

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

**ANDREW GLICK, *Applicant***

**vs.**

**SWIFT TRANSPORTATION SERVICES, LLC;  
PERMISSIBLY SELF-INSURED, ADMINISTERED BY CORVEL, *Defendants***

**Adjudication Number: ADJ11799924  
Van Nuys District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

Applicant seeks reconsideration<sup>1</sup> of the August 14, 2023 Second Amended Findings, Award and Order (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a truck driver on November 26, 2018, sustained industrial injury to the left knee, left shoulder, cervical spine, thoracic spine, lumbar spine, neurocognitive, sleep/arousal disorder, headaches, psyche and visual systems. The WCJ awarded permanent and total disability and attorney's fees. The attorney's fees were calculated utilizing a zero percent adjustment for the anticipated increase in the state average weekly wage (SAWW) rate pursuant to Labor Code<sup>2</sup> section 4659(c).

Applicant contends that the calculation of attorney fees should include the reasonably anticipated annual increase in SAWW, using either 3.0 or 4.6 percent.

Applicant has also filed a Petition to File Amended Petition for Reconsideration and an Amended Petition for Reconsideration (Petition) on August 21, 2023. We have granted the request pursuant to WCAB Rule 10964, and have reviewed the Supplemental Petition herein. (Cal. Code Regs., tit. 8, § 10964.)

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<sup>1</sup> Commissioner Dodd, who was previously a member of this panel, is currently unavailable. Another panelist has been substituted in her place.

<sup>2</sup> All further statutory references are to the Labor Code unless otherwise stated.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied or that the petition be granted but that any increase in fees be limited to a quarterly payment based on the actual increase received per SAWW adjustment.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration and affirm the decision of August 14, 2023, except that we will amend the decision to defer the issue of attorney's fees.

## **FACTS**

Applicant sustained injury to the left knee, left shoulder, cervical spine, thoracic spine, lumbar spine, neurocognitive, sleep/arousal disorder, headaches, psyche and visual systems while employed as a truck driver by defendant Swift Transportation on November 26, 2018.

On June 6, 2023, the parties proceeded to trial, placing in issue, inter alia, the issue of permanent disability and attorney fees. (Minutes of Hearing (Further) and Summary of Evidence, June 6, 2023, p. 3:1.) Applicant testified, and the parties submitted the matter for decision.

On July 24, 2023, the WCJ issued his Findings, Award, and Order and Opinion on Decision. The WCJ found applicant had sustained permanent and totally disability, with corresponding attorney's fees of \$97,275.16, to be deducted in a uniform manner over the course of the award. (Findings, Award and Order, July 24, 2023, p. 3.) The corresponding Commutation Request as authored by the WCJ on July 13, 2023 specified an attorneys fee of 15 percent, and an annual SAWW increase of zero percent. (Commutation Request, July 13, 2023.)

On July 25, 2023, applicant filed a Petition for Correction of Error, averring the Award failed to reflect the statutory increase for SAWW pursuant to section 4659(c). Applicant requested the Findings and Award and Order and Opinion on Decision be correct to reflect permanent total disability with corresponding yearly cost of living adjustments (COLA) for the remaining permanent disability and life pension benefits as reflected in the SAWW index. (Petition for Correction of Error, July 25, 2023, p. 5:2.)

On August 1, 2023, the WCJ issued an Amended Findings, Award and Order, that specified applicant's permanent disability rate was to be increase annually pursuant to section 4659(c).

(Amended Findings, Award and Order, Finding of Fact No. 5.) The Award made no change to the dollar amount of the attorney's fees awarded. (*Id.* at p. 5.)

On August 2, 2023, applicant filed an Amended Petition for Correction of Error, noting that attorney's fees were calculated using a zero percent SAWW, and requesting that fees be recalculated using an anticipated 4.33 percent SAWW as requested at trial, or in the alternative, a 3.0 percent SAWW deemed equitable in prior WCAB panel decisions. (Amended Petition for Correction of Error, August 2, 2023, p. 3:8.)

On August 14, 2023, the WCJ issued his Second Amended Findings, Award and Order, which amended Finding of Fact No. 8 to enter the dollar amount of attorney's fees, without change to the amount previously calculated. (F&A, Finding of Fact No. 8.) The F&A was not accompanied by an Opinion on Decision or further discussion of the changes made.

On August 18, 2023, applicant filed the instant Petition, averring the WCJ had amended his decision to include provision for annual COLA adjustment per section 4659(c), but had not "revise[d] the initial Commutation schedule to remove the 0% SAWW and replace it with either the 4.33% that the applicant requested or any other percentage that has been approved by the WCAB for use in total permanent disability cases." (Petition for Reconsideration, at 10:23.) Applicant contends that the decision left "applicant's counsel with a fee award based solely on the present value of applicant's permanent disability award." (*Id.* at p. 11:4.)

On August 29, 2023, the WCJ filed his Report, noting that applicant's counsel had not provided separate notice to his client of a potential conflict in interest associated with the request for increase in attorney's fees, as required by WCAB Rule 10842. (Report, at p. 2; Cal. Code Regs., tit. 8, § 10842.) The WCJ observed that "[applicant's] counsel is requesting to be paid today with the value of what today's dollar will be worth in the future ... if granted, for all practical purposes counsel is, in essence, receiving a fee equivalent to a return on a (fictitious) investment and for which the applicant will shoulder the burden of financing." (Report, at p. 5.) The WCJ observed that the present value of attorney's fees would nearly double using a 3.0 percent SAWW to \$183,866.05, and that a 4.3 percent SAWW would further increase the attorney's fees to \$230,742.85. (*Id.* at p. 6.) The WCJ further observed that there are WCAB panel decisions offering differing opinions on the propriety of contemplating COLA adjustment in the calculation of attorney's fees in advance of the actual changes made pursuant to section 4659(c). (*Ibid.*) Accordingly, the WCJ recommended applicant's petition be denied.

## DISCUSSION

We begin our discussion with the issue of notice to applicant of a potential conflict of interest arising out of his attorney's request for increased fees. WCAB Rule 10842 provides that "[a]ll requests for an increase in attorney's fee shall be accompanied by proof of service on the applicant of written notice of the attorney's adverse interest and of the applicant's right to seek independent counsel," and that "[f]ailure to notify the applicant may constitute grounds for dismissal of the request for increase in fee." (Cal. Code Regs., tit. 8, § 10842.) The WCJ appropriately noted that as of the date of the Report, no proof of service evidencing service of the Petition was reflected in the Electronic Adjudication Management System (EAMS). (Report, at p. 2.) However, we also note that applicant's counsel has subsequently filed a letter containing the disclosure described by Rule 10842 on September 6, 2023, along with applicant's written, signed, waiver of the potential conflict. (Waiver re Increased Fees, September 2, 2023.) Accordingly, we are persuaded that the disclosures required by WCAB Rule 10842 have been accomplished.

Turning to the issue of the basis for the calculation of attorney's fees, we begin by noting that attorney fee awards for securing compensation on behalf of injured workers are within the broad authority vested in the Legislature over the complete workers' compensation system by article [XIV], section 4 of the California Constitution." (*Longval v. Workers' Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 799-800 [61 Cal.Comp.Cases 1396].)

Section 4906 provides, in relevant part:

(a) A charge, claim, or agreement for the legal services or disbursements mentioned in subdivision (a) of Section 4903, or for the expense mentioned in subdivision (b) of Section 4903, is not enforceable, valid, or binding in excess of a reasonable amount. The appeals board may determine what constitutes a reasonable amount, but payment pursuant to subdivision (a) of Section 4903 or Section 5710 shall not be allowed for any services or expenses incurred prior to the filing of the disclosure form described in subdivision (e) with the appeals board and the sending of that form to the employer, or to the insurer or third-party administrator, if either is known, by the attorney.

(b) An attorney or agent shall not demand or accept any fee from an employee or dependent of an employee for the purpose of representing the employee or dependent of an employee in any proceeding of the division, appeals board, or any appellate procedure related thereto until the amount of the fee has been approved or set by the appeals board.

(Lab. Code, § 4906.)

Here, the claim for attorney’s fees is based on the WCJ’s award of permanent and total disability, and as the WCJ correctly notes, the issue is not the percentage of attorney’s fees awarded, but rather the basis for the calculation of those fees. (Report, at p. 4.)

Applicant avers that the award of permanent disability indemnity reflects the annual increase specified in section 4659(c), as set by the annual SAWW figures reported by the United States Department of Labor for California. (See Lab. Code, § 4659(c).) Applicant contends it was error for the WCJ to include provision for the statutorily mandated SAWW adjustments in the award of permanent and total disability, but to omit those same SAWW increases in the calculation of the attorney’s fees to be commuted from the award. (Petition, at 10:22.) Applicant further cites to the WCAB panel decision<sup>3</sup> in *Gilmore v. Autoland Resale Center* (April 17, 2013, ADJ4677964) [2013 Cal. Wrk. Comp. P.D. LEXIS 148], wherein the Appeals Board found it reasonable to allow “a fee on the entire present value of the 100% permanent disability award, including the COLA increases.” (*Id.* at p. 7.)

The WCJ’s Report observes, however, that in *Miramontes v. Lions Raisins* (February 3, 2012, ADJ2777203) [2012 Cal. Wrk. Comp. P.D. LEXIS 91] (*Miramontes*), the Appeals Board upheld the WCJ’s determination that commutation of unknown future COLA adjustment was not in applicant’s best interests. Therein, the WCJ wrote, “[i]f there is a commutation of the attorney fee, it should be solely based on the present value of the life pension award ... Such a commutation would result in the attorney being compensated in today’s dollars which would have the maximum purchasing power of any dollar spent during the remaining course of applicant’s life (as the law does not take into account deflation).”<sup>4</sup> (*Id.* at pp. 20-21.)

The WCJ’s Report observes:

[T]he purpose of LC 4659(c) is the preservation of the value of benefits to injured workers because money shrinks with time and the legislature sought to

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<sup>3</sup> Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

<sup>4</sup> We also observe that in *Miramontes* the WCJ’s award did not altogether preclude consideration of increased attorney’s fees based on increased life pension payment attributable to COLA increases. Rather, the WCJ declined to apply a *projected* SAWW figure in advance of the actual annual changes required under section 4659(c). The November 10, 2011 Supplement Finding of Fact therein provided that, “to the extent that applicant receives a COLA increase[,] twelve percent (12%) of the weekly life pension payment above \$ 314.50 will be paid to applicant’s attorney for the rest of applicant’s life.” (*Id.* at p. 6.)

ensure that a dollar tomorrow is equal to a dollar today. It is simply a hedge against inflation and not an additional benefit to applicant. Although applicant receives a temporary total disability rate for life, he is paid bi-weekly for the duration of his life whereas applicant counsels receive the full value of those weekly payments forthwith, thereby immediately receiving a fee on the full value without waiting. Counsel is not entitled to receive what is tantamount to an investment on the value of that money for years to come at a 3% or 4.33% return which, in essence, he is requesting. Applicant's counsel is already receiving a fee on the full value of applicant's total disability award (td benefits for life) today, not tomorrow. This practice of commutation is proper in order to ensure injured workers get adequate representation from competent counsel. However, applicant counsel is requesting to be paid today with the value of what today's dollar will be worth in the future. As stated, if granted, for all practical purposes counsel is, in essence, receiving a fee equivalent to a return on a (fictitious) investment and for which the applicant will shoulder the burden of financing.

(Report, at pp. 4-5.)

The WCJ further observes that there is a substantial difference in attorney's fees using a zero percent and a 4.3 percent SAWW, as reflected in the "DEU's later calculation uploaded in filenet."<sup>5</sup> (Report, at p. 6.) The WCJ notes that the latter calculation more than doubles the amount of attorney's fees awarded, necessarily reducing the net amount of indemnity paid to applicant. (*Ibid.*)

However, we note that pursuant to Section 5101(b), the determination of a lump sum amount requires that the sum be reduced to present value. The section provides, in relevant part:

If the injury causes permanent disability or death, the appeals board shall fix the total amount of the permanent disability payment or death benefit payable therefor in accordance with Chapter 2 of Part 2 of this division, and shall estimate the present value thereof, *assuming interest at the rate of 3 percent per annum* and disregarding the probability of the beneficiary's death in all cases

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<sup>5</sup> The WCJ requested and received two additional commutation calculations from the Disability Evaluation Unit following the filing of the instant Petition. EAMS does not, however, reflect service of either the requests or the resulting calculations on the parties. In *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 [2010 Cal. Wrk. Comp. LEXIS 74], we emphasized the need for transparency in the interactions between the WCJ and the Disability Evaluation Unit. (*Id.* at p. 627.) We observed that in the context of a Formal Rating, the DEU rater is an expert witness, and that ex parte communication with a witness is proscribed by Code of Judicial Ethics, Canon 3B(7). However, we also acknowledged that the Code of Judicial Ethics also provides that a judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities pursuant to Code of Judicial Ethics. (*Ibid.*) Although our discussion in *Blackledge* concerned communications involving a formal rating, we believe that similar considerations would apply with respect to commutation calculations requested by the WCJ and referenced in his Report. (Report, at p. 6.) We therefore believe that best practices in this matter would include timely service of any commutation requests made by a WCJ and the resulting commutation calculations on the parties.

except where the percentage of permanent disability is such as to entitle the beneficiary to a life pension, and then taking into consideration the probability of the beneficiary's death only in estimating the present value of such life pension.

(Lab. Code, § 5101(b), italics added.)

In addition, DWC Rule 10169.1(a) requires a determination of the present value of a life pension be made “in accordance with the Commutation Instructions contained in Section 10169, and shall be based on the actuarial data contained in Section 10169, Table 2 (“Present Value of Life Pension at 3% Interest for a Male”) or Table 3 (“Present Value of Life Pension at 3% Interest for a Female”).” (Cal. Code Regs., tit. 8, § 10169.1(a).)

Here, the WCJ requested an attorney fee commutation on July 13, 2023, using a 15 percent attorney fee and a zero percent SAWW. (Commutation Request, July 13, 2023.) The DEU Rater issued a corresponding “Attorney Fee Calculation - PTD” on July 19, 2023. Page 2 of the worksheet includes a calculation entitled “Commutation of All Remaining Life Pension After Commencement of Life Pension.” (Attorney Fee Calculation – PTD, July 19, 2023, p. 2.) Therein, paragraph 2 calculates the present value (PV) for the life pension based on the date of commutation, using the Present Value tables specified in Rule 10169.1.

We also observe that the August 21, 2023 commutation calculation performed by the DEU at 3 percent calculates the commuted value of the remaining permanent total disability, including the 3 percent SAWW. (Attorney Fee Calculation, August 21, 2023, p. 3.) However, the net weekly reduction is calculated under Section F, Commutation of Portion of Remaining Life Pension by Uniform Reduction of Life Pension, by applying the present value figures required under Rule 10169.1. (*Id.* at p. 5.)

In both instances, the weekly commutation calculations appear to apply the statutorily required 3 percent present value discount *irrespective* of any SAWW adjustment. It is not clear on the record before us that this fact was considered by the parties or by the WCJ.

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board En Banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision and the WCJ shall “. . . make and file findings upon all facts involved in the controversy[.]” (Lab. Code, § 5313; *Hamilton, supra*, at p. 476; *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622.) The WCJ's decision must “set[] forth clearly and

concisely the reasons for the decision made on each issue, and the evidence relied on,” so that “the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record.” (*Hamilton, supra*, at p. 476 (citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).) The purpose of the requirement is “to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful.” (*Evans, supra*, at p. 755.)

Here, the issue of the appropriate basis for the calculation of attorney’s fees, including the application of SAWW and/or the present value discount was not framed with specificity at the time of trial. Accordingly, the record does not adequately address the interaction, if any, between the statutorily mandated present value reduction set forth in section 5101, and the inclusion of SAWW adjustments per section 4659(c) in the calculation of attorney’s fees. Nor does the record address the concomitant public policy considerations inherent in the arguments for present value reduction versus attorney fee adjustments made pursuant to COLA. We believe that a complete record under section 5701 and *Hamilton, supra*, requires further explication of these issues.

Accordingly, and based on the above analysis which is limited to the facts of this case, we will grant reconsideration and affirm the August 14, 2023 F&A, except that we will amend the decision to defer the award of attorney’s fees, pending development of the record. To the extent that the WCJ’s Order (F&A, p. 3.) includes liens related to living expenses, we defer the *commutation* of those liens pending a determination of attorney’s fees.

Upon return of this matter to the trial level, we encourage the parties to explore the possibility of amicable settlement based on the existing record, including those determinations of the WCJ which we leave undisturbed. If amicable resolution is not possible, we recommend the parties consider including a cross-examination of the DEU Rater as part of the development of the evidentiary record.



For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the decision of August 14, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of August 14, 2023 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

#### **FINDINGS OF FACT**

5. In accordance with Finding #4, said injury caused permanent total disability, payable at the initial rate of \$592.07 per week for life, with permanent total disability rate commencing 5/12/21, less credit for sums paid on account thereof & less attorney fees & liens for living expenses, and said disability rate to be increased annually pursuant to LC 4659(c).

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8. The issue of the attorney's fees is deferred.

**ORDER**

The issue of commutation of attorney's fees and the liens allowed in Finding of Fact No. 6 is deferred.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**October 17, 2023**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**ANDREW GLICK  
LAW OFFICES OF SEF KRELL  
GODFREY, GODFREY, LAMB & ORTEGA**

**SAR/abs**

I certify that I affixed the official seal of the  
Workers' Compensation Appeals Board to this  
original decision on this date. *abs*