

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

**RODRIGO ACEVEDO, *Applicant***

**vs.**

**GEORGIA PACIFIC; permissibly self-insured, administered by ESIS, *Defendants***

**Adjudication Number: ADJ10393295  
Riverside District Office**

**OPINION AND DECISION DENYING PETITION FOR  
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Orders (F&O) issued on November 3, 2023, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) the case in chief was resolved by a findings and award issued on June 29, 2022; (2) neither party sought reconsideration of the June 29, 2022 findings and award; and (3) applicant's attorney did not prove that the DEU should be ordered to calculate a commutation of the attorney's fee arising from applicant's life pension by factoring an increase in the state average weekly wage (SAWW) at a rate higher than 3 percent.

The WCJ denied applicant's request for an order requiring the DEU to calculate a commutation of the attorney's fee at a rate higher than 3 percent and ordered the parties to adjust and commute the attorney's fee, with jurisdiction reserved to the WCJ in the event of a dispute.

Applicant contends that the WCJ (1) misapplied Labor Code sections 5100 and 5101<sup>1</sup> by finding that calculation of a commutation of the attorney's fee by factoring a SAWW increase at a rate of 3 percent was reasonable; and (2) failed to identify evidence to support the finding that the DEU should not be ordered to calculate a commutation of the attorney's fee by factoring an increase in the SAWW rate higher than 3 percent.

We received an Answer from defendant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will deny the Petition.

### **FACTUAL BACKGROUND**

On September 6, 2023, the matter proceeded to trial as to the following issues:

1. Attorney's fees.
2. Applicant's request for a consultative commutation by DEU using SAWW of 4.14% for applicant's petitions filed November 21, 2022 and April 5, 2023. (Minutes of Hearing and Summary of Evidence, September 6, 2023, p. 2:21-23.)

The WCJ admitted an exhibit entitled DEU Commutation Calculation of Life Pension at 3% SAWW dated July 28, 2022, into evidence. (*Id.*, p. 3:11-12.) It includes the following:

#### **PRESENT VALUE OF DEFERRED LIFE PENSION**

...  
Initial rate of paid LP benefits: \$177.81  
Assumed annual increase: 3.00%

...  
**Present Value = \$99,5661**

Calculated by: SHANNON JEAN  
Disability Evaluation Unit  
(Ex. 4, DEU Commutation Calculation of Life Pension at 3% SAWW, July 28, 2022, p. 7.)

In the Opinion on Decision, the WCJ states:

Applicant attorney has filed a petition for commutation calculation dated 11/21/2022. The applicant attorney petitioned for a SAWW rate of 4.037% and use of the most recent U.S Decennial Life Table for 1999-2001. The request was for a DEU rating using 3% SAWW and 4.18% SAWW. The DEU impliedly performed a 3% SAWW commutation calculation but needed a judge order to allow a calculation at a higher rate. This WCALJ declined to order the DEU to do the calculation but deferred to a hearing in order to have a record.

...  
It was noted that the DEU currently uses a SAWW of 3% rate for commutation calculations. The applicant attorney argues that . . . to calculate an accurate present value of future benefits, the most current data for average annual SAWW should be used and a commutation calculation based on a lower percentage is obsolete. Ultimately it was argued that the overall value of the benefits that the attorney fees are based on are undervalued.  
(Opinion on Decision, p. 4.)

In the Report, the WCJ states:

In reviewing the petition for reconsideration (EAMS DOC ID 49253207) and the two petitions from the petitioner regarding commutation (Applicant 2 & 3), as well as the MOH and SOE (EAMS DOC ID 77133217), as well as updated private rating from the applicant attorney (Exhibit 6, EAMS DOC ID 4796192), it is clear that the Petitioner does not dispute the attorney fee derived permanent disability.

Permanent disability awarded was 83%, \$185,962.50. The applicant attorney was awarded 15% attorney fees. The calculation by the DEU and private rating by Blair Megowan state that the attorney fees from this amount at 15% = \$27,894.38. I have found no dispute to these attorney fees awarded.

In reviewing the same documents above, the issue at the heart of the appeal is the petitioner has requested a 4.14% assumed SAWW increase versus a 3% assumed increase.

...

Although this is a partial commutation to pay attorney fees from the life pension portion of the award, the commutation must be in the best interest of the applicant and there should be a policy of caution when it comes to commutation (*Paquette v. City of Ventura* (1978) 43 CCC 1129, 1133 (appeals board *en banc*)).

In the Opinion on Decision (EAMS DOC ID 75663498, page 9 under heading Attorney Fees) it was stated: The applicant attorney is entitled to 15% of impairment awarded and/or commuted and 15% of the net temporary total disability benefits due to applicant after deduction of payments by defendant and EDD. It was also stated that the attorney fees are to be adjusted between the parties with jurisdiction reserved. In the Award the attorney fees were awarded as follows:

“Reasonable attorney fees are 15% of value of benefits awarded for impairment and for 15% of temporary total disability net...” The applicant attorney fees were not awarded for a certain commutation rate and jurisdiction was reserved on attorney fees. There was no prior order or award of commutation but in the body of the Findings and Award dated 06/29/2023 (EAMS DOC ID 75663498, page) it was stated as follows: The applicant attorney is entitled to 15% of impairment awarded and/or commuted and 15% of the net temporary total disability benefits due to applicant after deduction of payments by defendant and EDD.

In this case the applicant did testify he understood the attorney fee issue and did not have a problem with it. He was provided with a letter from applicant attorney that was in compliance with CCR 10842. A commutation using 4.14% rather than the 3% commonly used and default commutation (SAWW of 3%) under the circumstances is not in the best interests of the applicant. It did not appear reasonable under the circumstances. The higher commutation rate was not in the best interests of the applicant as he would receive less benefits.

The applicant attorney did include data from Workcompcentral that was reportedly from U.S. Department of Labor. There is no indication that the information was

true and accurate. Assuming arguendo that it is accurate, it is clear that there is a large range of numbers and fluctuation. In this regard, 3% is certainly within the range of evidence of the numbers presented. The annual average using the very high averages, especially during Covid-19, are far outside the norm. The rate of commutation in the ranges provided from 1999-2023 support a finding that a 3% rate is reasonable.

The applicant attorney was reasonably awarded 15% of the benefits awarded. The parties were encouraged to adjust between themselves and were never thwarted from entering into negotiations and resolving any calculation issues among themselves. In balancing the interests of the applicant and applicant attorney it was concluded that 3% commutation rate struck a balance between the interests of the applicant and the applicant attorney getting paid now versus at a later time and 15% of that amount is considered reasonable under the circumstances. It is equitable. Therefore the DEU should not be ordered to provide the requested commutation calculation at 4.14% commutation rate.

It does not appear that awarding attorney fees or using a commutation of 3% will have a cooling effect on quality attorneys taking cases such as this for fear of not being reasonably compensated or that there has been prolific litigation on this issue.

The applicant attorney also argued that the DEU fallback position should be updated every 10 years consistent with the requirement of CCR 10169.1 and update after each decennial census. That is outside of the power of this WCALJ and more of a legislative or other entity purview and acting on this request/argument. It is acknowledged that it is a dynamic number, but it is also determined that the commutation rate of 3% appears reasonable based on the circumstances in this case. There is no detriment to the applicant and in fact the higher commutation would be to the applicant's detriment as he would receive less money.

(Report, pp. 3-6.)

## **DISCUSSION**

Section 5100 provides:

At the time of making its award, or at any time thereafter, the appeals board, on its own motion either upon notice, or upon application of either party with due notice to the other, may commute the compensation payable under this division to a lump sum and order it to be paid forthwith or at some future time if any of the following conditions appear:

(a) That such commutation is necessary for the protection of the person entitled thereto, or for the best interest of the applicant. In determining what is in the best interest of the applicant, the appeals board shall consider the general financial condition of the applicant, including but not limited to, the applicant's ability to live without periodic indemnity payments and to discharge debts incurred prior to the date of injury.

- (b) That commutation will avoid inequity and will not cause undue expense or hardship to the applicant.
  - (c) That the employer has sold or otherwise disposed of the greater part of his assets or is about to do so.
  - (d) That the employer is not a resident of this state.
- (§ 5100.)

Section 5101 provides:

The amount of the lump sum shall be determined as follows:

- (a) If the injury causes temporary disability, the appeals board shall estimate the probable duration thereof and the probable amount of the temporary disability payments therefor, in accordance with Chapter 2 of Part 2 of this division, and shall fix the lump sum at the amount so determined.
  - (b) 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 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.
- (§ 5101.)

Commutation of attorney's fees is a matter of routine in workers' compensation cases because the procedure allows for at least part of the case to conclude. (See, e.g., *Karr-Reddell v. Christopherson Homes* 2013 Cal. Wrk. Comp. P.D. LEXIS 316<sup>2</sup> (explaining that because older attorneys might not live to reap the fruits of their labor if their fee awards are paid in piecemeal fashion or might find it difficult to wind down their businesses if it were necessary to monitor old cases to ensure payment of fees, fee commutations are appropriate.)

In the present case, applicant argues that the WCJ misapplied sections 5100 and 5101 by finding that calculation of a commutation of applicant's attorney's fee by factoring a SAWW increase at a rate of 3 percent was reasonable. More specifically, applicant argues that the WCJ "confuse[d] the 3% discount rate set forth under Labor Code § 5101 with the annual average

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<sup>2</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 statutory or regulatory construction. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

SAWW rate” used by the DEU to calculate the present value of the life pension to commute the attorney’s fee and mistakenly concluded that the 3 percent rate was mandated by statute. (Petition, pp. 6:23-24.)

However, we discern no grounds to conclude that the WCJ confused section 5101’s discount rate with the SAWW rate. To the contrary, the record reveals that the WCJ recognized that the DEU used its default SAWW rate of 3 percent to calculate the present value of applicant’s life pension for the purpose of determining the amount of the commuted attorney’s fee. (Opinion on Decision, p. 4; Ex. 4, DEU Commutation Calculation of Life Pension at 3% SAWW, July 28, 2022, p. 7; Report, p. 5.) Thereafter, the WCJ examined the DEU’s default rate in the context of SAWW rate averages over the period from 1993 through 2023 and found it reasonable.

Accordingly, we discern no merit to applicant’s argument that the WCJ misapplied sections 5100 and 5101 to find that calculation of a commutation of applicant’s attorney’s fee using a rate of increase in the SAWW of 3 percent was reasonable.

Applicant also argues that the WCJ failed to identify evidence to support the finding that the DEU should not be ordered to calculate a commutation of the attorney’s fee by factoring an increase in the SAWW rate higher than 3 percent.

Section 4659(c) provides:

For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" [SAWW] as compared to the prior year. For purposes of this subdivision, "state average weekly wage" means the average weekly wage paid by employers to employees covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred.  
(§ 4659(c).)

Here, as explained in the Report, the WCJ recognized that applicant’s life pension is to increase pursuant to section 4659(c) and allowed a reasonable fee equivalent to 15 percent of its present value. (Report, pp. 4-5.) Since calculation of the attorney’s fee arising from the life pension involves accounting for the SAWW increase with assistance from the DEU as necessary and appropriate, applicant’s attorney requested the DEU to calculate the fee using its own SAWW rate and a SAWW rate of 4.18 percent. (See *Gilmore v. Autoland Resale Ctr.* (2013) 2013 Cal.

Wrk. Comp. P.D. LEXIS 148; *Wilson v. Piedmont Lumber & Nursery* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 48; Opinion on Decision, p. 4.) The DEU in turn calculated the fee using its current 3 percent SAWW rate and declined applicant's attorney's request to perform a calculation using a 4.18 percent SAWW rate. (Opinion on Decision, p. 4.)

Following trial, the WCJ found that applicant's attorney did not prove that the DEU should be ordered to calculate a commutation of the attorney's fee arising from the life pension at a rate higher than 3 percent on the grounds that the DEU utilized its "default" rate and applicant's attorney failed to present "true and accurate" data on which he could rely to conclude that the DEU's rate was unreasonable. (Report, p. 5.) Moreover, we are unable to discern from the record grounds to conclude that the data selected by applicant's attorney from "Workcompcentral that was reportedly from U.S. Department of Labor" may constitute competent evidence as to the issue of the appropriate SAWW rate. (Report, p. 5.)

It is thus clear that the WCJ's findings were based upon the DEU's determination of the appropriate SAWW rate and the absence of evidence suggesting that it would be an abuse of discretion to accept the DEU's determination. (See, e.g., *Wilson, supra*; *Munson v. City of Los Angeles Police Dept.* (2011) Cal.Wrk.Comp. PD LEXIS 387; *Los Angeles County Metropolitan Transit Authority v. Workers' Comp. Appeals Ed (La Count)* (2015) 80 Cal. Comp. Cases 470.)

Consequently, we do not conclude that the WCJ erred by failing to identify evidence to support the finding that the DEU should not be ordered to calculate a commutation of the attorney's fee by factoring an increase in the SAWW rate higher than 3 percent.

Accordingly, we will deny the Petition.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings and Orders issued on November 3, 2023 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

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

**/s/ JOSÉ H. RAZO, COMMISSIONER**



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

**JANUARY 23, 2024**

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

**RODRIGO ACEVEDO  
LAW OFFICES OF LUCY M. BISHOP  
D'ANDRE LAW**

**SRO/cs**

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