



LAW OFFICES  
of  
McDERMOTT & CLAWSON, LLP

## LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

July 2009

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# THE COLA WARS

A great deal of confusion and litigious contention has predictably arisen over the application of the so-called COLA (Cost of Living Adjustment) application to life pension cases and 100% permanent total disability cases with dates of injury after January 1, 2003. Currently, cases are making their way through the judicial system in search of a uniform rule governing exactly how and when the COLA adjustment are to be made. The outcome of this issue will have a significant impact on the economic value of these cases.

All injuries with a date of injury on or after January 1<sup>st</sup>, 2003, shall have the benefit rates for life pension and 100% permanent total disability increased annually based upon the percentage increase in the "State Average Weekly Wage". The first such increases began as of January 1<sup>st</sup>, 2004. LC §4659(c). Unlike similar provisions affecting temporary disability payments, the COLA increases for life pensions and permanent total disability payments are not limited by earnings, but rather are applied to the indemnity payment itself irrespective of earnings at time of injury.

The problem is (as was the case with much of the reform legislative drafting) there is a major ambiguity as to *when* the COLA increase is to be applied in any given case. Since, effectively, these increases have a compounding effect on the benefit payments, and since the differing interpretations may make difference of several years in the date the increases start, the outcome of this issue will have a significant economic impact on case exposure, especially in life pension cases where the pension payments do not begin for many years to come.

Since its implementation, LC §4659(c) has mandated increases in the benefit payments for every year except 2004. The COLA increases since then have been: 1.97% for 2005, 4.01% for 2006, 4.96% for 2007, 3.93% for 2008, 4.54% for 2009 and 2.94% effective January 1<sup>st</sup>, 2010. If an injured worker began receiving payments affected by the COLA increases in 2003, the compounded effect of these increases would yield \$120.95 in benefits for every \$100 originally payable in 2003, or an overall increase of almost 21% over period of 6 years.

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There is a big difference in the effect, however, if the increases apply from the date of injury forward (whether or not entitled to permanent disability over the entire time) as opposed to applying them from the Permanent and Stationary date, as opposed to applying them still later when life pension benefits may be due and payable. In our example, if (hypothetically) the injured worker was injured in 2003 but not entitled to payments of a pension until 2008, and the increases were not applied until 2008. It is easy to see that immediate effect of the increases would be far less.

In the case of *Mari Monte-Alexander vs. SCIF* FRE 0223543 (Aug. 2008 panel decision after Reconsideration), a three judge panel of WCAB commissioners ruled that the COLA increases do not apply until the January 1<sup>st</sup> of the year after permanent total disability becomes payable. This is a position very favorable to defendants, because it eliminates potential additional compounding for years between the date of injury and the time the benefit becomes payable. By analogy, it would seem to apply in the same manner to life pension payments: no increases until January 1<sup>st</sup> of the year following the start of the pension.

Applicant's attorneys have been pushing for a more liberal interpretation of the statute, claiming that the full benefit of the COLA increases would not be realized unless the increases start to apply on January 1<sup>st</sup> the year after the date of injury. Thus, even though payments may not be due, when the first payment of pension is finally made, it will be increased by the compounded effect of every SAWW increase back to the date of injury. This was the argument made in *Xyzzx SJO2 v. Subsequent Injuries Benefits Trust Fund*, another 2009 panel decision after Reconsideration, which stated that cost-of-living adjustments (COLA) for life pensions or permanent total disability benefits should begin the first January following the date of injury. The Subsequent Injuries Trust Fund has filed a petition for a Writ to the 6<sup>th</sup> District Court of Appeals. In its

petition, the Fund argued that the WCAB erred in interpreting the statute, claiming they "simply got (it) wrong." The Court has agreed to consider the case, but we don't know at this point if the justices will accept *amicus* briefs from non-parties, or whether oral argument will be scheduled.

Despite the recent history of lower percentage increases in the State Average Weekly Wage, if you seek a determination of the present value of a life pension or 100% disability case from Blair Megowan at the DEU, you will get a determination calculated on an assumption of an average annual increase of 4.7%. We know this because Mr. Megowan recently made a presentation at the California Applicant's Attorneys Association meeting at Lake Tahoe where this was a topic of discussion. We also know this because it was the subject of a case decision in *Daniel Pan v SCIF*, (October, 2007) MON 0322363 (Decision Denying Reconsideration). A three judge panel of Commissioners noted "Based on the evidence presented herein, we conclude that the inclusion of the statewide average weekly wage factor is a proper factor to be included in a present value assessment, and that the 4.7% figure used by Megowan, the head of the DEU, based upon a 50 year average, justifies the calculation of present value and the attorney's fees in this case."

For now, unless and until we get a binding ruling either from the WCAB *en banc* or the Court of Appeal (or State Supreme Court) we favor the more conservative interpretation that the COLA increase should be calculated and applied when the payment is due. It may be that once a higher court speaks, it will be necessary to make a retroactive adjustment, but we doubt there would be exposure under LC 5814 for unreasonable delay.

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## HEARD AT CAAA

Many of our readers are probably aware that we routinely attend meetings of the California Applicant's Attorneys Association in order to gear up for the latest attacks on the SB 899 reforms and to gain insight into the thinking of attorneys who represent injured workers and the thinking of doctors who stand ready to help them. The June meeting at Squaw Valley was no exception.

Clearly, the hot topics revolved around the *Almaraz/Guzman* holdings. They also focused on LC §4662 cases (100% PD cases outside the *AMA Guides*) and, of course, the COLA issue discussed above. Overall, we are beginning to see some creative ideas for using the *Guides* (rather than attempting to avoid them) to achieve higher impairment ratings. We can look forward to more, and better reasoned, challenges to apportionment, more interest in applying the *Ogilvie* decision to cases where there is apportionment to multiple injuries, and more depositions of doctors by applicant's counsel.

One interesting quote from applicant attorney Larry Silver: "Denied is a great word." If you missed it, go to [www.mcdermott-clawson.com](http://www.mcdermott-clawson.com) click on "recent events" and open the June 2009 newsletter, "The Downside of Denials."

Article by Howard Stevens, Orange Office

\*Editor's note: We normally do not have access to trial level opinions unless they involve cases within our own firm; therefore, our reporting of these cases is limited to information received via reliable sources. Decisions of trial level judges do not bind other judges, even at the same Board. However, they do give some indication of what judges may do at trial on cases with similar issues. Reports concerning writ denied cases are published in the California Compensation Cases and may be cited at trial level but are not binding authority on a trial judge.

## Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our Education Committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](mailto:Howard.Stevens@mcclaw.com) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

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