, 394 P.2d at 588, 39 Cal. Rptr. at 748).

“Each salary payment in [Mass] accrued on a date certain. Unless the suspension itself [could] be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If [the] plaintiff had not been wrongfully suspended, he would have obtained the benefits 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.”

Id. (quoting Mass., 61 Cal. 2d at 1533-34, 394 P.2d at 588, 39 Cal. Rptr. at 748).

As in Mass., so here. The pension payments to which Plaintiff Flethez was entitled to each occurred on a date certain. Unless the denial of Plaintiff Flethez' disability retirement application could be sustained and the Board of Retirement relieved of any obligation whatsoever, the pension payments became vested as of the dates they accrued. Plaintiff Flethez' pension payments nominally began accruing on the date that his application for disability retirement was filed, but the so called deemer clause (the final sentence of the statute) pushed back the effective date of his retirement to the date following the day for which he last received regular compensation, which was "deemed to be the date the application was filed", § 31724, inasmuch as it was delayed by inability to ascertain the permanency of his incapacity until after that date. See Porter v. Bd. of Ret., 222 Cal. App. 4th 335, 338, 165 Cal. Rptr. 3d 510, 512 (2013) (reversing denial of the earlier date) (thirteen month delay between the applicant's last day of work and the filing of her application for disability retirement); see also Piscioneri v. City of Ontario, 95 Cal. App. 4th 1037, 1044, 116 Cal. Rptr. 2d 38, 43 (2002) (concluding that if an employee can "prove that he has been continuously disabled from the date of discontinuance of . . . service to the time of [his

or her] application for disability retirement, [the] application is timely”⁷) (twelve year delay between first and second applications).

The Court of Appeal treats this case as a simple one of statutory construction, (see Slip Op. at 4, 15-16), and so it is. But the Court of Appeal gravely misconstrued the statute. Simply stated, the right to retroactive payments vests when the payment accrues and the employee, but for its wrongful withholding, would have become entitled to receive it.

Vesting in this context means only that the obligation must be subject to ascertainment either on its face or by calculation. “[F]or purposes of ordering retroactive payments, the right to receive benefits vests in the recipient on the first day of his entitlement. For purposes of awarding interest each payment of benefits similarly should be viewed as vesting on the date it becomes due.” Tripp, 17 Cal. 3d at 683, 552 P.2d at 757, 131 Cal. Rptr. at 797. Not to put too fine a point on the subject, an obligation to pay prejudgment interest vests, not when the retiring employee establishes his or her entitlement to retroactive benefit payments, as the Court of Appeal asserts, (see Slip Op. at 14), but instead when the underlying obligation accrues, as the cases quoted and discussed herein teach.

⁷ See Cal. Gov’t Code § 21154(d) (West).

As something of an afterthought, the Court of Appeal asserts that until the retiring employee proves his or her right to recover retroactive disability retirement payments, “there is no underlying monetary obligation (i.e. damages) on which to award section 3287(a) prejudgment interest”. (Slip Op. at 14 (emphasis omitted).) But this ipse dixit is merely a reprise of the argument concerning vesting in a different garb. For, contrary to the Court of Appeal, (see Slip Op. at 14), the operation of section 3287(a) is not dependent on the date that the retiring employee proves his or her right to recover retroactive disability payments.

To reiterate, monetary obligations vest when they accrue. See discussion supra p. 2. By statute, a disability retirement pension, once granted, is effective as of the date of the application therefor, see § 31724, and of necessity retroactive payments of the retiring employee’s pension benefits will be required as the Board of Retirement cannot possibly process and grant the retirement application on the very day that it is filed. The consequent delay of the payment of pension benefits is not wrongful because it is inherent in any system for the distribution of benefits—an administrative determination of eligibility takes time.⁸ See AFL-CIO, 23

⁸ “The requirement that the right to [pension benefits] commences retroactively to the date of the application assures that the employee receives the full amount of his or her benefit coverage.” Weber, 62 Cal.

Cal. 4th at 1037, 920 P. 2d at 1326, 96 Cal. Rptr. 2d at 121 (stating that until the agency erroneously determines that an applicant is ineligible for benefits, thus requiring him or her to seek review by way of administrative mandamus in the Superior Court, “no wrongful withholding of benefits attributable to the administrative process occurs”); see also id. at 1034, 920 P.2d at 1324, 56 Cal. Rptr. 2d at 119 (stating that interest may not be awarded “merely because at some point in the administrative process someone made an error that the administrative agency . . . itself corrected”).

But if the employee is forced to resort to a writ of mandamus in the Superior Court in order to obtain his or her due and then prevails, ipso facto his benefits were wrongfully withheld by the Board of Retirement—all of them. By statutory command the employee’s disability retirement payments become effective “as of the date that [his or her] application [was] filed with the [B]oard, but not earlier than the day following the last day for which he [or she] received regular compensation”. § 31724. Once the pension became effective, each payment vested as it accrued. See discussion supra p. 2. And “once disability is demonstrated to the Board’s satisfaction, the [employee’s] right to receives benefits vests retroactively to

App. 4th at 1448, 73 Cal. Rptr. 2d at 774.

the date that the application was filed”, Weber, 62 Cal. App. 4th at 1449, 73 Cal. Rptr. 2d at 774. Thus, the employee is entitled to prejudgment interest “on all retroactive amounts”, J. Granting Peremp. Writ of Mandate para. 2, at 2; Appellant’s App. 127), inasmuch as SBCERA refused to pay those sums despite being obligated to do so, i.e., inasmuch as it wrongfully withheld them.

The right to prejudgment interest is equally clear when (as here) the benefits begin on the date following the day for which the employee last received regular compensation because this date is “deemed to be the date the application was filed”, id., one of the two contingencies authorizing operation of the deemer clause having been satisfied.⁹ The bottom line may be greater, but the principle is exactly the same: a pension is granted effective as of the date following the employee’s last day of work—the Board of Retirement refuses to pay (wrongfully withholds) the resulting retroactive benefits—retroactive benefits continue to accrue and vest as payments come due—the employee obtains a writ in the Superior Court

⁹ The final sentence of section 31724 (the deemer clause) provides that if the Board of Retirement finds that a retiring employee’s application “was delayed by administrative oversight or by inability to ascertain the permanency of [his or her] incapacity until after the date following the day for which the [employee] last received regular compensation, such date will be deemed the date the application was filed.

ordering payment of the benefits due—and that Court awards interest on all retroactive amounts pursuant to section 3287(a).

Simply stated, the obligation to pay pension benefits arises when an employee's application for disability retirement becomes effective, which it does either as of the actual date his or her application for disability retirement was filed or as of the earlier date it may be deemed to have been filed. The right to receive these payments vests as they accrue, and they constitute damages within the meaning of section 3287(a). If these payments are wrongfully withheld by the Board of Retirement, therefore, prejudgment interest is entirely appropriate and necessary to make the employee whole.

A POSTSCRIPT ON LIBERAL CONSTRUCTION

This Court must view section 3287(a) through the lens of liberal construction. When the law governing a pension plan reasonably can be construed to so permit, this Court is, "of course, required to construe the provisions liberally in favor of the applicant so as to carry out [its] beneficent policy". Bellus v. City of Eureka, 69 Cal. 2d 336, 351, 444 P.2d 711, 720, 71 Cal. Rptr. 135, 144 (1968) (internal quotation omitted); see Pearl v. WCAB (Bd. of Trustees of the Cal. State Univ.), 26 Cal. 4th 189,

197, 26 P.2d 1044, 1050, 109 Cal. Rptr. 2d 308, 314 (2001) (“provisions of [a pension law] must be liberally construed in favor of pensioners if they are ambiguous or uncertain”) (internal quotation omitted). “[A]ny doubt as to the proper interpretation of the [statute]” must be resolved in favor of the employee. Wendland v. City of Alameda, 46 Cal. 2d 786, 791, 298 P.2d 863, 866 (1956).

Granted, section 3287(a) is not itself a pension statute, but liberal construction is appropriate with regard to ascertainment of its meaning and application when (as here) the subject to which it is applied is one that itself merits liberal construction. See Tripp, 17 Cal. 3d at 685, 552 P. 2d at 759, 131 Cal. Rptr. at 799 (finding that an award of prejudgment interest to be “in conformity with the mandate that the law relating to welfare programs be liberally construed). And liberal construction mandates that Plaintiff Flethez’s workaday reading of that statute, which permits it to operate so as to make county employee retirees whole, be adopted in preference to the crabbed reading of the statute advanced by SBCERA, which would leave them deprived of the earnings on their retroactive payments of the pension benefits.

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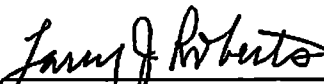
CONCLUSION

For the reasons explained herein, Plaintiff Flethez is fully entitled to the judgment entered herein awarding prejudgment interest on his retroactive disability retirement benefits. Accordingly, this Court should grant review and reverse the decision of the Court of Appeal ruling otherwise.

Dated: 30 May 2015

Respectfully submitted,

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By: 
Larry J. Roberts

Attorneys for Plaintiff and Respondent,
Frank Flethez

CERTIFICATE OF COMPLIANCE

WITH APPELLATE RULES 8.204(b)(2)(3)(4)

Plaintiff-Respondent Frank Flethez certifies that his brief is in a proportionately spaced type face (Times New Roman) of 13 point, that it is double spaced, and that it contains 5,223 words.

Dated: 30 May 2015

Respectfully submitted,

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Frank Flethez

EXHIBIT "A"

CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

FRANK FLETHEZ,

Plaintiff and Respondent,

v.

SAN BERNARDINO COUNTY
EMPLOYEES RETIREMENT
ASSOCIATION,

Defendant and Appellant.

D066959

(Super. Ct. No. CIVDS1212542)

APPEAL from a judgment of the Superior Court of San Bernardino County, David Cohn, Judge. Affirmed in part; reversed in part and remanded for further proceedings.

Arias & Lockwood and Christopher D. Lockwood for Defendant and Appellant.

Faunce, Singer & Oatman, Mark Ellis Singer and Edward L. Faunce for Plaintiff and Respondent.

On February 1, 2000, following his last day of work as an employee of San Bernardino County (County), Frank Flethez underwent surgery for a work-related spinal injury he suffered in 1998. In 2008, he filed an application with the San Bernardino County Employees Retirement Association (SBCERA) for work-related disability

retirements benefits. SBCERA granted his request for disability benefits, beginning as of 2008, but did not grant him retroactive benefits for the period before the date of his application. Flethez filed a petition for writ of mandamus seeking retroactive disability retirement benefits beginning July 15, 2000. The trial court issued a judgment granting his petition and awarding him Civil Code section 3287, subdivision (a),¹ (§ 3287(a)) prejudgment interest on the retroactive benefits to which the judgment provided he was entitled. On appeal, SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest on his retroactive benefits beginning July 15, 2000, because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits in 2008. Based on our interpretation of section 3287(a) and consideration of relevant case law and the facts in this case as discussed below, we conclude the trial court erred by awarding Flethez prejudgment interest on his retroactive disability benefits before payments of those benefits were due and before his right to recover those payments became vested under section 3287(a).

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Flethez became an employee of County. He worked as an equipment operator from 1991 until 2000. In 1998, he was injured while performing his job duties. After his last day of work on January 28, 2000, he underwent spinal surgery for that 1998

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

injury. He underwent additional surgeries in 2001 and 2002 and received physical therapy through 2004.

On June 12, 2008, Flethez filed an application with SBCERA for disability retirements benefits, but it was rejected for omission of a signed medical records authorization. On July 16, 2009, he filed a complete application, including a signed medical records authorization and a supporting physician's report. On August 5, 2010, based on its staff's recommendation, SBCERA granted Flethez's application for disability retirement benefits, effective as of the date of his initial application in 2008. Flethez requested a formal administrative hearing limited to the issue of the appropriate starting date for his retirement benefits. On December 15, 2011, the administrative hearing was held and the hearing officer subsequently issued proposed findings of fact, conclusions of law, and a recommended decision. On October 4, 2012, SBCERA adopted the hearing officer's proposed decision and maintained the effective date of June 12, 2008, for the beginning of Flethez's disability retirement benefits.

Flethez filed the instant petition for writ of mandamus pursuant to Code of Civil Procedure section 1094.5, seeking a writ ordering SBCERA to set aside its decision and grant him service-connected disability retirement benefits effective as of July 15, 2000, with interest at the legal rate on all retroactive amounts. On November 21, 2013, the trial court entered a judgment granting Flethez's petition, stating that a peremptory writ of mandate had been issued by the court commanding SBCERA to grant him service-connected disability retirement benefits retroactive to July 15, 2000, the day after the last day he received regular compensation pursuant to Government Code section 31724. The

judgment also ordered "payment of interest at the legal rate on all retroactive amounts. Those interest payments total \$132,865.37." SBCERA timely filed a notice of appeal "limited to the issue of interest."

DISCUSSION

I

Standard of Review

The interpretation of a statute is a question of law that an appellate court determines de novo independently of the trial court's interpretation. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531; *Riehl v. Hauck* (2014) 224 Cal.App.4th 695, 699.) Furthermore, the application of a statute to undisputed facts is also reviewed de novo. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.)

"The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] 'In determining intent, we look first to the language of the statute, giving effect to its "plain meaning."' [Citations.] Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the Legislature. [Citation.] Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.)

II

Disability Retirement Benefits for County Employees under CERL

The retirement benefits for county employees are generally set forth in the County Employees Retirement Law of 1937 (Gov. Code, §§ 31450 et seq.) (CERL). County employees may be entitled to disability retirement benefits regardless of their age if they have become permanently incapacitated as a result of injury or disease substantially arising out of and in the course of their employment. (Gov. Code, §§ 31720, 31720.1.)

To obtain disability retirement benefits, a county employee (or his or her employer, the retirement board, or another person on his or her behalf) must file an application for disability retirement benefits. (Gov. Code, § 31721, subd. (a) ["A member may be retired for disability upon the application of the member"].) An application for disability retirement benefits "shall be made while the member [i.e., employee who is part of a county retirement system] is in service, within four months after his or her discontinuance of service, within four months after the expiration of any period during which a presumption is extended beyond his or her discontinuance of service, or while, from the date of discontinuance of service to the time of the application, he or she is continuously physically or mentally incapacitated to perform his or her duties." (Gov. Code, § 31722.) The county retirement board [e.g., SBCERA] "may require such proof, including a medical examination at the expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability." (Gov. Code, § 31723.)

Importantly for this case, Government Code section 31724 provides:

"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 [or her] duties in the service, it shall retire him [or her] effective on the expiration date of any leave of absence with compensation to which he [or she] shall become entitled . . . or effective on the occasion of the member's consent to retirement prior to the expiration of such leave of absence with compensation. His [or her] *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 [or she] received regular compensation. . . .

"When it has been demonstrated to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed." (Italics added.)

The retirement board shall determine whether the member is permanently incapacitated for the performance of his or her job duties. (Gov. Code, § 31725.) The burden of proof is on the member applying for disability retirement benefits to show he or she is permanently incapacitated as a result of performing his or her job duties. (*Masters v. San Bernardino County Employees Retirement Assn.* (1995) 32 Cal.App.4th 30, 46; *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337; *Harmon v. Board of Retirement* (1976) 62 Cal.App.3d 689, 691.)

"Board members 'are entrusted by statute with the exclusive authority to determine the factual issues whether a member is permanently incapacitated for duty [citation] and whether the disability is service connected [citation].' [Citation.] The Board is therefore required to administer the retirement system 'in a manner to best provide benefits to the participants of the plan.' [Citations.] It cannot fulfill this mandate unless it investigates

applications and pays benefits only to those members who are eligible for them.

[Citations.] . . . [¶] . . . The Board, not the employer, has the constitutional and statutory duty to manage the retirement fund and to determine whether the fund is obligated to pay benefits to any particular applicant." (*McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 734-735.)

III

Prejudgment Interest on Flethez's Retroactive Disability Retirement Benefit

SBCERA contends the trial court erred by awarding Flethez section 3287(a) prejudgment interest from July 15, 2000, on his retroactive disability retirement benefits because SBCERA could not have granted those benefits until he filed an application for disability retirement and submitted evidence showing his entitlement to those benefits. It asserts prejudgment interest could not apply to retroactive benefits before payments of those benefits were due and before Flethez's right to recover those payments became vested under section 3287(a), which SBCERA contends did not occur until December 15, 2011, the date of the administrative hearing at which disability benefits to Flethez were denied.

A

Section 3287(a) provides:

"A 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 the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt. . . ."
(Italics added.)

"There is scant pertinent legislative history, but [section 3287(a)'s] meaning is clear. Section 3287(a) allows parties to recover prejudgment interest in damage actions based on a general underlying monetary obligation, including the obligation of a governmental entity determined by way of mandamus." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1030 (*AFL*).

In the context of employees' salary and benefits, "[a]mounts recoverable as *wrongfully withheld payments of salary or pensions* are damages within the meaning of [section 3287(a)]. [Citations.] *Interest is recoverable on each salary or pension payment from the date it fell due.*" (*Olson v. Cory* (1983) 35 Cal.3d 390, 402, italics added.)

"[P]ursuant to [section 3287(a)], courts have awarded prejudgment interest on a trial court judgment following a successful administrative mandamus action to recover *wrongfully withheld* benefits. [Citations.] Interest may be awarded in the mandamus action because the requirements for the additional award of interest are met once the court determines the Board wrongfully denied benefits." (*AFL, supra*, 13 Cal.4th at p. 1022.)

"[T]o recover section 3287(a) interest in the mandamus action, the claimant must show: (1) an underlying monetary obligation, (2) damages which are certain or capable of being made certain by calculation, and (3) a right to recovery that vests on a particular day. [Citation.] The rationale for the mandamus interest award is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board's denial." (*AFL, supra*, 13 Cal.4th at

p. 1022.) In the context of unemployment benefits, the California Supreme Court in *AFL* reasoned that the Employment Development Department (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 day of the claimant's entitlement, and the EDD must promptly pay benefits due*, regardless of any appeal taken. [Citations.] Hence, *a 'wrongful withholding' of benefits, and the corresponding delay in receiving benefits, cannot have legal significance entitling the claimant to prejudgment interest until the Board makes its final decision that the claimant is not entitled to the benefits.*" (*Id.* at p. 1023, italics added.) *AFL* alternatively explained: "*Benefits . . . are due promptly only after a claimant has established benefit eligibility.* [Citation.] . . . The delays inherent in this system [for determining eligibility for unemployment benefits] are not, however, tantamount to a 'wrongful withholding' of benefits giving rise to a right to section 3287(a) prejudgment interest" (*Id.* at p. 1026, italics added.) However, if the EDD denies eligibility, the employee may file a petition for writ of administrative mandate in the trial court. (*Ibid.*) If the court then exercises its independent judgment and finds the EDD "has *wrongfully withheld* benefits, 'a claimant has met all requirements of the act, and all contingencies have taken place under its terms, [the claimant] then has a statutory right to a fixed or definitely ascertainable sum of money. [Citations.]" [Citation.] At this point, the claimant has met the requirements of section 3287(a), and may seek prejudgment interest on the mandamus judgment for the delay caused by the [EDD] Board's wrongful

denial of benefits."² (*AFL, supra*, 13 Cal.4th at p. 1027; cf. *Currie v. Workers' Comp. Appeals Bd.* (2001) 24 Cal.4th 1109, 1118-1119 [§ 3287(a) prejudgment interest must be awarded by WCAB on retroactive wages from the date employee should have been reinstated and paid those wages for employer's violation of Lab. Code, § 132a].) In *San Diego County Deputy Sheriffs Assn. v. San Diego County Civil Service Com.* (1998) 68 Cal.App.4th 1084, 1094, we observed: "The central theme of *AFL* . . . is that [prejudgment] 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." (Italics added.)

In *Tripp v. Swoap* (1976) 17 Cal.3d 671 (*Tripp*), the California Supreme Court held that if the Director of the former Department of Social Welfare wrongfully denies a claimant's application for welfare disability benefits, the claimant may file a petition for writ of administrative mandamus for an order directing the Director to pay the claimant benefits retroactively from the date of his or her application. (*Id.* at pp. 675-676.) In the circumstances of that case, *Tripp* concluded "the effective date of [the claimant's] entitlement to benefits" was the "first day of the month following the date of application [for benefits]." (*Id.* at p. 678.) Citing section 3287(a)'s language, *Tripp* stated: "[F]or purposes of ordering retroactive payments, the right to receive benefits vests in the

² *AFL* concluded that because "only a court may award prejudgment interest on its judgment following a mandamus action to recover benefits wrongfully withheld by Board," administrative law judges do not have statutory authority to award interest on awards of retroactive unemployment insurance benefit payments. (*AFL, supra*, 13 Cal.4th at p. 1043.)

recipient on the first date of his [or her] entitlement." (*Tripp*, at p. 683.) *Tripp* concluded the claimant was entitled to prejudgment interest on benefits wrongfully withheld from the claimant based on section 3287(a)'s language and the delay caused by the claimant's need to vindicate his or her entitlement to benefits. (*Id.* at pp. 683, 685.) The court held: "[W]here a recipient of welfare benefits is adjudged entitled to retroactive payment of benefits pursuant to the statutory obligation of the state, such recipient is entitled to an award of prejudgment interest at the legal rate *from the time each payment becomes due.*" (*Id.* at p. 685, italics added.) Interpreting *Tripp*, *AFL* subsequently stated that *Tripp* held "interest awarded in mandamus actions *vests on the date the claimant was entitled to receive payment* of unemployment insurance [benefits]." (*AFL, supra*, 13 Cal.4th at p. 1034, italics added.)

In *Weber v. Board of Retirement* (1998) 62 Cal.App.4th 1440 (*Weber*), the court addressed the question of whether administrative agencies (e.g., retirement boards) have the authority "to award interest on benefits which have *not been denied*, but . . . represent the period before the Board made the eligibility determination, and . . . are designed to bring the disbursements current." (*Id.* at p. 1445.) *Weber* stated: "*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 [the retirement system] has no monetary obligation to that member.*" (*Id.* at p. 1448, italics added.) "[O]nce disability is demonstrated to the Board's satisfaction, the member's right to receive benefits vests retroactively to the date the application was filed." (*Id.* at p. 1449.) Alternatively stated, "[Government Code section 31724] provides that once the eligibility determination is

made, the right to benefits vests immediately, effective retroactively." (*Id.* at p. 1451.)

Weber explained:

"[T]he member seeking [disability retirement] benefits must apply [citation], and carries the burden [citation] of demonstrating, to the Board's satisfaction [citation], his or her eligibility for the benefits. [Citation.] *Until the member makes the necessary showing of eligibility, his or her right is merely inchoate.*" (*Weber, supra*, 62 Cal.App.4th at p. 1451, italics added.)

Weber concluded neither the CERL nor section 3287(a) authorized an administrative award of prejudgment interest. (*Weber, supra*, at p. 1452.)

In *Austin v. Board of Retirement* (1989) 209 Cal.App.3d 1528 (*Austin*), the court addressed the question of whether the trial court erred by finding an employee was entitled to interest from the last day of service on the retroactive portion of his award of disability retirement benefits. (*Id.* at pp. 1530-1531.) In that case, the employee applied for disability retirement benefits in 1985, which application was initially denied, and, following an administrative hearing, the retirement board denied his application in 1987 on finding he was not disabled. (*Id.* at p. 1531.) In 1988, the trial court granted the employee's petition for writ of mandate and issued a writ directing the retirement board to grant him disability retirement benefits retroactive to his last day of service with interest at the legal rate on the amount of the pension that was retroactive (i.e., presumably for payments for the period from 1985 through 1988). (*Ibid.*) *Austin* initially concluded the statutory scheme governing disability pension benefits did not preclude recovery of section 3287(a) interest on "damages awarded as prejudgment benefits *from the date such benefits became due.*" (*Austin*, at p. 1533, italics added.) The court stated: "[Section

3287(a)] 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.*" (*Id.* at p. 1533, quoting *Mass v. Board of Education* (1964) 61 Cal.2d 612, 625, italics added.) Accordingly, *Austin* rejected the retirement board's argument that section 3287(a) interest could not accrue on the amount of retroactive benefits for the period prior to its completion of the administrative process in deciding the employee's application. (*Austin*, at pp. 1532-1534.) The court reasoned: "If [the employee] 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.) Therefore, *Austin* affirmed the judgment awarding the employee section 3287(a) prejudgment interest. (*Austin*, at p. 1536.)

B

Based on our interpretation of the language of section 3287(a) and that statute's apparent underlying legislative intent, we conclude an award of section 3287(a) prejudgment interest cannot, and should not, be made for retroactive disability retirement benefit payments for the period prior to the date those payments became due. Section 3287(a) provides: "A 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 the person upon a particular day, is entitled also to recover interest thereon from that day*" (Italics added.) Paraphrasing that statute, we conclude, in the context of disability retirement benefits, a retiring member is entitled to recover section 3287(a) prejudgment interest on a court award of disability retirement benefits from the day on which his or

her right to recover those benefit payments became vested. However, it is important to distinguish between the retroactive date from which benefits are awarded and the date on which the retiring member becomes entitled to recover those retroactive benefit payments. It is not until the retiring member establishes his or her entitlement to retroactive benefit payments that the right to such payments becomes vested. Prior to such proof, the retiring member's right to such retroactive benefit payments is merely inchoate. (*Weber, supra*, 62 Cal.App.4th at p. 1451.) Furthermore, until the retiring member proves his or her right to recover retroactive disability retirement payments, there is *no underlying monetary obligation* (i.e., damages) on which to award section 3287(a) prejudgment interest. (Cf. *AFL, supra*, 13 Cal.4th at p. 1023.) It is only on the date that a retiring member proves entitlement to retroactive benefit payments that those payments become due and the right to recover those payments becomes vested within the meaning of section 3287(a). (*Olson v. Cory, supra*, 35 Cal.3d at p. 402 [regarding salary and pension payments]; *Weber*, at p. 1451 [regarding disability retirement benefits]; cf. *AFL*, at pp. 1023, 1026 [regarding unemployment benefits]; *Tripp, supra*, 17 Cal.3d at pp. 683, 685 [regarding welfare disability benefits]; *Mass v. Board of Education, supra*, 61 Cal.2d at p. 625 [§ 3287(a) interest should not be awarded on an amount before it is due].)

In the context of disability retirement benefits under the CERL, a retiring member generally is not entitled to payment of disability retirement benefits until such time he or she files an application for such benefits. (Gov. Code, § 31721, subd. (a) ["A member may be retired for disability upon the application of the member . . .".]) Furthermore,

the burden of proof is on the retiring member to show he or she is permanently incapacitated and that such incapacity substantially was the result of performing his or her job duties. (Gov. Code, §§ 31723, 31725; *Masters v. San Bernardino County Employees Retirement Assn.*, *supra*, 32 Cal.App.4th at p. 46; *Glover v. Board of Retirement*, *supra*, 214 Cal.App.3d at p. 1337; *Harmon v. Board of Retirement*, *supra*, 62 Cal.App.3d at p. 691.) The retirement board has the constitutional and statutory duty to manage the retirement fund and, in so doing, to determine whether the fund is obligated to pay benefits to any particular applicant. (*McIntyre v. Santa Barbara County Employees' Retirement System*, *supra*, 91 Cal.App.4th at pp. 734-735.) Until such time as the retiring member submits an application for disability retirement benefits and submits proof that he or she is permanently incapacitated substantially as a result of performing his or her job duties, the retirement board has no obligation to pay such benefits to that member. Therefore, a retiring member has no "vested" right to recover disability retirement benefit payments, whether retroactive or prospective, and thus no "damages," or underlying monetary obligation, within the meaning of section 3287(a) until such time as he or she files an application for such benefit payments and proves entitlement thereto. It is only on that particular day section 3287(a) interest begins to accrue on benefit payments that are then due.

Our interpretation of section 3287(a) in this context is supported by its apparent underlying legislative intent, implicitly recognized by the California Supreme Court. In both *Tripp* and *AFL*, the court explained section 3287(a) prejudgment interest was intended to compensate the claimant for the *delay* in receiving payment of benefits

caused by the *wrongful* denial or withholding of those benefits. (*Tripp, supra*, 17 Cal.3d at pp. 683, 685; *AFL, supra*, 13 Cal.4th at pp. 1022-1023, 1027.) The California Supreme Court stated: "The rationale for the [section 3287(a)] mandamus interest award is that a claimant who is wrongfully denied unemployment insurance [or other] benefits by the Board must receive compensation for the egregious *delay* in receiving benefits caused by the necessity of filing a mandamus action challenging the Board's denial." (*AFL*, at p. 1022.) Absent any wrongful denial or wrongful withholding of benefits and the delay in receiving benefit payments caused thereby (e.g., by requiring the retiring member to file a petition for writ of mandate to obtain such benefit payments), there is no justification for an award of section 3287(a) prejudgment interest. Until such time a retiring member has filed an application for disability retirement benefits and proves entitlement thereto, the retirement board has neither wrongfully withheld payment of those benefits nor caused any delay in the member's receipt of those payments and therefore no section 3287(a) prejudgment interest should accrue on any retroactive benefits ultimately awarded to the member attributable to the time period before that application and proof.

C

Applying our interpretation of section 3287(a) to the undisputed facts in this case, we conclude, as SBCERA asserts, the trial court erred by awarding Flethez section 3287(a) prejudgment interest on those retroactive disability benefit payments attributable to the period before he filed his application for, and proved his entitlement to, the disability benefits. To the extent *Austin, supra*, 209 Cal.App.3d 1528, held to the

contrary as Flethez asserts, we disagree with, and decline to follow, its holding.³

Although the trial court in this case properly found, and SBCERA does not contest on appeal, Flethez was entitled to retroactive disability retirement benefits from the day following the last day he received regular compensation (i.e., July 15, 2000), it erred by awarding him section 3287(a) interest on those retroactive benefit payments attributable to the period from July 15, 2000, through the time he applied for, and proved his right to receive, such payments.⁴ However, based on the record on appeal, we cannot conclude with certainty on what date Flethez, in fact, established his right to receive retroactive disability retirement benefit payments pursuant to Government Code section 31724.

SBCERA asserts that date was December 15, 2011, the date of the administrative hearing. However, the parties' briefing and evidence in the record cited on that issue is insufficient for us to make that factual finding on appeal. On remand the court is directed to conduct further proceedings to determine that question of fact and then award Flethez the appropriate amount of section 3287(a) prejudgment interest from that date.

³ It is not clear from the opinion in *Austin* when the retiring member filed his application for, and proved his entitlement to, disability retirement benefits. If, in fact, his last day of service was on or after June 11, 1985, and he met his burden to prove his right to benefits on the date he filed his application (i.e., June 11, 1985), then the result in *Austin* is entirely consistent with our interpretation. (*Austin, supra*, 209 Cal.App.3d at pp. 1530-1531, 1536.)

⁴ In resolving this appeal on this ground, we need not, and do not, address SBCERA's alternative contention that section 3287(a) prejudgment interest does not accrue during such time as Flethez's acts, or inactions (i.e., his prolonged delay in filing his application and proving his entitlement to benefits), "prevented" it from paying his retroactive disability retirement payments, or its "debt," within the meaning of section 3287(a).

DISPOSITION

The judgment is reversed to the extent it awarded Flethez section 3287(a) prejudgment interest on all retroactive disability retirement benefits. In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.

I, KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that this preceding and annexed is a true and correct copy of the original on file in my office.

WITNESS, my hand and the Seal of the Court this
April 22, 2015

KEVIN J. LANE, CLERK



By A. Galvez
Deputy Clerk

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 404 Enclave Circle #208, Costa Mesa, CA 92626

That on May 30, 2015, I served the foregoing document described as: **PETITION FOR REVIEW** on all interested parties as follows:

(X) by placing () the original (X) a true copy thereof enclosed in sealed envelope(s) addressed as follows:

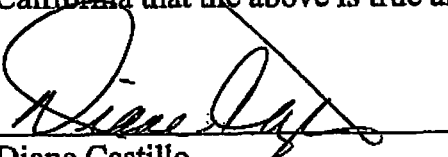
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Executed on May 30, 2015 at Costa Mesa, California.

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


Diane Castillo

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Exhibit 3

S226779

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FRANK FLETHEZ

Petitioner,

v.

SAN BERNARDINO COUNTY EMPLOYEES RETIREMENT ASSOCIATION,

Respondent

San Bernardino Superior Court Case Number CIVDS 1212542
Fourth District, Division One Number D066959

ANSWER TO PETITION FOR REVIEW

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I

**INTRODUCTION AND STATEMENT WHY REVIEW
SHOULD NOT BE GRANTED**

This case is controlled, and was properly decided below, by a correct application of governing law. Where a petitioner seeks a disability benefit from a public retirement system whose governing law requires him or her to file an application and submit proof to that agency and to receive an award of that benefit only after an administrative process leading to a determination by that agency's governing board that the application should be granted, the agency's failure to award that benefit will not give rise to an award of prejudgment interest unless and until the agency has rendered an erroneous decision denying the benefit, after the applicant has established a right to receive the benefits sought. Even where such an error does occur, and prejudgment interest caused by the agency's wrongful delay comes to be owed, it will not ordinarily begin to run until the date of the agency's final, erroneous decision on the merits.

Where the benefit at issue is an award of retroactive disability benefits under the County Employees Retirement Act of 1937, this question has been conclusively decided by Weber v. Bd. of Retirement (1998) 62 Cal.App.4th 1440, which held:

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 [the retirement system] has no monetary obligation to the member...*[A]s soon as the Board's decision is made, retirement and the right to payments vest.*

[P]rejudgment interest under 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*. Weber, 62 Cal.App.4th at 1448-1450 (italics in original; underlining supplied).

The Respondent here does not deny that some interest is owed. Rather, it concedes that it owes prejudgment interest from the date of its final decision to deny the pre-application retroactive portion of Petitioner's benefits, which the trial court later found to be erroneous. But no prejudgment interest is owed from before that date, unless Respondent unreasonably delayed making its decision after petitioner presented sufficient evidence to establish his entitlement to the retroactive benefits.

The principle established in Weber is that prejudgment interest is awarded to compensate the disability applicant for any damages caused by an agency's *wrongful* failure to award what is due in a manner that causes unreasonable delay. A certain amount of delay is built into the administrative process itself, but the applicant is not damaged by that inevitable delay and hence is not entitled to the recovery of prejudgment interest for it unless the agency caused the delay to be unreasonable by its own wrongful actions.

Petitioner's argument conflates the award of prejudgment interest with the award of retroactive benefits, but that is not the law. The prejudgment interest award is separate from the benefits, and allowed for different reasons to serve a different purpose, namely to compensate for damages arising from a wrongful delay caused by the agency. Ordinary administrative delays inherent in the administrative process do not justify such damages.

The prejudgment interest statute itself makes this distinction because

it does not authorize the award of prejudgment interest for damage caused by a petitioner rather than by the respondent, or caused by the respondent agency's legal inability to grant the benefits sought. Civil Code § 3287(a) provides:

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, *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, municipal corporation, public district, public agency, or any political subdivision of the state. (Emphasis supplied.)

The fallacy in petitioner's argument is apparent. Petitioner cannot have been damaged by any delay caused by his own repeated delay in filing an application and failures to provide the retirement board with the evidentiary basis to act on his claims. Petitioner did not file his first application for disability retirement until 2008, almost 8 years after his last day in paid status. By statute, disability benefits cannot be paid until there is an application for them together with sufficient evidence to support the claim.

Further, if the applicant wishes to establish a pre-application effective date for the start of his disability retirement, he or she must present additional evidence beyond that necessary to establish a right to the disability retirement itself, which ordinarily takes effect no earlier than the date of his or her application. Until evidence has been presented that would authorize the Board to grant the requested additional relief, and the

retirement system has been given a reasonable time to complete the ordinary administrative processes, including preparation and finalization of a hearing officer's report and recommendation following a hearing, before submitting the matter to the retirement board for consideration and a final decision, the petitioner has not been damaged by any unreasonable delay caused by the retirement board. Rather, it is his or her own inaction or the inherent delays built into the administrative process that caused that portion of the delay, and neither the statute itself, nor the controlling case law, permit the recovery of prejudgment interest for that period.

As discussed in more detail below, the record shows that Petitioner's last day in paid status occurred in 2000, yet he did not file his original application for disability retirement until 2008, did not file a complete application for disability until 2009, and the Retirement Board granted his application for disability retirement in 2010, effective as of his earliest application date in 2008. However, Petitioner then sought retroactive, pre-application benefits effective from 2000 forward, but did not submit any evidence to explain his claimed entitlement to pre-application retroactive benefits until the end of 2011. Processing objections and finalizing the hearing officer's report and recommendation for submission to the Board was completed only in July of the following year, and partially as a result of a request for a one month continuation by Petitioner from the September Board meeting, the Board did not consider the report and recommendations and make its decision on such claim for additional, retroactive benefits until its meeting on October, 4, 2012. Nevertheless, the trial court awarded prejudgment interest going back to 2000, eight years before Petitioner's initial application, 11 years before he made any attempt to meet his burden of proof on retroactive pre-application effectiveness, and 12 years prior to the Board's decision on that retroactivity issue.

The Court of Appeal properly reversed and remanded, noting that prejudgment interest cannot begin to run until an agency's wrongful denial of benefits, or its unreasonable delay in making its decision after the petitioner had established his right to the retroactive award. Because the issue of when Petitioner had presented sufficient proof to establish his right to a retroactive pre-application effectiveness date could not be decided by the Court of Appeal as a matter of law, the decision properly remanded the case to the superior court to make that factual determination governing the start date for prejudgment interest.

No matter when that date of establishment occurred, it is patent that it could not have occurred before the Petitioner filed his initial application in 2008, and should not properly be deemed to have occurred before Petitioner finally offered testimony supporting his demand for a pre-application effectiveness date in 2011, and the retirement system was given adequate time for the ordinary administrative processes to occur before the matter was submitted to the Retirement Board for its consideration and final decision on such additional requested retroactivity.

The application of this legal principle by the Court of Appeal is fully consistent with the governing case law and statute, and is fair to both retirement boards and the applicants before them because it awards prejudgment interest only for any wrongful delay caused by the retirement boards, not delay caused by the applicants themselves or by the ordinary delays inherent in the disability application process. The decision below was entirely consistent with the statute and the extant case law. There is no serious doubt as to either the law or its application to this case. Accordingly, the Petition for Review should be denied.

II

REAL ISSUE PRESENTED BY THE PETITION

The petition ignores most of the evidence and it ignores the actual holdings of the cases it cites. The real issue presented by this petition is: Does prejudgment interest begin to run (1) before an application for retirement benefits is filed, and (2) before an applicant presents sufficient evidence to overcome a statutory presumption that there are no pre-application date benefits, and (3) before the Board has an opportunity to consider the evidence supporting a claim for pre-application date retroactivity and render a final decision?

Stated otherwise, the question is whether applicants for disability retirement can obtain huge windfalls by being paid 7% prejudgment interest for years prior to applying for benefits and for years prior to presenting sufficient evidence to overcome a statutory burden of proof to establish entitlement to a pre-application effective date.

III

BRIEF SUMMARY OF THE CASE

Petitioner was an employee of the County of San Bernardino, and thus a member of the San Bernardino County Employees Retirement Association ("SBCERA") for nine years, concluding in 2000. In 2008, he filed an application for disability benefits, which was rejected because he refused to allow SBCERA to review his medical records. In 2009, he filed a complete application.

SBCERA's Board, in its initial decision on August 5, 2010, granted his disability application, with benefits effective as of the earliest application date, in 2008. But Petitioner then sought benefits retroactive to 2000. By statute, it is presumed that benefits are not retroactive prior to the

date of the application. To qualify for retroactive benefits prior to that date, the applicant must present evidence to overcome the presumption. The SBCERA Board did not award a retroactive pre-application effective date for the benefits in 2010, finding nothing in the record then before it that would justify such an additional retroactive award. Petitioner then requested an administrative hearing, and finally presented evidence to support his request for retroactive pre-application benefits at an administrative hearing in 2011. The hearing officer, and thereafter the Board, found Petitioner's testimony at the administrative hearing insufficient to meet his burden of proof to establish his right to pre-application benefits. In a subsequent writ proceeding the trial court disagreed and awarded retroactive benefits, which SBCERA has now granted. The retroactivity of benefits starting in 2000 is no longer at issue in this case.

Petitioner then sought prejudgment interest on the retroactive benefits, also retroactive to 2000. Even though Petitioner made no contact with SBCERA until 2008, did not file his complete application until 2009, and did not submit testimony to justify an award of retroactive benefits until 2011, and SBCERA's Board had not taken final action until 2012, the trial court awarded prejudgment interest retroactive to 2000. The result was an award of over \$132,000 in interest, at a rate far higher than Petitioner could have obtained at any bank.

The court of appeal reversed. It held that prejudgment interest does not begin to run until Petitioner filed an application and submitted evidence through the regular procedures sufficient to establish the petitioner's right to overcome the statutory presumption against such a retroactive pre-application effectiveness date. It remanded for determination of that precise "establishment" starting date of prejudgment interest because it

could not be determined as a matter of law on the record before the Court of Appeal. Petitioner then sought review in this Court.

IV

STANDARD OF REVIEW

Respondent accepts the Petition's contention that, should the Court decide to hear this case, the standard of review would be de novo.

V

THE RECORD AND CITATIONS THERETO

Most of the record is the three volume administrative record. It will be cited as [volume] AR [page].

Additional documents were filed in an appellant's appendix before the court of appeal and will be cited as AA [page].

The reporter's transcript will be cited as RT [page].

VI

THE PURPOSE AND ROLE OF THE SAN BERNARDINO COUNTY PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

County employee retirement associations such as SBCERA are public entities established pursuant to the County Employees Retirement Law of 1937 ("CERL"), Government Code § 31450 et seq. Although they are set up to provide retirement benefits for employees of counties, other local agencies may join. SBCERA serves over 34,000 members from 17 agencies.

Contributions from active members and their employers are held in trust and invested, and then paid in retirement benefits pursuant to statutory formulas, including disability retirement benefits in appropriate cases.

County retirement associations such as SBCERA are required to make quasi-judicial decisions about whether applications for disability retirement should be granted or denied. Masters v. San Bernardino Employees' Retirement Ass'n (1995), 32 Cal.App.4th 30, 45. SBCERA's Board cannot properly perform this function "unless it investigates applications and pays benefits only to those members who are eligible for them. [Citations]" McIntyre v. San Bernardino County Employees Retirement Ass'n (1995) 91 Cal.App.4th 730, 734.

VII

APPLICABLE ADMINISTRATIVE PROCEDURES

County employees can retire for service only if they reach a sufficient age and have worked a sufficient number of years. However, they can retire for disability, without meeting these criteria, if they can prove that they have become permanently incapacitated as a result of injury or disease, and these disability benefits are higher if they can prove that the disability was caused by their employment. Government Code §§ 31720, 31720.1.

When an application for a disability retirement is filed, the applicant is required to file documents including (a) an application, (b) a statement of facts and circumstances describing the basis for the claim, (c) a physician's statement, and (d) authorizations to obtain the medical records relevant to the claim. (Government Code § 31721 ["A member may be retired for disability upon the application of the member . . ."]; SBCERA's By-Laws, pages 22-24; see 1 AR 20 [application], 24 [statement of facts and circumstances], and 29 [physician's statement].)¹

¹The bylaws are available at SBCERA.org.

The applicant has the burden of proving that a disability exists, and if there is a contention that it was caused by employment, that a disability is service-connected, by a preponderance of the evidence. McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1051, n. 5 (“As in ordinary civil actions, the party asserting the affirmative at an administrative hearing has the burden of proof, including both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence”); Glover v. Board of Retirement (1989) 214 Cal.App.3d 1327, 1337 (“the burden was on him to prove by a preponderance of the evidence that such disability was caused by his employment”); Masters, supra, 32 Cal.App.4th at 46 (“The applicant also bears the burden of proving that the disability is work-related”).

Staff obtains copies of the relevant medical records. (See 1 AR 62 to 3 AR 1583) The application and records are first reviewed by Staff and by a medical advisor, and often the applicant is examined by an independent medical examiner. (See 1 AR 46) Staff then makes a recommendation to the Board. (See 3 AR 1585)

The Board reviews the Staff recommendation and makes an initial decision. If the applicant is dissatisfied with the Board’s initial decision, the applicant can request reconsideration. (See 1 AR 22)

If the applicant is still not satisfied, the applicant can request a formal hearing. If that occurs, an independent hearing officer is appointed and the issues are addressed de novo before the hearing officer. (SBCERA’s By-Laws, page 29; Wieser v. Bd. of Retirement (1984) 152 Cal. App. 3d 775, 781-782.)

The hearing officer holds an administrative hearing at which evidence is presented anew (see AR 1599), and closing briefs are filed. (See AR 1649, 1662, 1680) The parties have the right to call witnesses by

subpoena. (See 1 AR 6) The hearing officer prepares a written report and recommendation. (See AR 1689) The decision of the hearing officer is a recommendation which the Board then accepts, rejects or modifies. (SBCERA's Bylaws, page 30; see 3 AR 1689)

If the applicant is still dissatisfied with the decision after fully exhausting the administrative remedies described above, the applicant is entitled to file a petition for writ of mandate in superior court. The administrative decision is reviewed under Code of Civil Procedure § 1094.5.

VIII

IT IS PRESUMED THAT DISABILITY RETIREMENT BENEFITS ARE NOT RETROACTIVE TO BEFORE THE APPLICATION DATE

In the trial court, Petitioner was granted the requested disability benefits retroactive to the date after his last day of regular employment in 2000, and was granted attorney's fees. SBCERA did not appeal those rulings and has paid the retroactive benefits as ordered by the trial court. The only issue on appeal is the starting date for prejudgment interest on the pre-application retroactive benefits.² The court of appeal did *not*, as Petitioner contends, limit interest to post-judgment interest; its actual decision is addressed below.

It is presumed that the starting date of retirement benefits is the later of the date of the application or the end of regular compensation. The first paragraph of Government Code § 31724 contains the presumption that, once granted, a member's disability retirement allowance:

²To be clear, contrary to some assertions in the Petition for Review, SBCERA is not contending that no prejudgment interest at all is owed.

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.

The second paragraph of § 31724 allows an earlier starting date of benefits, but only if the applicant meets a specified burden of proof to overcome the presumption.

When it has been *demonstrated to the satisfaction of the board* that the filing of the member's application was delayed by administrative oversight or by inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed.

The Board could not have awarded Petitioner's requested benefits on a pre-application retroactive basis until he presented evidence supporting his inability to ascertain the permanency of his disability at the time he left county service, and the Board had time to consider that evidence, find it satisfactory, and render a decision on it. Thus, no pre-application retroactive payments could lawfully have been made until the Board's final decision on that topic at the administrative level.

IX

STATEMENT OF THE CASE

A. ADMINISTRATIVE PROCEEDINGS

Last day of regular compensation

Petitioner's last day of regular compensation was July 14, 2000. (1 AR 59)

Initial incomplete application

On June 12, 2008, Petitioner tried to file an application for disability retirement. The application was not accepted at that time because Petitioner refused to sign an authorization to obtain the relevant medical records (1 AR 11; 3 AR 1663), one of the basic parts of an application. Government Code § 31723 (the Board “may require such proof, including a medical examination at the expense of the member, as it deems necessary or the board upon its own motion may order a medical examination to determine the existence of the disability.”).

Complete application

Petitioner filed a complete application on July 16, 2009. (1 AR 20)

Agreement to deem the 2009 application retroactive to 2008

Petitioner threatened to sue over the refusal to accept the incomplete application in 2008. That issue was resolved by an agreement that the later filed application would be deemed filed on June 12, 2008 for purposes of the starting date for benefits. (1 AR 11; 3 AR 1663)

Petitioner’s statement of facts and circumstances

The statement of facts and circumstances submitted in support of the 2009 application stated that Petitioner was employed by the County of San Bernardino as a grounds caretaker I. It lists two injuries. First, on April 5, 1993 he was rear ended while driving a dump truck. Second, on July 14, 1998 he was injured when using a power pruner to trim trees. (1 AR 24)

Staff Recommendation and Initial Board Decision

Staff reviewed the records and arranged for a review by a medical advisor. (See 1 AR 46) Staff recommended findings that:

1. Petitioner was permanently disabled and his disability is service-connected based on cervical and lumbar spine injuries.
2. Petitioner was not capable of gainful employment.

3. The starting date of benefits should be June 12, 2008, the date of the original application. (3 AR 1585)

On August 5, 2010 the Board reviewed the application and accepted the Staff Recommendation. (3 AR 1588)

Request for Review and Reconsideration

SBCERA's rules allow a party to seek review and reconsideration, though that step is optional. On September 30, 2010 Petitioner filed a request for review and reconsideration limited to the question of the starting date for benefits. (1 AR 22, 23) Per SBCERA's procedures, Petitioner then had six months to submit additional evidence in support of the contention that, at the time he left county service, he could not have ascertained the permanency of his disability. Petitioner submitted no additional evidence during this six month period. After that period had elapsed, Staff recommended continued denial of retroactive pre-application benefits. (3 AR 1586) On April 7, 2011 the Board maintained its original decision. (3 AR 1591)

Request for Administrative Hearing

On April 14, 2011 Petitioner filed a request for a formal hearing, again limited to the question of the starting date for benefits. (1 AR 23) An independent hearing officer was appointed to review the issue and make a recommendation to the Board. (1 AR 6)

Evidence and initial briefing before the administrative hearing

SBCERA's rules require each side to file a prehearing statement. (See 1 AR 6) SBCERA's prehearing statement cited the lack of evidence to show that the Petitioner had been unable to ascertain the permanence of his disability when he left county service in 2000, which would be needed to support an effective date prior to the agreed upon 2008 filing date. (1 AR 10) Petitioner did not submit any additional evidence with his prehearing

statement, and only referenced his intention to present his own testimony. (3 AR 1594)

Administrative hearing

On December 15, 2011, the hearing officer held a formal hearing. (3 AR 1599) Petitioner submitted no exhibits at the hearing. (3 AR 1603, 1605) The sole evidence Petitioner presented was his own testimony. (3 AR 1615-1640)

Hearing Officer's Report and Recommendation

The hearing officer prepared a detailed report and recommendation on May 25, 2012. (Government Code § 31533; 3 AR 1989) Both sides submitted objections to the initial report and recommendation. (Government Code § 31534; 3 AR 1714, 1716) The hearing officer prepared a final report and recommendation on July 16, 2012. (3 AR 1722) The hearing officer found that Petitioner had failed to carry his burden of proof of showing an exception to the general rule that benefits are effective as of the date of filing the application.

Final Board Decision

On July 30, 2012 Petitioner requested that the Board postpone consideration of the matter from the Board's September to its October meeting. (3 AR 1726) The hearing officer's final report and recommendation was presented to the Board and considered and adopted by it on October 4, 2012. (3 AR 1739)

B. TRIAL COURT PROCEEDINGS

Petitioner filed a petition for writ of mandate. (AA 1) The trial court awarded retroactive benefits (RT 1-8), awarded attorney's fees (RT 9-13, 17-23), and awarded \$132,865.37 in prejudgment interest at 7% per annum, *retroactive to 2000*, on all disability payments Petitioner would have received if he had filed a disability retirement application the day he

stopped working. (RT 23-23; AA 127)

The retroactive benefits and attorney's fees have been paid and were not an issue on appeal. (AA 59 [writ], 61 [return to writ])

X

SUMMARY OF THE ISSUE DECIDED

BY THE COURT OF APPEAL

The sole issue on appeal was the starting date for prejudgment interest on the retroactive pre-application benefits. An applicant who wants pre-application date benefits, which are thus retroactive to the last day of employment, is required to submit evidence to prove an entitlement to them to overcome the statutory presumption.

When it has been *demonstrated* to the satisfaction of the board that the filing of the member's application was delayed by administrative oversight or by *inability to ascertain the permanency of the member's incapacity* until after the date following the day for which the member last received regular compensation, such date will be deemed to be the date the application was filed. Government Code § 31724, second paragraph.

There was never any contention that filing of the application was delayed by administrative oversight. Petitioner was therefore entitled to retroactive benefits only if he overcame the presumption by proving "inability to ascertain the permanency of the member's incapacity until after the date following the day for which the member last received regular compensation." The question on appeal is whether SBCERA should pay prejudgment interest *prior* to the date Petitioner met his burden of proof under § 31724 in order to establish his entitlement to pre-application-date

retroactivity, and the usual administrative procedures had been conducted leading to the Retirement Board's decision on the issue.

Nothing in the retirement statutes gives any right to interest on retroactive disability benefit awards. The sole basis for requesting and awarding prejudgment interest is Civil Code § 3287(a). That statute provides, as noted above, that when a plaintiff's right to recover damages "is vested in him upon a particular day," such plaintiff "is 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.*" (Emphasis supplied.)

SBCERA recognizes that some prejudgment interest is owed. The only issue is when it began to run. The court of appeal correctly ruled that interest cannot start to run before an applicant has submitted sufficient evidence to establish his right to the benefit that was erroneously denied and the agency has been given sufficient time to conduct the ordinary administrative processes to make its decision on the evidence submitted to it. Petitioner's testimony in support of his "inability to ascertain the permanency" of his incapacity was not presented until the formal hearing on December 15, 2011. (3 AR 1599) The Board itself, which is the only entity with the power to actually award such pre-application date benefits, had no opportunity to consider that evidence until after the hearing officer's report and recommendation was finalized on July 16, 2012, and the matter was returned to the Board. Pursuant to Petitioner's request submitted to SBCERA on July 30, 2012, Board consideration of the hearing officer's recommendation was set for October 4, 2012. (3 AR 1736, 1739)

It would have been an unconstitutional gift of public funds to have paid Petitioner retroactive benefits prior to the time he met his burden of proof. See San Marcos Water Dist. v. San Marcos Unified Sch. Dist.

(1986) 42 Cal. 3d 154, 167 (paying an invalid assessment would be a gift of public funds). Paying benefits, regular or retroactive, before Petitioner met his burden of proving entitlement to them, also would have violated SBCERA's statutory and fiduciary mandate to investigate claims and only pay those benefits that are valid. McIntyre v. San Bernardino County Employees Retirement Association (1995) 91 Cal.App.4th 730, 734.

XI

THE COURT OF APPEAL DECISION

The court of appeal simply held that when a person is required to file an application and to meet a specified burden of proof to overcome a statutory presumption, prejudgment interest does not begin to run until the application is filed, sufficient evidence has been presented to establish the applicant's entitlement to the benefit sought, and the retirement board has been given sufficient time to complete the administrative procedures to rule on that evidence. The court of appeal cited multiple cases holding that prejudgment interest is awarded to compensate for benefits "wrongfully withheld," and it stated that benefits have not been wrongfully withheld unless and until there is both an application for them and proof sufficient to overcome the statutory presumption. (Slip opinion pages 8-16.) See, in particular, AFL-CIO v. Unemployment Insurance Appeals Board (1996) 13 Cal.4th 1017, 1026, discussed in the slip opinion at pp. 9-10 ("Benefits . . . are due promptly only after a claimant has established benefit eligibility. . . . The delays inherent in this system are not, however, tantamount to a 'wrongful withholding' of benefits giving rise to section 3287(a) prejudgment interest. . . ."); and San Diego Deputy Sheriffs Assn. v. San Diego County Civil Service Comm. (1998) 68 Cal.App.4th 1084, 1094, discussed in the slip opinion at p. 10 ("The 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.”).

Further examination of the cases shows a consistent principle. Prejudgment interest begins to run when the money is unconditionally owed and should have been paid, and not before. Thus, where an employer wrongfully fails to pay an employee the proper wages, interest will run from the date of each paycheck that the employee was denied, because the employee’s entitlement existed without any need of an administrative decision, and that entitlement would have been fulfilled but for the employer’s wrongful act. (See, e.g., Currie v. Workers' Comp. Appeals Bd. (2001) 24 Cal.4th 1109 [wrongful termination]; Olson v. Cory (1983) 35 Cal.3d 390 [pay wrongfully reduced]; Mass v. Bd. of Education (1964) 61 Cal.2d 612 [wrongful termination]; Goldfarb v. Civil Service Comm'n (1990) 225 Cal.App.3d 633 [wrongful demotion]). Where, in contrast, the plaintiff’s entitlement to receive the payment does not exist independently, but requires an application supported by evidence upon which an administrative agency is obligated to act, the payment has not been wrongfully denied unless and until the agency actually makes a decision that erroneously denies payment, or unreasonably delays such a decision after sufficient evidence has been submitted. (See, e.g. AFL-CIO, supra, 13 Cal.4th at 1022 [interest on unemployment benefits not due unless and until such benefits are wrongly denied; the purpose of interest in such a case is to compensate for “the egregious delay in receiving benefits *caused by the necessity of filing a mandamus action*”] [emphasis supplied]; Tripp v. Swoap (1976) 17 Cal.3d 671, 682-83 [interest on wrongfully denied welfare benefits is owed “once eligibility is determined” and runs “as of the date the applicant is first entitled to receive the aid”]; Weber v. Board of Retirement

(1998) 62 Cal.App.4th 1440 (1998) [interest on disability retirement benefits not due unless and until such benefits are wrongly denied]).

Against this backdrop of uniformity of principle, Austin v. Board of Retirement (1989) 209 Cal. App. 3d 1528, 1534, is the lone potential exception, discussed at slip opinion pp. 12-13 (“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 the accrual of each payment.”) However, the court of appeal in the instant case, which is the same court of appeal and division that previously decided Austin, explicitly disagreed with Austin, and declined to follow it, to the extent that it could be read to require interest to begin running during “the period before [Petitioner] filed his application for, and proved his entitlement to, the disability benefits.” (Slip Op. at 16).

The key holding with respect to the proper start date for the running of prejudgment interest appears on page 17 of the slip opinion as follows:

Although the trial court in this case properly found, and SBCERA does not contest on appeal, Flethez was entitled to retroactive disability retirement benefits from the day following the last day he received regular compensation (i.e., July 15, 2000), it erred by awarding him section 3287(a) interest on those retroactive benefit payments attributable to the period from July 15, 2000, through the time he applied for, and proved his right to receive, such payments. [Footnote] However, based on the record on appeal, we cannot conclude with certainty on what date Flethez, in fact, established his right to receive retroactive disability retirement benefit payments pursuant to Government Code section 31724. SBCERA asserts that date was December 15, 2011, the date

of the administrative hearing. However, the parties briefing and evidence in the record cited on that issue is insufficient for us to make that factual finding on appeal. On remand the court is directed to conduct further hearings to determine that question of fact and then award Flethez the appropriate amount of section 3287(a) prejudgment interest from that date.

The court of appeal's decision rests firmly on the legal principle that prejudgment interest is awarded on a separate basis from the award of the retroactive benefits themselves, and runs only from and after the date that the applicant's right to the benefit has been established. This is fully consistent with the governing case law and statute, which awards prejudgment interest only for any *wrongful* delay caused by the retirement board, not delay caused by the applicants themselves or by the ordinary delays inherent in the disability application process.

Petitioner contends the court of appeal opinion conflicts with other cases. That contention misstates the record, ignores most of the analysis of the court of appeal, ignores Petitioner's burden of filing an application and proving a basis for a pre-application retroactive disability retirement, and misstates the holdings of the cited cases. Most importantly, the Petitioner's argument misstates the holding on prejudgment interest in the controlling case, Weber v. Board of Retirement (1998) 62 Cal.App.4th 1440. Footnote 3 on page 6 of the Petition proffers Weber's conclusion, at page 1449, that disability benefits themselves can "vest retroactively" to support its assertion that prejudgment interest automatically follows the same rule whenever such benefits are granted. In fact, the Weber decision rejected precisely that argument:

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.* Weber, *supra*, 62 Cal.App.4th at p. 1449 (emphasis supplied).

In summary, all of the cited cases, possibly excepting the court of appeal's own prior decision in Austin, are consistent with the holding of the court of appeal that when a party is required to file an application and to meet a specific burden of proof to overcome a statutory presumption, prejudgment interest does not begin to run until benefits are wrongfully withheld, and withholding does not become wrongful until (1) the required application is filed and (2) the burden of proof is met through evidence provided in regular proceedings, and (3) only a reasonable time to allow the ordinary administrative procedures to consider that evidence has passed before there is a final decision. The purported conflict among the cases does not exist.

CONCLUSION

Civil Code § 3287 provides that prejudgment interest does not begin to run until the right is "vested on a particular day" and does not run "during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt." Here, SBCERA was prevented by law (Government Code § 31724) from paying disability retirement benefits to Petitioner until he proved his legal entitlement to them to the SBCERA Board of

Retirement and the Board acted on his application.

As to his claim for disability benefits for the period *preceding his filing his disability retirement application*, Petitioner did not even seek to rebut the application-filing-date presumption until after August 5, 2010, when the Board granted his original claim for disability retirement benefits retroactive to 2008.

Accordingly, no prejudgment interest for damages caused by the Retirement Board's alleged wrongful delay could have accrued until sometime after August 5, 2010, providing sufficient time for the Board to conduct the ordinary administrative processes necessary to evaluate the claim for additional retroactive benefits.

In the decision below, the court of appeal concluded that it could not determine that precise date and thus remanded to determine those facts based on the wrongful delay principle described in Weber. Because there is no serious question of the correctness and fairness of the legal principle applied by the decision below, this Court should deny the Petition.

DATED: June 18, 2014

ARIAS & LOCKWOOD

By _____
Christopher D. Lockwood
Attorneys for respondent
SBCERA

WORD COUNT CERTIFICATION

This brief was prepared in Times New Roman 13 point type.
According to Word Perfect, it contains 6206 words.

Christopher D. Lockwood

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO

I am employed in the County of San Bernardino, State of California. I am over the age of 18 and not a party to the within action. My business address is 225 West Hospitality Lane, Suite 314, San Bernardino, California 92408.

On June 18, 2015, I served the following document described as **ANSWER TO PETITION FOR REVIEW** by placing a true copy of the original thereof enclosed in sealed envelopes addressed as follows:

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Faunce, Singer & Oatman
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(818) 755-8723
(Attorneys for Petitioner Frank Flethez)

Civil Division
SAN BERNARDINO COUNTY SUPERIOR COURT
303 West Third Street
San Bernardino, California 92415-0210
(Case No.: CIVDS 1212542)

California Court of Appeal,
Fourth District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, California 92101

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same date with postage thereon fully prepaid at San Bernardino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on June 18, 2015 at San Bernardino, California.

Kelly M. Edmunds

Exhibit 4

No. S226779

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

FRANK FLETHEZ,
Plaintiff and Respondent,

v.

**SAN BERNARDINO COUNTY EMPLOYEES
RETIREMENT ASSOCIATION,**
Defendant and Appellant.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One
Case No. D066959

**REPLY IN SUPPORT OF PETITION FOR
REVIEW**

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SUPREME COURT OF THE STATE OF CALIFORNIA

FRANK FLETHEZ,)	No. S226779
)	
Plaintiff and Respondent,)	
)	
vs.)	
)	
SAN BERNARDINO COUNTY)	
EMPLOYEES RETIREMENT)	
ASSOCIATION,)	[San Bernardino Co.
)	Super. Ct No. CIVDS
Defendant and Appellant.)	1212542; 4th Civil No.
)	D066959]

THE MUTATING QUESTION

The Question of Retroactive Benefits

This action originally asked a mundane question: when did Plaintiff Flethez' disability retirement become effective? SBCERA answered the question by declaring that the effective date of the pension was the date of Plaintiff Flethez' initial application therefor, 12 June 2008. (See Slip Op. at 3.) Unwilling to accept that answer, Plaintiff Flethez demanded and was

afforded a formal administrative hearing administrative hearing and decision in which he challenged that determination without success. (Id.) Plaintiff Flethez then took his challenge to the Superior Court, which found that the “deemer” clause of section 31724 of the Government Code was applicable and that therefore his retirement should be retroactive to the date after the last day that he received regular compensation, 15 July 2000. (See id. at 3-4.)

The Question of Interest: Vesting.

The question then became whether the award of retroactive - retirement benefits carried with it interest on all such amounts pursuant to section 3287(a) of the Civil Code. The Superior Court answered affirmatively, but the Court of Appeal answered negatively.

According to the Court of Appeal a retiring county employee is entitled to recover interest on a court award of retirement benefits from the day that his or her right to those benefits vested. (See Slip Op. at 13-14.) And the Court of Appeal asserts that vesting occurs, not on the retroactive date when benefits commence, but instead on the date when the employee establishes his or her entitlement to such retroactive benefits. (See id. at 14.)

Until such time a retiring [employee] has filed an application for disability retirement benefits and has proven entitlement thereto, the right to receive such benefits has not vested, and therefore no section 3287(a) prejudgment interest should accrue on any retroactive benefits ultimately awarded to the employee attributable to the time period before that application and proof. Id. at But Plaintiff Flethez has established otherwise. Section 3287(a) requires vesting ““only in order to fix with sufficient certainty the time the obligation accrues so that interest should not be awarded before it is due””. Austin v. Bd. of Ret., 209 Cal. App. 3d 1528, 1533, 209 Cal. Rptr. 3d 106, 109 (1989) (quoting Mass v. Bd. of Educ., 61 Cal. 2d 612, 626, 394 P.2d 579, 588, 39 Cal. Rptr. 739, 748 (1964)).

“Each salary payment in [Mass] accrued on a date certain. Unless the suspension itself [could] be sustained and the board thus relieved of any obligation whatsoever, the salary payments became vested as of the dates they accrued. If [the] plaintiff had not been wrongfully suspended, he would have obtained the benefits 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.”

Id. (quoting Mass, 61 Cal. 2d at 1533-34, 394 P.2d at 588, 39 Cal. Rptr. at 748.

Thus, the question becomes: what is the meaning of vesting.

Plaintiff Flethez and the Court of Appeal have contradictory views as to the

correct answer to that question, and the inherent importance of the issue requires that the conflict be resolved by this Court.

The Question of Interest

While nodding to the Court of Appeal, (see Answer to Pet. for Review at 5 [hereinafter Answer]), SBCERA redirects the question from vesting to wrongful withholding. The theory advanced by SBCERA is that the failure of the board of retirement to award disability retirement benefits “will not give rise to an award of prejudgment interest unless and until the [board] has rendered an erroneous decision denying the benefit, after the applicant has established a right to receive the benefits sought”. (Id. at 1.) For this proposition SBCERA relies upon Weber v. Bd. of Ret. 62 Cal. App. 4th 1440, 73 Cal. Rptr. 2d 769 (1998). (See Answer at 1-2.) In the view of SBCERA, section 3287(a) ““is designed to compensate for the lengthy delay resulting from the mandamus action made necessary to indicate the claimant’s rights following the Board’s wrongful denial of benefits””. Answer at 1-2 (quoting Weber, 62 Cal. App. 4th at 1449-50, 73 Cal. Rptr. at 775 (all emphasis omitted))

But SBCERA’s theory, while plausible fails to recognize the central role of retroactivity in the operation of section 31724 that renders the lump

sum retroactive payment that a successful claimant receives subject to interest pursuant to section 3287(a). If an employee proves that he is permanently incapacitated physically or mentally for the performance of his or her duties, the board of retirement commanded to retire him or her “effective as of the date [his or her] application for disability retirement is filed with the board”. § 31724. Moreover, if an employee can prove that his or her “application was delayed . . . by inability to ascertain the permanency of [his or her] incapacity until after the date following the day for which [he or she] last received regular compensation”, that date is deemed to be the date the application was filed. Id. (final sentence); see Piscieneri v. City of Ontario, 95 Cal. App. 4th 1039, 1044, 116 Cal. Rptr. 2d 38, 43 (2002) (“[D]isability is often of uncertain duration. If the employee is able to prove that he or she has been continually disabled from the date of discontinuance of . . . service to the time of the application for disability retirement, his [or her] application is timely . . .”).

In either case, if the employee prevails the effective date of his or her retirement benefits (pension) is earlier than the date that board ruled in his or her favor. Consequently, the [b]oard “must then make a lump-sum payment to bring payments current”. Weber, 62 Cal. App. 4th at 1450, 73 Cal. Rptr. 2d at 775. The employee “is retired [,] and his or her right to the

benefits vests as of the date [or deemed date] of application for those benefits”. Id. Thus, the statutory scheme “provides that once the disability determination is made, the right to benefits vest immediately, effective retroactively”. Id. at 1451, 73 Cal. Rptr. 2d at 776 (emphasis added). To repeat, “the right to the [pension] benefit vests automatically; retroactive to the date the [employee for] benefits”. Id. (emphasis added)

But “[t]hat the payment is retroactive does not mean that the [b]oard wrongfully denied benefits for that period”. Id. at 1450, 73 Cal. Rptr. 2d at 775. Until the board finally rules against the applicant and forces him or her to resort to the Superior Court, the board is simply doing its job. See AFL-CIO v. Unempl. Ins. Appeals Bd., 23 Cal. 4th 1017, 1037, 920 P.2d 1314, 1326, 56 Cal. Rptr. 109, 121 (1996) (stating that until the agency erroneously determines that an applicant is ineligible for benefits, thus requiring him or her to seek review by way of administrative mandamus in the Superior Court, “no wrongful withholding of benefits attributable to the administrative process occurs”); see also id. at 1034, 920 P.2d at 1324, 56 Cal. Rptr. 2d at 119 9stating that interest may not be awarded “merely because at some point in the administrative process someone made an error that the administrative agency . . . itself corrected”).

But when the employee prevails in a mandamus action the board is

reversed, this right to prejudgment interest comes to the fore. “[S]ection 3287(a) allows trial courts, as interest following a successful administrative mandamus action to recover wrongfully withheld benefits.” Weber, 62 Cal. App. 4th at 1446, 73 Cal. Rptr. 2d at 772. That the trial court may award prejudgment interest on the retirement benefits wrongfully denied by the board “is settled law”. Id. at 1445, 73 Cal. Rptr. 2d at 772.

The prejudgment interest award extends not just to the benefits that accrued after the board’s final ruling and while the mandamus action was in progress, as SBCERA asserts, but instead from the date that section 31724 declares the pension to be effective, either the actual date of the application for disability retirement or the deemed date. “Interest is recoverable on each —pension payment from the date it fell due.” Austin, 209 Cal. App. 3d at 1532, 258 Cal. Rptr. at 107 (quoting Olson v. Cory, 35 Cal. 3d 390, 402, 673 P.2d 720, 728, 197 Cal. Rptr. 843, 851 (1983)). “[N]othing in the statutory scheme suggest[s] a legislative intent to preclude recovery of interest on damages awarded [retroactively] from the date such benefits become due.” Weber, 62 Cal. Rptr. at 1449 n.4, 73 Cal. Rptr. 2d at 775 n.4.

And that arrangement is entirely as it should be. “The requirement that the right to a [pension] commences retroactively to the date of application assures that the [employee] receives the full amount of his or

her benefit coverage.” Weber, 62 Cal. App. 4th at 1448, 73 Cal. Rptr. at 774. “The same public policy that favors the award of retroactive benefits would appear to favor the award of prejudgment interest on such benefits.” Tripp v. Swoap, 17 Cal. 3d 671, 683, 552 P.2d 749, 758, 131 Cal. Rptr. 789, 798 (1970).

The Upshot

As the end of the day, the principle and precedents enunciated by this Court mandates that the interest award granted by the Superior Court on all retroactive pension payments pursuant to section 3287(a) of the Civil Code must be affirmed. But the force of the analysis of the issue by the Court of Appeal and the analysis by SBCERA cannot be gainsaid. Plaintiff Flethez asks whether the retroactive effective date of a disability retirement entitles the employee to retroactive prejudgment interest as the payments accrue and answers in the affirmative. The Court of Appeal asks whether the right to the retroactive payments has vested and answers in the negative. SBCERA asks whether the retroactive payments have been wrongfully withheld and also answers in the negative.

These disparate views of the interaction of section 3287(a) and section 31724 of the Government Code reveal a conceptual uncertainty that

generates the conflict in the caselaw outlined by Plaintiff Flethez in his
Petition for Review. This Court consequently should grant the petition and
resolve the significant question presented by the intersection of these two
statutes with regard to the award of prejudgment interest to retroactive
disability retirement awards.

Dated: June 2015

Respectfully submitted,

Mark Ellis Singer
Edward L. Faunce
Larry J. Roberts
Faunce, Singer & Oatman

By: _____
Larry J. Roberts

Attorneys for Plaintiff and Respondent,
Frank Flethez

CERTIFICATE OF COMPLIANCE

WITH APPELLATE RULES 8.204(b)(2)(3)(4)

Plaintiff-Respondent Frank Flethez certifies that his brief is in a proportionately spaced type face (Times New Roman) of 13 point, that it is double spaced, and that it contains _____ words.

Dated: June 2015

Respectfully submitted,

**Mark Ellis Singer
Edward L. Faunce
Larry J. Roberts
Faunce, Singer & Oatman**

**By: _____
Larry J. Roberts**

**Attorneys for Plaintiff and Respondent,
Frank Flethez**

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 404 Enclave Circle #208, Costa Mesa, CA 92626

That on June , 2015, I served the foregoing document described as: **REPLY IN SUPPORT OF PETITION FOR REVIEW** on all interested parties as follows:

(X) by placing () the original (X) a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE

(X) **(BY MAIL)** I deposited such envelope(s) in the mail at 3101 W. Sunflower Ave., Santa Ana, CA 92799.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. The envelope was mailed with postage thereon fully prepaid. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing as stated in the Declaration.

Executed on June , 2015 at Costa Mesa, California.

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

Diane Castillo

SERVICE LIST

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Exhibit 5



Supreme Court of California
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NEWS RELEASE

Contact: Cathal Conneely, 415-865-7740

FOR IMMEDIATE RELEASE

July 17, 2015

Summary of Cases Accepted and Related Actions During Week of July 13, 2015

[This news release is issued to inform the public and the press of cases that the Supreme Court has accepted and of their general subject matter. The statement of the issue or issues in each case set out below does not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court.]

#15-119 *Association of California Ins. Companies v. Jones, S226529.* (B248622; 235 Cal.App.4th 1009; Los Angeles County Superior Court; BC463124.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: (1) Does the Unfair Insurance Practices Act (Ins. Code, § 790, et seq.) give the Insurance Commissioner authority to promulgate a regulation that sets forth requirements for communicating replacement value and states that noncompliance with the regulation constitutes a misleading statement, and therefore an unfair trade practice, for purposes of the act? (2) Does the Insurance Commissioner have the statutory authority to promulgate a regulation specifying that the communication of a replacement cost estimate that omits one or more of the components in subdivisions (a)-(e) of section 2695.183 of title 10 of the California Code of Regulations is a “misleading” statement with respect to the business of insurance? (Cal. Code of Regs., tit. 10, § 2695.183, subd. (j).)

#15-120 *Flethez v. San Bernardino County Employees Retirement Assn., S226779.* (D066959; 236 Cal.App.4th 65; San Bernardino County Superior Court; CIVDS1212542.) Petition for review after the Court of Appeal reversed the judgment in an action for writ of administrative mandate. This case includes the following issue: If a retroactive award of service-connected disability retirement benefits is made in an administrative mandate proceeding, is prejudgment interest under Code of Civil Procedure section 3287 calculated from the day after the employee’s last day of regular compensation or the day on which the employee submitted the claim for the benefits?

#15-121 *In re Aguilar, S226995.* (H040784; nonpublished opinion; Monterey County Superior Court; HC7945.) Petition for review after the Court of Appeal granted relief on a petition for writ of habeas corpus.

#15-122 *People v. Prescott*, S226553. (A135991; nonpublished opinion; Alameda County Superior Court; C165685A.) Petition for review after the Court of Appeal remanded for resentencing and otherwise affirmed a judgment of conviction of a criminal offense.

The court ordered briefing in *Aguilar* and *Prescott* deferred pending decision in *In re Alatraste*, S214652 (#14-21), *In re Bonilla*, S214960 (#14-22), and *People v. Franklin*, S217669 (#14-56), which include the following issues: (1) Did Senate Bill 260 (Reg. Sess. 2013-2014), which includes provisions for a parole suitability hearing after a maximum of 25 years for most juvenile offenders serving life sentences, render moot any claim that such a sentence violates the Eighth Amendment to the federal Constitution and that the petitioner is entitled to a new sentencing hearing applying the mitigating factors for such juvenile offenders set forth in *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455]? If not: (2) Does *Miller* apply retroactively on habeas corpus to a prisoner who was a juvenile at the time of the commitment offense and who is presently serving a sentence that is the functional equivalent of life without the possibility of parole? (3) Is a total term of imprisonment of 77 years to life (*Alatraste*) or 50 years to life (*Bonilla* and *Franklin*) for murder committed by a 16-year-old offender the functional equivalent of life without possibility of parole by denying the offender a meaningful opportunity for release on parole? (4) If so, does the sentence violate the Eighth Amendment absent consideration of the mitigating factors for juvenile offenders set forth in *Miller*?

#15-123 *Boyce v. T.D. Service Co.*, S226267. (B255958; 235 Cal.App.4th 429; Santa Barbara County Superior Court; 1438504.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. The court ordered briefing deferred pending decision in *Yvanova v. New Century Mortgage Corp.*, S218973 (#14-100), which presents the following issue: In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?

#15-124 *People v. Gattis*, S226917. (H040330; nonpublished opinion; Santa Clara County Superior Court; C1359476.) Petition for review after the Court of Appeal affirmed a judgment of conviction of a criminal offense. The court ordered briefing deferred pending decision in *People v. Friday*, S218288 (#14-77), *People v. Garcia*, S218197 (#14-78), and *People v. Klatt*, 218755 (#14-79), which present the following issue: Are the conditions of probation mandated by Penal Code section 1203.067, subdivision (b), for persons convicted of specified felony sex offenses — including waiver of the privilege against self-incrimination, required participation in polygraph examinations, and waiver of the psychotherapist–patient privilege — constitutional?

#15-125 *People v. Lopez*, S227028. (H039896; 236 Cal.App.4th 518; Santa Clara County Superior Court; 202265.) Petition for review after the Court of Appeal affirmed

the denial of a petition to recall sentence. The court ordered briefing deferred pending decision in *People v. Chaney*, S223676 (#15-13), and *People v. Valencia*, S223825 (#15-14), which present the following issue: Does the definition of “unreasonable risk of danger to public safety” (Pen. Code, § 1170.18, subd. (c)) under Proposition 47 (“the Safe Neighborhoods and Schools Act”) apply on retroactivity or other grounds to resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)?

#15-126 *People v. Young*, S226972. (E061236; nonpublished opinion; Riverside County Superior Court; RIF74426.) Petition for review after the Court of Appeal affirmed the denial of a petition to recall sentence. The court ordered briefing deferred pending finality of decision in *People v. Johnson*, S219454 (#14-87), and *People v. Machado*, S219819 (#14-88), which present the following issues: (1) For the purpose of determining eligibility for resentencing under the Three Strikes Reform Act of 2012 (Prop. 36, Gen. Elec. (Nov. 6, 2012) [Pen. Code, § 1170.126]), is an offense considered a serious or violent felony if it was *not* defined as a serious or violent felony on the date the offense was committed but *was* defined as a serious or violent felony on the effective date of the Act? (2) Is an inmate serving an indeterminate term of life imprisonment under the Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(j), 1170.12), which was imposed for a conviction of an offense that is *not* a serious or violent felony, eligible for resentencing on that conviction under the Three Strikes Reform Act if the inmate is also serving an indeterminate term of life imprisonment under the Three Strikes Law for a conviction of an offense that *is* a serious or violent felony?

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The Supreme Court of California is the state's highest court and its decisions are binding on all other California state courts. The court's primary role is to decide matters of statewide importance and to maintain uniformity in the law throughout California by reviewing matters from the six districts of the California Courts of Appeal and the fifty-eight county superior courts (the trial courts). Among its other duties, the court also decides all capital appeals and related matters and reviews both attorney and judicial disciplinary matters.