

**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 of the January 30, 2024 Findings and Order re Atty Fees (F&O), wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant had sustained permanent and total disability. The WCJ awarded indemnity at the initial weekly rate of \$592.07, subject to annual cost of living adjustments (COLAs) pursuant to Labor Code<sup>1</sup> section 4659(c), less attorney's fees of \$97,275.16, to be commuted in the amount of \$125.65 from each weekly payment of permanent disability indemnity.

Applicant contends that the basis for the calculation of the award of attorney's fees did not appropriately reflect the entirety of the award because it did not include COLAs.

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.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant the Petition,

---

<sup>1</sup> All further references are to the Labor Code unless otherwise noted.

rescind the F&O, and return this matter to the trial level for the issuance of an award of attorney's fees consistent with this opinion.

## **FACTS**

Applicant sustained injury arising out of and in the course of the employment to his 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 August 14, 2023, the WCJ issued a Second Amended Findings, Award and Order, finding in relevant part that applicant's disability was permanent and total, and awarding weekly indemnity at the initial rate of \$592.07, to be increased annually pursuant to section 4659(c), less attorney's fees of \$97,275.16, to be commuted from each weekly payment in the amount of \$125.65. (Findings of Fact No. 5.)

On August 21, 2023, applicant sought reconsideration, contending in relevant part that the WCJ had calculated attorney's fees based on the present value of the award of permanent disability, without regard to future COLAs.

On October 17, 2023, we granted applicant's Petition and amended the Findings of Fact to defer the issue of attorney's fees. Our Opinion and Decision After Reconsideration (ODAR) directed the parties to create an evidentiary record responsive to the issues regarding attorney's fees as raised by applicant, and to further consider the 3 percent present value reduction required when commuting lump sums. We also encouraged the parties to consider cross-examination of the DEU rater regarding the issues of calculation of the attorney's fees in permanent and total disability cases. (ODAR, p. 8.)

On December 18, 2023, the parties returned to trial, and offered into evidence attorney fee calculations relying on an annual projected uniform state average weekly wage (SAWW) adjustment of either 3.00% or 4.33%. (Minutes of Hearing (Further) and Summary of Evidence (Minutes), dated December 18, 2023, at p. 2:8.) The parties adduced the testimony of the Disability Evaluation Unit (DEU) rater and submitted the matter for decision.

On January 30, 2024, the WCJ issued his F&O, determining in relevant part that a reasonable attorney fee was \$97,275.16. (F&O, Findings of Fact No. 1.) The WCJ utilized the calculations of the DEU, which in turn were based on the WCJ's instruction to calculate the present

value of the weekly indemnity permanent and total disability indemnity, assuming no future COLA increases.

Applicant's Petition for Reconsideration (Petition) avers the WCJ erred in not considering COLAs in the calculation of attorney's fees. Applicant notes that the WCJ's award of attorney's fees contemplated no COLA adjustments, resulting in an award with a present value of \$648,501. However, when factoring in a 3.00 percent COLA, the present value of the Award increased to \$1,144,607. (Petition, at p. 13:4.) Applying these figures to the dollar amount awarded by the WCJ, applicant contends the WCJ has effectively awarded 8.5 percent or 6.7 percent attorney's fees on a permanent and total disability case, depending on the percent of the projected COLA increases, and that neither figure is appropriate or sufficient. Applicant further contends that our jurisprudence in this area supports the award of attorney's fees that includes the value of future COLAs. (*Id.* at p. 14:24.) The Petition thus requests we grant reconsideration and that we determine the appropriate method of calculating the present value of the applicant's permanent and total disability includes the value of future COLAs at either 3.00 percent or 4.3 percent. (*Id.* at p. 16:14.)

The WCJ's Report avers the present value discount mandated by section 5101 is a discount for the carrier to compensate it for the loss of investing monies commuted and paid to the applicant as a lump sum, while the COLAs of section 4659(c) are designed to insulate applicant's award of disability from inflation and the devaluation of the dollar. (Report, at p. 3.) The WCJ notes that pursuant to California State Bar Rule Sec. 7.955 and section 4903(a), "the essence of a proper attorney's fee is what is reasonable," and that attorney's fees should be reasonable "for both the employee and the attorney." (*Id.* at p. 4.) The WCJ observes that fees requested by applicant's attorney would "erode applicant's benefits even further making it more difficult to survive," and that "applicant counsel's efforts did not obtain the COLA for applicant as LC 4659(c) is a statutory provision for which all applicants who receive a life pension are entitled." (*Id.* at p. 6.)

## DISCUSSION

In our October 17, 2023 ODAR, we instructed the parties to create an evidentiary record responsive to the issue of attorney's fees, and specifically whether the COLA increases required under section 4659(c) should be included in the calculation of attorney's fees. We asked the parties to further address the interplay between the statutory present value discount required in all

commutations pursuant to section 5101(b), and the extent to which the discount should be considered in determining whether to include COLA adjustments in the determination of attorney's fees. (ODAR, at p. 7.) Following return of this matter to the trial level, the parties solicited expert testimony from the DEU rater as to the mechanics of how the commutation was accomplished, based on the parameters provided by the WCJ. (Minutes, at p. 3:7.) However, the DEU rater was unable to comment on the public policy issues underlying the present value discount required by section 5101. (*Id.* at p. 4:21.) No additional evidence responsive to our order for development of the record has been offered by the parties.

The WCJ has awarded attorney fees based on the present value of applicant's permanent and total disability award, assuming no COLA increase. The WCJ's Report explains that he awarded fees based on a potential range of fees as described in the Division of Workers' Compensation and Workers' Compensation Appeals Board Policy and Procedural Manual.<sup>2</sup> Therein, attorney's fees of 9 to 12 percent fees are deemed appropriate in cases of average complexity, while fees greater than 12 percent may be appropriate in cases of above-average complexity. (Report, at p. 4; Policy & Procedure Manual, § 1.140.) Factors that may indicate a case is above-average in complexity include cases establishing a new or obscure theory of injury or law, cases involving highly disputed factual issues, where detailed investigation, interrogation of prospective witnesses, and participation in lengthy hearings are involved, cases involving highly disputed medical issues, or cases involving multiple defendants ...." (*Ibid.*) Here, the WCJ indicates the relative complexity of the case might otherwise support attorney's fees at the 9 to 12 percent level, or a fee as low as \$36,000 on this permanent and total disability case. (Report, at p. 5.) Thus, a fee of \$97,000 appears to be reasonable because "the issue is what is a fair fee to both counsel and client on a sliding scale and not a pure mathematical input, although applicant counsels do regularly receive 15%." (*Ibid.*)

The WCJ again directs our attention to the analysis described in the nonbinding panel decision in *Miramontes v. Lions Raisins*<sup>3</sup> (February 3, 2012, ADJ2777203) [2012 Cal. Wrk. Comp.

---

<sup>2</sup> [https://www.dir.ca.gov/wcab/WCAB\\_Policy\\_ProcedureManual/Policy\\_andProcedure\\_Manual.pdf](https://www.dir.ca.gov/wcab/WCAB_Policy_ProcedureManual/Policy_andProcedure_Manual.pdf)

<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].) Here, we refer to these panel decisions because they considered a similar issue.

P.D. LEXIS 91] (*Miramontes*), wherein the Appeals Board declined to disturb the WCJ's award of attorney's fees. Therein, the WCJ awarded an attorney fee via commutation based on the present value of the life pension, and in addition, 12 percent of each of the individual payments made to the applicant above the then initial value of the life pension. In other words, the WCJ awarded 12 percent of the difference between the *initial* permanent disability payment and the *future* permanent disability payment after applicable COLAs. The WCJ in *Miramontes* characterized the commutation of anticipated COLA increases as inherently speculative, and therefore determined that attorney's fees would be paid for the lifetime of the award based on the *actual increases* each year. (*Miramontes*, at pp. 9-10.)

However, *Miramontes* is of limited relevance to the present matter because the attorney's fees awarded therein were, in fact, based on COLA increases, albeit to be paid in future installments rather than as a lump sum based on a commuted value. Here, the WCJ has determined that the award of reasonable attorney's fees should not include the value of *any* COLAs, whether in future installments or commuted as a lump sum.

We believe a more cogent analysis can be found in *Wilson v. Piedmont Lumber & Mill Co.*<sup>4</sup> (April 1, 2011, ADJ2290591 (SRO 0134544), ADJ2894653 (SRO 0134623)) [2011 Cal. Wrk. Comp. P.D. LEXIS 196] (*Wilson*), a case in which applicant challenged an award of attorney's fees based on the present value of an award of permanent and total disability calculated without consideration of the annual COLA required by section 4659(c). The WCJ in *Wilson* awarded attorney's fees of 12 percent based on calculations of the DEU that "did not assume any average annual SAWW increase—and, therefore, did not assume any average annual COLA—over the remainder of applicant's expected life." (*Id.* at p. 11.)

The panel in *Wilson* began its analysis by acknowledging that in calculating a reasonable attorney's fee, the WCJ must consider the "responsibility assumed by the attorney, the care exercised in representing the applicant, the time involved, and the results obtained." (Lab. Code, § 4906(d); Cal. Code Regs., tit. 8, § 10844.) *Wilson* also observed that applicant's attorney had obtained favorable results on an evidentiary record where a finding of permanent and total disability or even life pension was not a foregone conclusion. Accordingly, the panel concluded that "given the care exercised, the responsibility assumed, the time expended, the results obtained,

---

<sup>4</sup> See fn. 3, ante.

and the difficult nature of the factual and medical issues, this is a case of above-average complexity for which a 15% fee is appropriate.” (*Id.* at p.9.)

With respect to the *basis* for the calculation of fees, the panel in *Wilson* observed that section 4659(c) provides for an annual COLA “equal to the percentage increase in the state average weekly wage as compared to the prior year,” (Lab. Code, § 4659(c)), and that a historical review of the SAWW over the prior 50 years averaged 4.7 percent. (*Wilson, supra*, at p. 12.) Nonetheless, the historical average of SAWW was not an absolute figure, and the determination of whether and how to include the COLA in the calculation of attorney’s fees required consideration of factors beyond the mechanical application of a percentage to the net present value of the award. *Wilson* thus concluded that in assessing the basis upon which an attorney fee is calculated in permanent and total disability cases, four principles must be considered:

First, the WCAB must consider the responsibility assumed, the care exercised, the time expended, and the results obtained by the attorney (Lab. Code, § 4906(d); Cal. Code Regs, tit. 8, § 10775), keeping in mind the discussions in *Pilkenton* [*Lawrence Drasin & Associates v. Workers' Comp. Appeals Bd. (Pilkenton)* (1992) 3 Cal.App.4th 1564 [57 Cal.Comp.Cases 142]] and *Tomlinson* [*Wheeler & Beaton v. Workers' Comp. Appeals Bd. (Tomlinson)* (1995) 40 Cal.App.4th 389, 395 [60 Cal.Comp.Cases 1075, 1078]] regarding the nature, extent, and quality of the representation.

Second, the WCAB also must consider its attorney’s fee guidelines, i.e., (1) whether the case is of “below average,” “average,” or “above average” complexity and (2) whether, in addition to obtaining a 100% permanent disability award, the attorney’s efforts also helped the applicant obtain temporary disability indemnity and/or out-of-pocket medical costs.

Third, the WCAB is not required to allow a fee based strictly on a fixed percentage of 621.25 weeks of permanent partial disability indemnity. Instead, the WCAB ordinarily should consider the actuarial present value of the injured employee’s lifetime PTD award at TTD indemnity rates, *including an average annual COLA under section 4659(c), if warranted. This is consistent with the language of section 4906(d) and Rule 10775(d) that, in establishing a reasonable attorney’s fee, consideration shall be given to “the results obtained.”* (Emphasis added.) Generally, when an attorney obtains a lifetime PTD award at TTD rates, this result is substantially better than if it had been 621.25 weeks at PPD rates.

Fourth, notwithstanding the third point just above, a reasonable attorney's fee in a 100% case ordinarily should not be based strictly on the PTD award's present value, *with an appropriate average annual COLA, if any*.

(*Wilson, supra*, at pp. 30-31, italics and bracketed material added.)

The panel in *Wilson* acknowledged that the SAWW was not a constant, but rather a "moving target," and that factors such as recent historical trends would impact the SAWW average. (*Id.* at pp.34-35.) And while "the risk that the actual COLA will be greater than the assumed COLA is better borne by the attorney," *Wilson* nonetheless concluded that "a reasonable attorney's fee in a 100% case ordinarily should *not* be based strictly on the PTD award's present value." (*Wilson, supra*, at p.37, italics added.) The matter was thus remanded to the trial level for calculation of an attorney's fee that contemplated the COLAs applicant was reasonably expected to receive under section 4659(c). (*Id.* at p.37.)

Following the return of the matter to the trial level for further proceedings on the issue of attorney's fees, the WCJ in *Wilson* issued a new decision that once again based the calculation of attorney's fees on the present value of applicant's permanent disability without consideration of any future COLAs. (*Wilson v. Piedmont Lumber and Nursery* (January 17, 2012, ADJ28964653 (SRO 0134623)) [2012 Cal. Wrk. Comp. P.D. LEXIS 48, at p. 5].) We granted applicant's subsequent Petition for Reconsideration and observed that while we did not object to the WCJ's reliance on DEU calculations generally, we could not agree with the WCJ's reliance on the calculation which used 0% for the COLA figure, "because it results in an award of attorney's fees which essentially ignores the fact that applicant will be receiving a COLA under Labor Code section 4659(c)." (*Id.* at p. 5.) Consequently, we interposed an award of attorney's fees that included COLAs, utilizing an assumed annual SAWW increase of 3.00 percent. (*Id.* at p. 11.)

Here, we are persuaded that a similar analysis applies. As was the case in *Wilson*, the award contemplates lifetime indemnity payments to applicant, including the COLA increases specified in section 4659(c). The DEU has estimated the value of the award, assuming a 3.0% average SAWW, as exceeding 1.14 million dollars. We also observe that in amending section 4659(c) in 2003 to provide for cost of living adjustments linked to the SAWW, the legislature did not change the criteria for assessing attorney's fees section found in section 4906(d) or alter the present value discount described in section 5101(b). We are thus persuaded that in the present matter, a reasonable assumption of future COLA increases, based on a historical assessment of the SAWW,

including recent trends and considering any other relevant factors, provides a reasonable basis upon which to calculate attorney's fees.<sup>5</sup> (*Wilson, supra*, at pp. 30-31; see also *Arias v. Williams Roofing Co.* (January 11, 2024, ADJ6428404) [2024 Cal. Wrk. Comp. P.D. LEXIS 29]; *Gonzales v. Cal. Fire* (2020) 85 Cal.Comp.Cases 412 [2020 Cal. Wrk. Comp. P.D. LEXIS 15; *Herrera v. Maple Leaf Foods* (June 19, 2018, ADJ4258585 (OXN 0130492), ADJ220258 (OXN 0130487)) [2018 Cal. Wrk. Comp. P.D. LEXIS 284]; *Gilmore v. Autoland Resale Ctr.* (April 17, 2013, ADJ4677964 (LAO 0868239)) [2013 Cal. Wrk. Comp. P.D. LEXIS 148].)

Thus, while we agree with the WCJ's assessment that attorney's fees of 15 percent are reasonable and appropriate, we do not agree with the WCJ's decision to exclude reasonably anticipated COLA adjustments from those calculations. Accordingly, we will grant applicant's Petition, rescind the F&A, and return this matter to the trial level for the WCJ to determine an appropriate anticipated average SAWW percentage by which to estimate future COLAs, and for the issuance of an award of attorney's fees based on the present value of the award of permanent and total disability including reasonably estimated annual COLAs.

---

<sup>5</sup> We further observe that it is common practice in the Workers' Compensation community in cases settling life pension or permanent and total disability claims by Compromise and Release to calculate attorney's fees based on the present value of the permanent disability including the anticipated value of the SAWW. We believe that awards issuing as the result of judicial decision or by stipulation of the parties should similarly provide a consistent basis for the calculation of attorney fees, irrespective of the manner in which the case is resolved.



For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the decision of January 30, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of January 30, 2024 is **RESCINDED** and that the matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

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

I CONCUR,

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**ANNE SCHMITZ, DEPUTY COMMISSIONER**  
CONCURRING NOT SIGNING



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

**April 26, 2024**

**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  
LAW OFFICES OF 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*