STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP373

DERRICK A. SANDERS,

Petitioner-Appellant,

v.

STATE OF WISCONSIN
CLAIMS BOARD,

Respondent-Respondent-Petitioner.

ON APPEAL FROM A JUDGMENT AFFIRMING THE DECISION OF THE WISCONSIN CLAIMS BOARD, ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

REPLY BRIEF OF RESPONDENT-RESPONDENT-PETITIONER STATE OF WISCONSIN CLAIMS BOARD

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The plain language of Wis. Stat. § 775.05(4) requires the Claims Board to "find the amount which will equitably compensate the petitioner, not to exceed $25,000 and at a rate of compensation not greater than $5,000 per year for the imprisonment." With its determination within the bounds of $25,000 made, the Claims Board's required duties as to compensation—and its authority to award compensation—end. It is the up-to-$25,000 determination, along with the Claims Board's earlier requisite innocence findings, that are subject to review under chapter 227. Wis. Stat. § 775.05(5).

Nothing in the statutory text requires the Claims Board to explain why it has *not* found "that the amount it is able to award is not an adequate compensation"—i.e., why it has *not* submitted a report to the Legislature. This Court should not rewrite the statute.

Calling the Claims Board's ability to submit a report to the Legislature a "safety valve," (Sanders's Br. 13), Sanders suggests that more could be judicially reviewed and somehow awarded. But the Claims Board's ability to submit a report to the Legislature does not create an avenue through which the Claims Board or any reviewing court can afford additional relief. Sanders argues that the statutory limit on compensation is too low, but that is a question for the Legislature, not our courts.

Separately, Sanders now disavows his "*ex parte*" communication argument as an alternative ground for relief. This Court therefore need not consider it further and should not remand for further proceedings on that issue.

I. Wisconsin Stat. § 775.05(4) does not require the Claims Board to affirmatively explain why it does not submit a report to the Legislature.

Wisconsin Stat. § 775.05(4) requires the Claims Board to "find the amount which will equitably compensate the petitioner, not to exceed $25,000 and at a rate of compensation not greater than $5,000 per year for the imprisonment." Sanders does not dispute that Wis. Stat. § 775.05(4) does not include the language he wants: it "does not . . . specifically direct the Board to determine whether its award is 'adequate.'" (Sanders's Br. 17 (emphasis omitted).)

Lacking any such statutory direction, Sanders instead takes a sort of functional approach: that there is no way for the Claims Board to determine the amount that will "equitably compensate" the petitioner up to $25,000 (step one) without simultaneously determining whether it considers $25,000 to be "an adequate compensation" (conditional step two). Put differently, he argues that the Claims Board must determine a total value-amount that it believes to be equitable compensation for the wrongful imprisonment—regardless of any statutory limitations—and then: (a) if that amount is $25,000 or lower, award it, or (b) if that amount is higher than $25,000, refer a report to the Legislature. Sanders offers no explanation for why the Claims Board would be unable to determine an award that will "equitably compensate" the petitioner up to $25,000, and he improperly substitutes his workability views in place of the statutory text.

A. Sanders ignores that the statutory text expressly limits the Claims Board's step one "equitably compensate" determination to a maximum of $25,000.

Sanders's theory flies in the face of the statutory text. The Legislature directed the Claims Board not to exceed

certain amounts in making its award: an amount "not to exceed $25,000 and at a rate of not greater than $5,000 per year for the imprisonment." Wis. Stat. § 775.05(4). Put simply, the statutory text sets the boundaries of $0 and $25,000 (with no more than $5,000 per year of imprisonment) and tells the Claims Board to find an amount that will "equitably compensate" *within that range*. The text does not say that the Claims Board shall find a limitless total dollar value that it believes would equitably compensate and then only "award" up to the maximum.

Sanders's eschewing of this express limitation is also why his heavy emphasis on the 1935 statutory change coming through a revisor's bill does not help him. Statutory interpretation does not move past the plain language unless the plain text is ambiguous: "Only when the statutory language is ambiguous may we consult extrinsic sources to ascertain legislative intent . . . By 'extrinsic sources' we mean interpretive resources outside the statutory text—typically items of legislative history." *State of Wis. Dep't. of Corrections v. Schwarz*, 2005 WI 34, ¶ 14, 279 Wis. 2d 223, 693 N.W.2d 703 (citation omitted).

Thus, while the statutory history—the "previously enacted and repealed provisions of a statute," i.e., the past and current versions of the *text itself*—is part of a plain-language contextual reading, *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581, moving past the text into the detective work of what the Legislature intended, by the presence or absence of a revisor's bill note, would be warranted only if the text were ambiguous. Unsurprisingly, this Court has held that bills submitted by the revisor of the statutes—while different in certain respects—"nevertheless are acts of the legislature and where there is no ambiguity . . . must be applied as they read." *Dovi v. Dovi*, 245 Wis. 50, 53, 13 N.W.2d 585 (1944).

Here, the statutory text is not ambiguous: it expressly provides that the Claims Board's "equitably compensate" determination is limited to a total of $25,000. Wis. Stat. § 775.05(4). While the text's history further reveals what is otherwise obvious—that the Legislature knows how to craft a limitless total-value requirement for the Claims Board as to compensation if it wishes to do that—this Court should not forgo the unambiguous text based on assertions about extrinsic sources.

B. Sanders asks this Court to replace the Legislature's chosen "if" to trigger step two with "whether."

Sanders's argument would also require this Court to replace the conditional "if" that triggers step two with a non-conditional "whether" finding. Throughout his brief, Sanders repeatedly asserts that the Board "must determine, within its discretion, *whether* its award is adequate." (Sanders's Br. 16–22.)

Here again, that is not what the statutory text says.

The text says that "*[i]f* the claims board finds that the amount it is able to award is not an adequate compensation," it shall submit a report to the Legislature. Wis. Stat. § 775.05(4). The difference between "if" and "whether" matters because it changes what is required of the Claims Board.

The use of "if" followed by a particular "then" directive provides for further action only in one situation (when the Claims Board affirmatively decides that the amount it can award is *not* an adequate compensation) and limits what the Claims Board may do if that condition is triggered (submit a report). Sanders's re-write would both require the Claims Board to determine in every petition "whether" the statutory maximum is or is not adequate and also impose an additional

requirement of explaining that decision. The Legislature knows how to use "whether" when it means "whether," *compare* Wis. Stat. § 775.11(3) ("On receipt of such a claim the claims board shall determine *whether* the claim is authorized. . ."), *with* Wis. Stat. § 775.05(4), and it did not choose that word here.

Though he does not expressly adopt it, Sanders's argument falls prey to the same problematic "linking" theory that led the court of appeals majority's opinion astray: he combines the "equitably compensate" discretionary determination in step one and the "not an adequate compensation" conditional affirmative decision in step two and assumes they constitute a single exercise of discretion. *See also Sanders v. Wis. Claims Board*, 2022 WL 2070388, ¶¶ 26–29 (Wis. Ct. App. June 9, 2022) (unpublished), (Pet.-App. 105). In so doing, he overlooks the distinct steps—and the parameters on step one and the conditional triggering of step two—that the Legislature enacted.

While the court of appeals majority reasoned that the use of the terms "equitably" and "adequate" together connected the two steps, *Sanders*, 2022 WL 2070388, ¶ 28, (Pet.-App. 105), the Legislature's use of different words in the different steps shows just the opposite. "When the legislature chooses to use two different words," courts generally "presume that different words have different meanings." *Augsburger v. Homestead Mut. Ins. Co.*, 2014 WI 133, ¶ 17, 359 Wis. 2d 385, 856 N.W.2d 874 (citation omitted).

Indeed, if "equitably compensate" were the same as an "adequate compensation," then how could the Claims Board *ever* simultaneously determine that an amount within the statutory maximum is indeed "equitabl[e] compensat[ion]" (as it is required to do by step one) while also choosing to affirmatively find that the amount it awarded as "equitabl[e] compensat[ion]" was "not an adequate compensation" and

submit a report? Put differently, if the inquiries were one-and-the-same, then the Claims Board's submitting a report to the Legislature would necessarily mean that its award was *not* "equitabl[e] compensat[ion]." This Court should reject Sanders's merging of the statutory steps.

Sanders argues that there is conflict between the statutory steps that requires harmonization. (Sanders's Br. 21–22.) But it is *his* interpretation that creates that conflict: it exists only if the step one "equitably compensate" determination and the step two conditional "not an adequate compensation" determination were instead one uniform exercise of discretion. They are not.[1]

Sanders's merging of the steps is also problematic because—at least thus far—he has never challenged the Claims Board's decision to award him the statutory maximum of $25,000 as "equitabl[e] compensat[ion]." And *that* is the decision for which he could seek judicial review. Wis. Stat. § 775.05(5). By asserting that the Claims Board's actions or inactions under Wis. Stat. § 775.05(4) are instead one big exercise of discretion to decide "whether its award is adequate to equitably compensate" him, Sanders attempts to: (1) use the procedure available to seek review of a decision he does not actually challenge, to (2) impose an exercise of discretion on the Claims Board that the statute does not require, to (3) obtain review of an amount of additional compensation that the Claims Board is not required to determine and not authorized to award. (*See* Sanders's Br. 30–31.)

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[1] Sanders's buying milk and law firm budgeting analogies fail for this same reason. (*See* Sanders's Br. 19.) His law firm budgeting analogy also fails because it replaces the step-one limited "equitabl[e] compensat[ion]" determination with a list of easily quantifiable expenditures.

Sanders's effort to analogize his argument to the predicate-act canon, which he acknowledges does not actually fit, further demonstrates the contrast between the actual statutory text and the requirement he tries to create. (*See* Sanders's Br. 19–20.) Sanders argues not that the Claims Board *can* state that the compensation it can award is inadequate, but instead that it *must* say whether it is or is not, and then explain that reasoning process. He reads all of these duties as silently implied, but statutes are not so read.

Sanders improperly reads the "tail of what is implied" as "wag[ging] the dog" to impose an affirmative duty on the Claims Board nowhere to be found in the text. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 193 (2012). His misunderstanding of Scalia's and Garner's explanation of textualism as considering the text and what it "fairly implies," or its "fair meaning," would turn those concepts into a green light to rewrite the law. (*See* Sanders's Br. 17–18); Scalia & Garner, *Reading Law*, at 356. They are not.

Wisconsin Stat. § 775.05(4) does not "fairly impl[y]" that the Claims Board must determine a number total for "equitabl[e] compensat[ion]" regardless of dollar amount when the statute expressly imposes a dollar-amount limitation. Wisconsin Stat. 775.05(4)'s "fair meaning" cannot be that the Claims Board must always determine and explain whether it considers the amount it awarded to be an adequate compensation when the statute only provides for a particular limited action for the Claims Board to take "*[i]f*" it decides that the amount it can award is "*not*" an adequate compensation.

C. Sanders's theory implicitly and incorrectly treats the Claims Board's choice to submit a report to the Legislature, and the amount it "considers adequate" listed in any such report, as subject to judicial review.

The Claims Board is *not* required to exercise discretion to determine whether the statutory maximum is or is not an adequate compensation. Nothing in the statutory text "compels" the "particular action" of the Claims Board determining whether the statutory maximum is an adequate compensation. Wis. Stat. §§ 227.57(5); 775.05(4). And even if the Claims Board chooses to send the Legislature a report, the amount it lists is whatever it "considers adequate," not a judicially reviewable standard.

Sanders unsurprisingly offers no answer as to how judicial review of this choice and report would even work. In step two of Wis. Stat. § 775.05(4), the Legislature provides no right of additional compensation based on the report. And it offers no "substantive criteria" from which a court could review the Claims Board's choice. *Cf. Friends of Black River Forest v. Kohler Company*, 2022 WI 52, ¶ 33, 402 Wis. 2d 587, 977 N.W.2d 342. Sanders's desire for this Court to impose on the Claims Board a duty to explain why it does or does not submit a report, and how it arrived at the number it "considers adequate," further makes no sense because no court can grant him additional compensation on judicial review.

The "decisions" of the Claims Board subject to review under Wis. Stat. § 227.52 are (1) its decision about whether a claimant has demonstrated by clear and convincing evidence that he was innocent of the crime for which he suffered imprisonment; and (2) its decision about the amount of equitable compensation, not to exceed $25,000. Wis. Stat. § 775.05(5). An adverse ruling on those issues "affect[s] the

substantial interests" of a claimant, Wis. Stat. § 227.52(1), and a court can review them under a deferential standard.

Indeed, that is what happened in *Turnpaugh v. State Claims Board*, 2012 WI App 72, 342 Wis. 2d 182, 816 N.W.2d 920—a case Sanders mistakenly relies on here. (*See* Sanders's Br. 29–30.) There, the court of appeals reversed the Claims Board's findings that the petitioner failed to show by clear and convincing evidence that he was (a) innocent and (b) imprisoned for that crime, where (a) the court of appeals previously held he was innocent as a matter of law and (b) he served time in custody for that crime. *Id.* ¶¶ 7–11.

In contrast, the Claims Board's choice about whether to file a report with the Legislature does not affect a petitioner's substantial interests because it creates no enforceable rights—the Legislature has no obligation to act on the report in any way, regardless of whether the Claims Board or a court believes that $25,000 was inadequate. That lack of reviewability is further reflected in the statutory direction for what to put in the optional report—whatever amount the Claims Board "*considers* adequate." Wis. Stat. § 775.05(4). That standard offers nothing against which a reviewing court could determine whether the Claims Board got it right.[2]

[2] Sanders's responses on harmless error further reflect why the judicial review he tries to manufacture fails. (*See* Sanders's Br. 32–34.) Remand here would indeed only require the Board "to make findings that. . . would be of no use to anyone." (*See* Sanders's Br. 34); *Houslet v. DNR*, 110 Wis. 2d 280, 281, 289–91, 329 N.W.2d 219 (Ct. App. 1982).

D. Sanders's policy arguments to change the statute are for the Legislature, not this Court.

Confronted with statutory language that is not what he would prefer, Sanders veers into policy arguments about why this Court should embrace his proposed statutory transformation. He stresses that Wisconsin has one of the lowest amounts of compensation for individuals who have been wrongfully incarcerated and identifies other instances in which the Claims Board has made the choice to submit a report to the Legislature. (Sanders's Br. 13–14.)

Reasonable minds could disagree on whether the statute should be updated or amended, and those decisions to belong with our Legislature—not this Court. This Court cannot substitute Sanders's ideas of what would be a "better, truer, and juster" law for the statutory text. Scalia & Garner, *Reading Law*, 94–95 (citation omitted).

* * *

Straightforward statutory interpretation shows that Wis. Stat. § 775.05(4) does not require the Claims Board to explain why it does not decide that the amount it can award is inadequate.

II. Sanders has now disavowed any claim for relief based on his argument that the Claims Board engaged in improper communication with the District Attorney's Office.

Sanders now expressly waives any further consideration of or relief from his argument that the Claims Board engaged in improper "*ex parte*" communications with the District Attorney's Office: "Sanders is not arguing that the Claims Board's decision should be reversed or remanded based on the Board's emails with the District Attorney's Office." (Sanders's Br. 35.)

As Sanders offers no response to the Claims Board's arguments and instead explains that he seeks no relief on that basis, this Court should hold that he has conceded the argument and waived any further consideration of it before this or any other court. *See, e.g., Matter of Commitment of S.L.L.*, 2019 WI 66, ¶ 42, 387 Wis. 2d 333, 929 N.W.2d 140 (arguments not responded to are deemed conceded). This Court therefore need not consider it further. Should this Court agree with the Claims Board's interpretation of Wis. Stat. § 775.05(4), it also should not remand to the court of appeals for further consideration of this conceded argument.

CONCLUSION

This Court should reverse the court of appeals and hold that Wis. Stat. § 775.05(4) does not require the Claims Board to affirmatively explain why it does not submit a report to the Legislature regarding additional compensation beyond the statutory maximum. It should also reject reversing or remanding the Claims Board's decision based on its staff's clarification email exchange with the District Attorney's Office.

Dated this 23rd day of March 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,998 words.

Dated this 23rd day of March 2023.

Electronically signed by:

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02 and Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

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