WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LENA WILSON, ***Applicant,*** **vs.** **PIEDMONT LUMBER & MILL COMPANY; and STATE COMPENSATION INSURANCE FUND,** ***Defendant(s).***	**Case Nos. ADJ2290591 (SRO 0134544)** **ADJ2894653 (SRO 0134623)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted the petitions filed by lien claimant, the Law Office of Richard J. Meechan (Meechan), and defendant, State Compensation Insurance Fund (SCIF), seeking reconsideration of the Findings and Award in Case No. ADJ2290591 (SRO 0134544) issued by the workers' compensation administrative law judge (WCJ) on November 8, 2010. We now issue our Decision After Reconsideration.

The WCJ's decision determined that applicant, Lena Wilson, sustained a May 7, 2005 industrial injury to her lumbar spine and psyche, causing left foot drop and weight gain, while employed as a gardener by Piedmont Lumber and Mill Company, the insured of SCIF. In relevant part, the WCJ also determined that this injury caused permanent total disability (i.e. 100%), without any legal basis for apportionment, and that Meechan rendered legal services having a reasonable value of $33,217.95.

In his petition for reconsideration, Meechan contends that the $33,217.95 attorney's fee is not reasonable because: (1) there is a significant discrepancy between the attorney's fees awarded by the Santa Rosa district office of the WCAB and those awarded by other district offices and that, given the complexity of the case, a fee corresponding to 15% of the present value of the permanent total disability (PTD) award should have been allowed; and (2) the present value of the PTD award

exceeds $815,000 after the expected annual cost of living adjustments (COLAs) under Labor Code section 4659(c)[1] are applied. We have not received any answer to Meechan's petition.

In its petition for reconsideration, SCIF contends that the WCJ failed to indicate the basis for the 100% permanent disability award,[2] in violation of section 5313 and WCAB Rule 10782 [sic].[3] Applicant filed an answer to SCIF's petition.

For the reasons stated in the Discussion section of the WCJ's Report and Recommendation on Petition for Reconsideration (Report), at pages 4 through the last full paragraph of page 9, which we adopt and incorporate by reference herein, we affirm the WCJ's determination that applicant's May 7, 2005 injury caused permanent total disability, without any basis for apportionment. This disposes of SCIF's petition.

With respect to Meechan's petition, for the reasons that follow, we defer the reasonable attorney's fee issue and remand that issue to the WCJ for further proceedings and a new decision consistent with this opinion.[4]

I. THE WCJ SHOULD HAVE AWARDED A 15% ATTORNEY'S FEE BECAUSE THIS WAS A CASE OF ABOVE-AVERAGE COMPLEXITY.

When it awards an attorney's fee, the WCAB's basic statutory injunction is that the fee

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[1] All further statutory references are to the Labor Code, unless otherwise specified.

[2] Defendant's petition captions Case No. ADJ 2894653 (SRO 0134623), in which the WCJ determined that applicant sustained a June 9, 2005 injury resulting in a need for further medical treatment but no permanent disability. However, because defendant's principal argument is that the WCJ failed to explain how he found applicant to be 100% permanently disabled, we will treat defendant's petition as having been filed in Case No. ADJ2290591 (SRO 0134544).

[3] Current WCAB Rule 10782 pertains to vexatious litigants. Former Rule 10782, which had required a WCJ to "prepare an opinion on decision setting forth clearly and concisely the reasons for the decision made," was repealed *in 1996*. Defendant's counsel is hereby admonished for failing to keep even remotely current on the applicable Rules.

[4] The WCJ's Report recites that Meechan "did not present any indication that he complied with Board Rule 10778" (Cal. Code Regs., tit. 8, § 10778). However, Meechan's petition appends a copy, albeit unsigned, of a November 19, 2010 letter to applicant. The letter states that Meechan is seeking reconsideration of the WCJ's award of attorney's fees and that his petition "is in direct conflict to [applicant's] interests." The letter also advises applicant that, "[i]f you wish, you may consult with another attorney of your choice to discuss this matter." Accordingly, Meechan substantially complied with Rule 10778.

awarded must be "reasonable." (Lab. Code, §§ 4903(c), 4906(a) & (d).)

In determining what constitutes a "reasonable" attorney's fee, the WCAB must take into consideration: (1) the responsibility assumed by the attorney; (2) the care exercised by the attorney; (3) the time expended by the attorney; and (4) the results obtained by the attorney. (Lab. Code, § 4906(d); Cal. Code Regs., tit. 8, § 10775.) In addition, under WCAB Rule 10775, the WCAB must make reference to the attorney's fee guidelines contained in its Policy and Procedure Manual (P&P Manual).[5] (Cal. Code Regs., tit. 8, § 10775; see generally, e.g., *Vierra v. Workers' Comp. Appeals Bd.* (2007) 154 Cal.App.4th 1142, 1147-1148 & fn. 2 [72 Cal.Comp.Cases 1128, 1131 & fn. 2]; *Reich, Adell, Crost & Perry v. Workers' Comp. Appeals Bd.* (*Jones*) (1979) 99 Cal.App.3d 225 [44 Cal.Comp.Cases 1119, 1123]; *Morgan, Beauzay, Hammer, Ezgar, Bledsoe & Rucka v. Workers' Comp. Appeals Bd.* (*Schneiderman*) (1976) 59 Cal.App.3d 353 [41 Cal.Comp.Cases 322, 323-324].)

Among other things, the P&P Manual's attorney's fee guidelines provide that, in cases of average complexity, the WCAB may allow an attorney's fee corresponding to 9% to 12% of the applicable benefits, i.e., 9% to 12% of the permanent disability award, plus 9% to 12% of any temporary disability indemnity or out-of-pocket medical expenses that were obtained through the attorney's efforts and that were not voluntarily furnished by the defendant. In cases of above-average complexity, however, the WCAB may allow an attorney's fee that is in excess of 12% of the applicable benefits. Cases of above-average complexity include, but are not limited to: (1) cases establishing a new or obscure theory of injury or law; (2) cases involving highly disputed factual issues, where detailed investigation, interrogation of prospective witnesses, and participation in lengthy hearings are involved; (3) cases involving highly disputed medical issues; and (4) cases involving multiple defendants. The P&P Manual further provides that, in all cases, "fees must be sufficient to encourage ... competent attorneys to participate in this field of practice." (See also, e.g., *Robert G. Beloud, Inc. v. Workers' Comp. Appeals Bd.* (*Leinweber*)

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[5] See section 1.140 of the P&P Manual at: http://www.dir.ca.gov/wcab/WCAB_Policy_ProcedureManual/WCABPolicy_ProcedureManual.html#29.

(1975) 50 Cal.App.3d 729, 737 [40 Cal.Comp.Cases 505, 510] ("The basis upon which fees are fixed should not be so low as to discourage competent attorneys from accepting employment in Workers' Compensation matters"); accord: *Bentley v. Industrial Acc. Com. (Martin)* (1946) 75 Cal.App.2d 547, 550 [11 Cal.Comp.Cases 204, 206].)

We agree with Meechan that, in this case, a 12% fee is too low. Instead, given the care exercised, the responsibility assumed, the time expended, the results obtained, 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. The record establishes that this case has involved, among other things, agreed medical evaluations in internal medicine and in psychiatry/neurology, a qualified medical evaluation in orthopedics, a report from a vocational expert, a deposition of the vocational expert, and a full day of trial with multiple witnesses. Furthermore, Meechan obtained a 100% permanent disability award notwithstanding the facts that the QME in orthopedics found only 52% whole person impairment (WPI)[6] and the AME in psychiatry found only a GAF of 60—which, under the Schedule for Rating Permanent Disabilities (Schedule), corresponds to 15% WPI. Under the Combined Values Chart of the Schedule, it is possible that the final permanent disability rating for these two body parts might not have resulted even in a life pension, let alone a total permanent disability indemnity award.[7]

Therefore, when this matter is returned to the WCJ for further proceedings, the WCJ shall allow an attorney's fee corresponding to 15% of the relevant benefits, taking into consideration the discussion that follows.

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[6] This 52% WPI might even be less if Dr. Morley's February 6, 2008 amendment of his October 2, 2007 report is taken into account.

[7] A very rough and informal rating might be:

15.03.00.00 - 52 - [5]66 - 491H - 59 - 59
14.01.00.00 - 18 - [8]25 - 491D - 21 - 21
59 C 21 = 68 FINAL PERMANENT DISABILITY

II. THE CASE IS RETURNED TO THE TRIAL LEVEL FOR FURTHER PROCEEDINGS ON THE PRESENT VALUE OF THE DISABILITY AWARD TO WHICH THE 15% FEE SHOULD APPLY AND FOR CONSIDERATION OF OTHER FACTORS.

A. The Disability Evaluation Unit Must Recalculate the Present Value of Applicant's Permanent Total Disability Indemnity Award, Taking into Account the COLAs that She May Reasonably Be Expected to Receive under Section 4659(c) during Her Anticipated Life

As observed above, the WCJ awarded a $33,217.95 attorney's fee, which is 12% of the $276,816.22 present value of applicant's PTD award, as calculated by the Disability Evaluation Unit (DEU). In making this present value estimate, the DEU assumed that applicant's PTD rate would remain constant at $253.33 per week during her expected life. However, for PTD awards, section 4659(c) provides for an annual COLA "equal to the percentage increase in the 'state average weekly wage' [SAWW] as compared to the prior year." The DEU's present value estimate 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.

In his petition, Meechan asserts that the present value of applicant's PTD award exceeds $815,000. The petition states that this figure is derived from calculations Meechan obtained from Blair Megowan (Megowan), the former DEU manager. These calculations, however, are not in evidence or appended to the petition.

The initial determination of the present value of a PTD award—or of a permanent partial disability (PPD) award with a life pension—is done by the DEU. In making its present value calculation, Rule 10169 requires the DEU to utilize the January 2001 Commutation Instructions, which the Rule adopts and incorporates by reference. (Cal. Code Regs., tit. 8, § 10169; see also § 10169.1.)[8] Obviously, though, the January 2001 Commutation Instructions do not take into account the 2002 amendment to section 4659 that provided for COLAs on PPD awards and life pensions for injuries occurring on or after January 1, 2003. (See Lab. Code, § 4659(c) [Stats. 2002, chap. 6, § 67 (AB 749)].)

Nevertheless, in making present value calculations under Rules 10169 and 10169.1, the

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[8] The January 2001 Commutation Instructions can be found at http://www.dir.ca.gov/dwc/CommInst.pdf.

DEU should not disregard subsequent changes in the law. This is because a subsequently enacted statute trumps a regulation to the extent they are inconsistent. (*Juarez v. 21st Century Ins. Co.* (2003) 105 Cal.App.4th 371, 376 ["[a] statute overrides any inconsistent provision in a regulation"]; *Sheyko v. Saenz* (2003) 112 Cal.App.4th 675, 687 ["a regulation ... cannot impede the force of the statute"]; see also Gov. Code, § 11342.2 ["no regulation adopted is valid or effective unless consistent and not in conflict with the statute"].) Therefore, when calculating the present value of any PTD or life pension awards, the DEU should determine whether any estimated average annual COLA should be applied.

Indeed, it appears the DEU's current policy is to apply an estimated average annual COLA in calculating present value. In this regard, we take judicial notice (see Evid. Code, § 452(c)) of the written materials on Commutations from the statewide 15th Annual Educational Conference given by the Division of Workers' Compensation (DWC) in 2008 (see http://www.dir.ca.gov/dwc/educonf15/Commutations/Commutations.pdf), which were prepared when Megowan was still the DEU Manager.[9] Those written materials state that the average annual SAWW increase over the prior 50 years was approximately 4.7% and indicate that, in the absence of a request by the WCJ or the parties to use a different percentage, the DEU will use 4.7% as the estimated average annual COLA in determining the present value of a PTD or life pension award. (*Id.* at p. 3.)[10] We also take judicial notice (see Evid. Code, §§ 451(a), 452(a), (c), & (d)) of prior decisions of the Appeals Board where Megowan and the DEU utilized a 4.7% average future COLA on the basis that this has been California's 50-year average for annual changes in the SAWW. (E.g., *Bacha v. State of California* (2009) 2009 Cal. Wrk. Comp. P.D. LEXIS 613 (Appeals Board panel); *Pan v. State of California* (2007) 2007 Cal. Wrk. Comp. P.D. LEXIS 227 (Appeals Board panel); *Munoz v. Barrocas Construction* (2007) 2007 Cal. Wrk. Comp. P.D. LEXIS 197 (Appeals Board panel).)

Of course, this 4.7% average future COLA has not been adopted as a regulation.

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9 Our understanding is that Megowan retired as the DEU Manager sometime in mid-2010.

10 See also http://www.dir.ca.gov/DWC/educonf17/Commutations/CommutationsandSAWW.pdf, at p. 4.

Nevertheless, the 4.7% figure appears to represent an effort by the DEU and Megowan, when he was the statewide DEU manager, to informally establish a reasonable estimated average future COLA that can be used in PTD and life pension cases state-wide without delaying resolution of those cases—and without flooding the WCAB's calendar—because of litigation over this issue. As other Appeals Board panels have said in the past:

> "Where life expectancies are used for purposes of establishing the present value of an award, and in order to comply with Labor Code section 4659(c), some type of formula or approach is necessary to establish a percentage figure for purposes of the statewide weekly wages factor, because the statute in fact requires that an injured worker's 100% permanent disability indemnity rate will be continually adjusted in the future. In the absence of evidence to the contrary, the use of the 50 year average of 4.7% is a rational and reasonable formula to satisfy the requirements of section 4659(c) and to determine the present value of the award and the correct attorney's fee." (*Pan, supra*, 2007 Cal. Wrk. Comp. P.D. LEXIS 227, at pp. 6-7; accord: *Bacha, supra*, 2009 Cal. Wrk. Comp. P.D. LEXIS 613, at pp. 9-10.)

Indeed, in the absence of other evidence, we presume that the DEU and Megowan regularly performed their official duties when they calculated a 4.7% average future COLA based on annual SAWW increases in California over the past 50 years. (Evid. Code, § 664; see also, e.g., *Inyo Citizens for Better Planning v. Inyo County Bd. of Supervisors* (2009) 180 Cal.App.4th 1, 12, 13-14 [presumption that county officials regularly performed their duty of calculating net acreage of property]; *Santa Ana Hospital Medical Center v. Belsh* (1997) 56 Cal.App.4th 819, 835-836 [presumption that Department of Health Services regularly performed its duty of calculating "disproportionate share hospital" reimbursement].)

Still, just because we have taken judicial notice of this 4.7% average future COLA and will assume it is correct in the absence of other evidence, this does not mean the 4.7% figure is absolute. A rater who prepares a present value calculation is free to use a different figure. For one, as already observed, the 4.7% average future COLA was not adopted by regulation. Therefore, it is not mandatory. For another, the 4.7% average future COLA is predicated on the assumption that the average annual increase in the SAWW over the preceding 50 years fairly reflects what future increases will be. In this regard, we recognize that the percentage increase in the SAWW has been

almost uniformly less than 4.7% over the last eight years, from 2004 through 2011. The only year during that span in which the SAWW increased by more than 4.7% was 2007, which saw a 4.96% increase. However, the percentage increases of the SAWW for the years 2005, 2006, 2008, 2009, and 2010 were, respectively, 1.97%, 4.01%, 3.93%, 4.55%, and 2.99%; moreover, the years 2004 and 2011 had *no* increase in the SAWW. (See http://www.dir.ca.gov/DWC/educonf17/Commutations/CommutationsandSAWW.pdf, at p. 3; *The Workers' Compensation Laws of California* (LexisNexis) (2011 ed.), at p. 1660, Table 14.)[11] Finally, the 50-year average annual SAWW is a moving target because it may change somewhat when a new year of SAWW data comes in. In fact, more recent materials from the DEU assume an average annual increase in the SAWW of *4.6%* over the 50-year period from 1952 through 2011.[12] We infer that this slightly lower assumed SAWW percentage takes into account that there was no SAWW increase in 2011.

Therefore, we will return the matter to the WCJ to refer this matter to the DEU to calculate the present value of applicant's PTD award, using whatever average future COLA, if any, that the

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[11] These figures are all based on DWC Newsline announcements regarding the SAWW for those years: http://www.dir.ca.gov/dwc/dwc_newslines/2010/Newsline_56-10.pdf (for 2011); http://www.dir.ca.gov/dwc/dwc_newslines/2009/Newsline_52-09.pdf (for 2010); http://www.dir.ca.gov/dwc/dwc_newslines/2008/Newsline_66-08.pdf (for 2009); http://www.dir.ca.gov/dwc/dwc_newslines/2007/Newsline_66-07.pdf (for 2008); http://www.dir.ca.gov/dwc/dwc_newslines/2006/Newsline_54-06.pdf (for 2007); http://www.dir.ca.gov/dwc/dwc_newslines/2005/Newsline_81-05.html (for 2006); http://www.dir.ca.gov/dwc/dwc_newslines/Newsline_63-04.html (for 2005); and http://www.dir.ca.gov/dwc/dwc_newslines/Newsline_18-03.html (for 2004).

[12] See the DEU Commutation Training materials that have been prepared for DWC's 18th Annual Educational Conference in early 2011, at http://www.dir.ca.gov/DWC/educonf18/Commutations/Commutations.pdf, p. 14 (slide 28).

rater deems appropriate.[13]

We recognize the WCJ's decision did not specify a start date for applicant's annual COLAs, but instead provided that her PTD indemnity payments would be "subject to adjustments under Labor Code §4659(c)." Presumably, this is because the question of when a COLA should start is currently pending before the Supreme Court in *Duncan v. Workers' Comp. Appeals Bd. (XYZZX SJO2)*, S179194. If the Supreme Court's decision in *Duncan* has not issued by the time of the present value calculation (which appears likely, since the Supreme Court has not even set a date for oral argument), the DEU should issue three alternative present value calculations using the three possible start dates: (1) January 1, 2004;[14] (2) the first January 1 after the date of injury;[15] and (3) the first January 1 after the PTD or LP payments start.[16] (See http://www.dir.ca.gov/DWC/educonf18/Commutations/Commutations.pdf, at p. 5 [slide 10].)

Once the DEU has made its present value calculation(s), the calculation(s) should be served on the parties, thereby giving them the opportunity to object. We will not prescribe when and how service of the present value calculation(s) should be effected; however, we *suggest* it be done through a notice of intention (NIT) from the WCJ indicating that the calculation(s) will be accepted

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[13] Of course, either before or after the DEU's present value calculation(s), it *might* be appropriate for the parties and Meechan to stipulate to the use of a particular estimated average annual COLA. Nevertheless, the WCJ should proceed extremely cautiously before accepting any such stipulation. (See Lab. Code, § 5702; Cal. Code Regs., tit. 8, § 10497.) This is because applicant and Meechan necessarily have adverse interests with respect to the estimated average annual COLA, i.e., a higher COLA means a higher fee for Meechan and lower PTD indemnity payments to applicant and vice versa. Therefore, if a stipulated estimated average annual COLA is proposed, the WCJ should carefully question applicant to determine whether she has a "full appreciation" of its consequences (see *Jefferson v. Dept. of Youth Authority* (2002) 28 Cal.4th 299, 304 [67 Cal.Comp.Cases 727, 730]), whether she might have "agree[d] to [an] unfortunate [stipulation] because of economic pressure or lack of competent advice" (see *Johnson v. Workmen's Comp. Appeals Bd.* (1970) 2 Cal.3d 964, 973 [35 Cal.Comp.Cases 362, 368]), and whether she had notice of Meechan's adverse interest and of her right to seek independent counsel (see Cal. Code Regs., tit. 8, § 10778).

[14] This was the date used by the Court of Appeal in its now decertified opinion in *Duncan* (see 74 Cal.Comp.Cases 1427).

[15] This was the date used by the Court of Appeal in its unpublished opinion in *Allied Waste Industries, Inc. v. Workers' Comp. Appeals Bd. (Rojas)* (2010) 75 Cal.Comp.Cases 1315.

[16] This was the date used by an Appeals Board panel in *Loya v. Arrowhead Brass Products* (2008) 2008 Cal. Wrk. Comp. P.D. LEXIS 87.

unless written objection is filed within a particular time. The use of an NIT will likely be more efficient than serving the present value calculation(s) together with the Findings and Award—or, as was done in this case, serving it *after* the Findings and Award—because this could obviate the need for a petition for reconsideration.

If either party or Meechan objects to the DEU's present value calculation(s), then a hearing should be set to allow the cross-examination of the rater who prepared the calculation(s) and/or to allow the presentation of evidence on what estimated average annual COLA should be used, if any.

Thereafter, the WCJ may award an attorney's fee based on the *lowest* present value calculation, reserving jurisdiction to later *increase* the fee if the Supreme Court's opinion in *Duncan* warrants it.[17]

B. An Attorney's Fee in a 100% Case Is Not Limited to an Attorney's Fee in a 99-¾% Case of Comparable Complexity; However, Although the Present Value of the 100% Award with COLAs Should Be Considered, the Fee Ordinarily Will Not Be Based Strictly on that Present Value

For the following reasons, we conclude that a "reasonable" attorney's fee in a 100% permanent disability case with COLAs is *not* limited to what a fee would be in a 99-¾% permanent disability case of similar difficulty and of comparable responsibility assumed, care exercised, and time expended by the attorney. (See Lab. Code, § 4906(d); Cal. Code Regs., tit. 8, § 10775(a)-(c).) Instead, because of the difference in the results obtained (see Lab. Code, § 4906(d); Cal. Code Regs., tit. 8, § 10775(d)), the WCAB has the discretion to consider the present value of the full amount of the injured employee's PTD award, together with an appropriate average annual COLA, if any. Nevertheless, a reasonable attorney's fee in a 100% case ordinarily should not be based strictly on the PTD award's present value.

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[17] We are directing the WCJ to use the lowest present value calculation for following reason. Let us assume, hypothetically, that the three present value calculations are $300,000, $400,000, and $500,000. The WCJ may conclude that a fee corresponding to 15% of $300,000 is reasonable. However, if the Supreme Court's decision in *Duncan* would mandate the use of an earlier start date for the COLA, the WCJ might conclude that a fee corresponding to 15% of $400,000 or $500,000 would be disproportionate under our discussion in Section II-B, *infra*.

In *Goler v. W&J Sloane* (1979) 44 Cal.Comp.Cases 1065 (Appeals Board en banc),[18] the Appeals Board addressed the effect on attorney's fees of a statutory amendment to section 4659, operative on April 1, 1974 (Stats. 1973, ch. 1023, § 7). The amendment provided that 100% permanently disabled employees would receive indemnity for life at their temporary total disability indemnity (TTD) rate. (See Lab. Code, § 4659(b).) Prior to the amendment, injured employees with 100% disability received 621.25 weeks of indemnity at their PPD indemnity rate, i.e., 2 weeks more than an employee with 99-¾% disability. *Goler* held that an attorney's fee in a 100% case should not be based on the present value of the full PTD award at TTD rates, but instead should be based on the 621.25 weeks of PPD indemnity that would have been payable in a 100% case prior to April 1, 1974. The underlying premise of *Goler* was that employees should receive "adequate" compensation for their injuries (see Cal. Const., art. XIV, § 4) and that attorneys representing them should not receive a windfall merely because of a statutory increase in the amount of indemnity payable only to permanently totally disabled employees. (See *Wheeler & Beaton v. Workers' Comp. Appeals Bd.* (*Tomlinson*) (1995) 40 Cal.App.4th 389, 395 [60 Cal.Comp.Cases 1075, 1078].)

In *Goler*, however, the Appeals Board determined that while it was a 100% permanent disability case, it was only at the "high end" of the range of cases of *average* complexity, so it awarded only a 11.5% attorney's fee.[19] *Goler* also awarded the fee based only on the applicant's permanent disability indemnity, i.e., it did not consider whether the fee should be increased based on temporary disability indemnity or out-of-pocket medical expenses obtained through the attorney's efforts.

Although *Goler* has not been formally overruled in the years since its issuance, its

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[18] Writ den. sub nom. *Law Offices of Bryan & Etting v. Workers' Comp. Appeals Bd.* (*Goler)* (1980) 45 Cal.Comp.Cases 58, review den. sub nom. *Bryan & Etting v. Workers' Comp. Appeals Bd.* (*Goler*) (1980) 45 Cal.Comp.Cases 1299.

[19] However, based on the attorney's fee guidelines of the P&P Manual, *Goler* stated that "if considerable efforts was [sic] involved in obtaining such benefits, a fee beyond the range of 9 percent to 12 percent may be appropriate." (44 Cal.Comp.Cases at p. 1069.)

application has been sharply limited.

In *Lawrence Drasin & Associates v. Workers' Comp. Appeals Bd.* (*Pilkenton*) (1992) 3 Cal.App.4th 1564 [57 Cal.Comp.Cases 142], the WCAB had applied *Goler* to allow a $6,000 attorney's fee in a 100% case. The Court of Appeal, however, determined that the particular 100% permanent disability case before it was of "above average" complexity. Therefore, the Court determined that, under the WCAB's own attorney's fee guidelines, it was improper to allow an attorney's fee corresponding to only slightly more than 12% of a permanent disability indemnity award based on 621.25 weeks of permanent partial disability indemnity. (*Pilkenton*, *supra*, 3 Cal.App.4th at p. 1573 [57 Cal. Comp. Cases at p. 148].) The Court also determined that the WCAB erred, under its own fee guidelines, in failing to additionally base the fee on the temporary disability indemnity and out-of-pocket medical expenses obtained through the attorney's efforts. (*Id.*) The Court concluded by saying:

> "Because the present case was a matter of above-average complexity, we need not determine whether the *Goler* formula for computing attorney fees is appropriate in cases of average complexity. We conclude, however, that, in a case of above-average complexity, the *Goler* limitation need not be followed. Limitation of the attorney fee to slightly more than 12 percent of 621.25 weeks of permanent partial disability indemnity may not adequately compensate an attorney in a case of above-average complexity if the attorney has expended a substantial amount of time and provided representation of high quality.
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> "On remand, the Board must adequately consider and discuss the criteria listed in California Code of Regulations, title 8, section 10775 and the Board's own guidelines on attorney fees for cases of above average complexity. *The Board should also consider whether, in view of the extent and quality of the representation of applicant in the present case, the portion of the attorney fee attributable to permanent disability indemnity should be computed based on a percentage of the lifetime award of total permanent disability indemnity at the total permanent disability indemnity rate.*"
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> (*Pilkenton*, *supra*, 3 Cal.App.4th at pp. 1573-1574 [57 Cal. Comp. Cases at p. 148] (emphasis added).)

Accordingly, *Pilkenton* did not expressly reject the premise of *Goler* that where the legal services provided in a 100% case are of a similar degree and nature as those in a 99-¾% case, the fact that the result obtained in the 100% case is substantially greater does not, by itself, necessarily entitle

an applicant's attorney to a higher fee. Nevertheless, *Pilkenton* establishes that a strict application of *Goler*—i.e., only allowing a fee that corresponds to *12%* of 621.25 weeks of permanent partial disability indemnity—is not appropriate where a case is of *above-average* complexity and where the attorney's efforts also helped the applicant *obtain temporary disability and out-of-pocket medical costs*. Moreover, as more pertinent to this case, *Pilkenton* stands for the principle that, notwithstanding *Goler*, when the WCAB determines a "reasonable" attorney's fee, it has the discretion to consider the actual present value of the injured employee's lifetime PTD award at TTD rates. (See also *City of Foster City v. Workers' Comp. Appeals Bd. (Sanchez)* (2001) 66 Cal.Comp.Cases 742, 746 (writ den.) ["the Board properly commuted the attorney's fee here based on the present value of applicant's permanent, total disability award in accordance with the principles set forth in *Lawrence Drasin* [(*Pilkenton*)] ... ."].)

Subsequently, in *Tomlinson, supra*, the WCAB applied *Goler* to allow a $10,500 attorney's fee in another 100% permanent disability case. The Court of Appeal, however, concluded that an attorney's fee of $10,500 "was inadequate," noting that the WCJ "apparently applied the *Goler* rule without giving full consideration to the [responsibility assumed, care exercised, time involved, and results obtained] factors listed in section 10775." (*Tomlinson*, 40 Cal.App.4th at p. 395 [60 Cal.Comp.Cases at pp. 1078-1079].) The Court in *Tomlinson* emphasized that: (1) the attorney assumed substantial responsibility by advising the employee to turn down a $114,000 settlement offer; (2) the attorney exercised great care in representing the employee because of his "fragile condition"; (3) although the parties used an agreed medical evaluator (AME) in psychiatry, the attorney deposed the AME and got the AME to change his opinion that the employee was only partially disabled; (4) the attorney obtained a ruling from the Rehabilitation Unit that helped establish the employee's inability to compete in the open labor market; (5) the attorney engaged in substantial settlement discussions with defendant and, thereafter, prepared for and participated in a trial which convinced the WCAB that the employee was totally disabled; and (6) the 100% permanent disability indemnity award obtained was a substantially better result than defendant's $114,000 settlement offer, out of which settlement the attorney may well have received a fee

greater than $10,500. (*Tomlinson*, 40 Cal.App.4th at p. 396 [60 Cal.Comp.Cases at p.1079].) The Court then said: "Section 10775 requires that these factors be considered in awarding fees. The *Goler* rule is not applicable in these circumstances." (*Id.*) Thus, *Tomlinson* does not expressly disapprove of *Goler* to the extent it concluded that an attorney's fee in a 100% case should not be more than the fee in a 99-¾% case of similar difficulty, time expended, care exercised, and responsibility assumed. (See Lab. Code, § 4906(d); Cal. Code Regs, tit. 8, § 10775(a)-(c).) Nevertheless, *Tomlinson* establishes that many factors must be considered in setting a "reasonable" fee in a 100% case, including the results obtained (see Lab. Code, § 4906(d); Cal. Code Regs, tit. 8, § 10775(d)) and, therefore, the WCAB cannot exclusively base a fee on a fixed percentage of an award of 621.25 weeks of permanent partial disability indemnity.

Reading *Goler, Pilkenton,* and *Tomlinson* together and in conjunction with section 4906(d) and WCAB Rule 10775, we conclude that the following basic principles must be considered in determining a "reasonable" attorney's fee in a 100% permanent disability case.

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* and *Tomlinson* regarding the nature, extent, and quality of the representation.[20]

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

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[20] *Pilkenton* and *Tomlinson* merely serve as models of types of circumstances to consider. The circumstances they mention are not exclusive.

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. There are at least two reasons for this.

For one, section 4906(d) and Rule 10775 do not just require consideration of the "results obtained." They also require consideration of the responsibility assumed, care exercised, and time expended by the attorney. As implicitly recognized by *Goler*, these latter three factors—especially time expended—generally are not significantly different when comparing a 100% case with a 99-¾% case involving legal services of a similar degree and nature.[21]

For another, it must be remembered that, ordinarily, the attorney's fee in a 100% case is commuted from each and every bi-weekly PTD payment over the injured employee's entire lifetime. This is significant in two respects.

Preliminarily, section 5100 sets "conditions" on any commutation of disability indemnity. Among other things, section 5100(a) allows a commutation where the "commutation is ... for the best interest of the applicant" and further provides that, "[i]n determining what is in the best interest of the applicant, the [WCAB] 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." Also, section 5100(b) sets another condition that the "commutation will avoid inequity and will not cause undue expense or hardship to the applicant." (See *Hulse v. Workers' Comp. Appeals Bd.* (1976) 63 Cal.App.3d 221, 229 [41 Cal.Comp.Cases 691, 696] ["[T]he Legislature ... has not intended that the [commutation]

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[21] When assessing a comparable 99-¾% case, however, the WCAB should take into account the life pension (see Lab. Code, § 4659(a)), the COLAs on that life pension (see Lab. Code, § 4659(c)), and any 15% bump-up or bump-down (see Lab. Code, § 4658(d)(2) & (d)(3)(A)) that might apply to the 99-¾% case.

device should be employed except in the urgency situations to which the [WCAB] ha[s] limited it, upon a case-by-case basis, for more than a half century."].) Accordingly, when an attorney's fee in a 100% case is to be commuted from the periodic payments under the injured employee's PTD award, the WCAB must consider whether the commutation is in the employee's best interest. It also must consider whether the reduced periodic payments after commutation will affect the employee's ability to live or otherwise cause the employee undue hardship. If the amount of the fee to be commuted would be contrary to these standards, the WCAB may decide to allow a lesser attorney's fee, provided the fee is still "reasonable."

Furthermore, a commuted attorney's fee is based on the *estimated* present value of the employee's lifetime PTD award using a *predicted* average annual increase in the SAWW and, therefore, a *predicted* average future COLA. But over his or her lifetime, the employee will receive *actual* annual COLAs based on the *actual* annual increase in the SAWW from year to year, if any. Accordingly, if the *predicted* average future COLA (e.g., 4.6%) is more than the *actual* COLA (e.g., 2.99% in 2010 or 0% in 2011) in any given year, then the employee's commuted bi-weekly benefits for that year will have been disproportionately reduced to accommodate the attorney's fee. Moreover, this disproportionate reduction is exaggerated in each and every following year because the assumed 4.6% average future COLA compounds. This means that the attorney's fee being commuted will be based on ever escalating *assumed* PTD payments, whereas the injured employee's *actual* PTD payments may not increase by nearly as much.[22] Of course, we realize there may be years during an injured employee's expected lifetime where the *actual* annual

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[22] For example, let us assume that an injured employee's PTD payments in year 1 are $500 per week and that the COLA begins in year 2. If a 4.6% *assumed* annual COLA is used for calculating an attorney's fee, then the *assumed* PTD payments in year 2 will be taken at $523 per week (i.e., $500 as increased by 4.6%). In year 3, the *assumed* PTD payments will be taken at $547.06 per week (i.e., $523 as increased by 4.6%) and so on. However, if the *actual* COLAS in years 2 and 3 are 1% and 2%, respectively, then the *actual* PTD payments in the year 1 would be $505 per week (i.e., $500 as increased by 1%) and $515.10 per week in year 3 (i.e., $505 as increased by 2%).

For a more graphic illustration of this potentially increasing disproportionality, go to page 3, slide 6, at http://www.dir.ca.gov/dwc/educonf15/Commutations/Commutations.pdf, which shows how a $100 per week PTD rate would stay constant over an approximately 50-year period if a 0% COLA is assumed, but would eventually increase to nearly $1000 per week if a 4.7% COLA is assumed.

COLA will be greater than the *assumed* COLA. However, provided that the attorney's fee being an commuted is "reasonable" in light of the responsibility assumed, care exercised, time involved, and results obtained (Lab. Code, § 4906(d); Cal. Code Regs., tit. 8, § 10775), we believe the risk that the actual COLA will be greater than the assumed COLA is better borne by the attorney. After all, it is the attorney, not the injured employee, who benefits from the commutation of the attorney's fee.

Our conclusion that a "reasonable" attorney's fee in a 100% case should not be based strictly on the present value of the lifetime PTD award—as increased by any appropriate average annual COLA—is consistent with the basic and overriding purpose of the California workers' compensation system, which is to extend "adequate" benefits to industrially-injured employees and to compensate them for the effects of their injuries. (See Cal. Const., art. XIV, § 4.)[23] Of course, attorney's fees should not be fixed in a manner that discourages competent attorneys from accepting employment in workers' compensation matters. (E.g., *Pilkenton*, 3 Cal.App. 4th at p.157 [57 Cal. Comp. Cases at p.147].) Nevertheless, an attorney's fee comes out of the benefits awarded to the injured employee (Lab. Code, § 4903(a))[24] and the Legislature has expressly limited the WCAB to allowing only a "reasonable" attorney's fee. (Lab. Code, §§ 4903(a), 4906(a).) The

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[23] Article XIV, section 4, vests the Legislature "with plenary power... to create, and enforce a complete system of workers' compensation ... to compensate ... workers for injury or disability ... . A complete system of workers' compensation includes adequate provisions for the ... general welfare of [injured] workers ... . [These provisions] are expressly declared to be the social public policy of this State, binding upon all departments of the State government."

[24] As a workers' compensation treatise said some time ago:

> "Ordinarily the amount [of workers' compensation benefits] recovered by the injured worker or his or her dependents is for necessary support, and lies between them and destitution. If back payments of indemnity have accrued, usually all of it is necessary to cover debts incurred during the period of litigation. If the fee comes out of future payments, again it competes with the claimant's requirements for bread and butter." (lA Hanna, *Cal. Law of Employee Injuries and Workmen's Compensation* (2d ed. 1988 rev.) §16.03[3], pp. 16-17 - 16-18.)

This statement applies with particular force where the injured employee is permanently totally disabled (100%). In many or most such cases, the employee's PTD has a total loss of future earning capacity and is unable to effectively compete in the open labor market. Therefore, the PTD award may be what the employee will largely have to rely upon for the rest of his or her life.

fee should be "reasonable" both for the employee and the attorney. Moreover, section 1.140 of the WCAB's P&P Manual declares: "The WCAB emphatically rejects the theory that [an] applicant ... should pay a higher fee to provide an offset for the cases which counsel handles at a loss. There is no reason for the deserving widow, the blind, the paraplegic or other employee with a major disability to underwrite the case of the employee with a minor or questionable claim."[25]

Accordingly, in light of the "results obtained," a "reasonable" attorney's fee in a 100% case with COLAs is not limited to what a fee would be in a 99-¾% case involving comparable time expended, care exercised, and responsibility assumed. However, a reasonable attorney's fee in a 100% case ordinarily should not be based strictly on the PTD award's present value.

III. CONCLUSION

For all the reasons above, we will return this case to the WCJ for further proceedings on a reasonable attorney's fee.

After the case is returned, the WCJ should direct the DEU to prepare three alternative present value calculations using the three possible starting dates for applicant's COLA, as discussed above, unless the Supreme Court's decision in *Duncan* has already issued.

When the DEU's present value calculations have been completed, the WCJ should serve them on the parties and Meechan, giving them a reasonable opportunity to object to the average annual COLA used by the DEU, if any. If there is a timely objection, a hearing should be set to allow the parties and Meechan to cross-examine the rater and/or to present evidence on the average annual COLA (i.e., average annual SAWW); however, if the parties and Meechan reach a stipulation on this issue, the WCJ should very carefully question applicant before accepting it, as discussed above (see fn. 13, *supra*).

Thereafter, in keeping with our finding that this is an above-average complexity case, the WCJ should determine what is 15% of the *lowest* of the three present value calculations. Then, the WCJ should determine whether a "reasonable" attorney's fee should be 15% of that figure or whether the 15% should be applied to a lesser amount, taking into consideration the factors

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[25] http://www.dir.ca.gov/wcab/WCAB_Policy_ProcedureManual/WCABPolicy_ProcedureManual.html#29.

discussed above. Concurrently, the WCJ should reserve jurisdiction to allow a *higher* fee if the Supreme Court's decision in *Duncan* on the COLA issue calls for application of one of the two other *higher* present value calculations.

Finally, the WCJ should instruct the rater whether to use the uniform reduction method, the uniform increasing reduction method, or some other method to calculate applicant's new weekly PTD rate, after commutation of the fee the WCJ has determined to be reasonable.[26]

The WCJ's Opinion on Decision should explain the basis for his determination on each of these points. (Lab. Code, § 5313.)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Appeals Board, that the Findings and Award in Case No. ADJ2290591 (SRO 0134544), issued by the workers' compensation administrative law judge on November 8, 2010, is **AFFIRMED** with the exceptions that Finding of Fact No. 9 and paragraph A of the Award are **DELETED** therefrom and the following are **SUBSTITUTED** therefor:

FINDINGS OF FACT

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9. The issue of a reasonable attorney's fee is deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of **LENA WILSON** and against **STATE COMPENSATION INSURANCE FUND** of:

A. Permanent total disability indemnity of 100%, entitling the applicant to lifetime payments of permanent total disability indemnity of $253.33 per week, commencing September 11, 2007, subject to adjustments under Labor Code §4659(c), less a reasonable attorney's fee payable to the Law

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[26] See http://www.dir.ca.gov/dwc/educonf15/Commutations/Commutations.pdf, at p. 7 [slide 14]; http://www.dir.ca.gov/DWC/educonf17/Commutations/CommutationsandSAWW.pdf, at pp. 4-5; http://www.dir.ca.gov/DWC/educonf18/Commutations/Commutations.pdf, at pp. 10-12.

We are aware that the WCJ's Award provided that the fee was "to be commuted from each weekly payment of permanent total disability indemnity, if necessary." We have amended that portion of the Award.

Office of Richard Meechan, in an amount to be determined by the WCJ with jurisdiction reserved, to be commuted in a manner to be determined by the WCJ with jurisdiction reserved, less $66.58 as a credit to defendant for overpayment of temporary disability indemnity, and less credit for all previous payments of permanent disability benefits.

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IT IS FURTHER ORDERED that this matter is **RETURNED** to the workers' compensation administrative law judge for further proceedings and decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO

I CONCUR,

DEPUTY

RICK DIETRICH

DEPUTY

NEIL P. SULLIVAN

WORKERS' COMPENSATION APPEALS BOARD SEAL

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

APR 0 1 2011

SERVICE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

LENA WILSON
RICHARD MEECHAN
STATE COMPENSATION INSURANCE FUND

NPS/bgr

WORKERS' COMPENSATION APPEALS BOARD
OF THE
STATE OF CALIFORNIA

CASE NOS.: SRO134623/ADJ2894653 and SRO134544/ADJ2290591

LENA WILSON	vs.	PIEDMONT LUMBER AND NURSERY AND STATE COMPENSTION INSRUANCE FUND
JAMES R. JOHNSON Workers' Compensation Judge		Date of Injury: SRO134623/ADJ2894653 6/9/2005 SRO134544/ADJ2290591 5/7/2005

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

On June 3, 2010, these cases came to calendar for a Mandatory Settlement Conference. At the hearing the parties filed a Pre-Trial Conference Statement in which they described the stipulations and issues and disclosed the identity of their witnesses and the exhibits to be offered at trial.

On July 13, 2010, an Order Granting Motion to Submit Expert Testimony by Deposition was filed and served on the parties.

On July 20, 2010, the case returned to calendar for a full day trial. At the trial the parties stipulated that on May 7, 2005 (SRO134544/ADJ2290591) and on June 9, 2005 (SRO14623/ADJ2894653) the applicant and injured worker, Lena Wilson, born September 30, 1964, while employed as a gardener, by Piedmont Lumber and Mill, insured by State Compensation Insurance Fund, sustained injuries arising out of and in the course of employment to her lumbar

spine and psyche, causing left foot drop and weight gain, and claims to have sustained injury arising out of and in the course of employment causing sexual dysfunction, high blood pressure, sleep loss, headaches, and injury to her upper back. At the trial the parties further stipulated that at the time of these injuries the applicant's average weekly earnings were $380.00 per week and that defendant is entitled to credit for overpayment of temporary disability benefits in the amount of $66.58.

At the trial the parties framed their remaining issues as follows: parts of body injured, permanent disability including apportionment, occupation and group number, need for further medical treatment, lien claim of EDD, lien claim of the Law Office of Richard Meechan, lien claim of Jeff Malmuth, and attorney's fees.

At the trial all of the offered medical reports and records were accepted into evidence. After testimony from the applicant, the applicant's daughter, and defendant's vocational expert, the case was submitted for decision. Applicant was allowed 20 days to file the deposition transcript of the applicant's vocational expert.

On September 13, 2010 an Order Admitting Evidence was filed and served on the parties which noted that the deposition transcript of Jeff Malmuth, dated July 9, 2010, was accepted into evidence as Applicant's Exhibit 2.

On November 8, 2010 Findings and Awards were filed in SRO134544/ADJ2290591 and SRO134623/ADJ2894653. In SRO134544/ADJ2290591 it was found, in pertinent part, that on May 7, 2005 the applicant and injured worker, Lena Wilson, while employed as a gardener, by Piedmont Lumber and Mill, insured by State Compensation Insurance Fund, sustained injuries arising out of and in the course of employment to her lumbar spine and psyche, causing left foot drop and weight gain which has caused permanent total disability of 100%, need for further medical

treatment to cure or relieve from the effects of these injuries, and that $33,217.95 was a reasonable attorney's fee

In SRO134623/ADJ2894653 it was found, in pertinent part, that on June 9, 2005 the applicant and injured worker, Lena Wilson, while employed as a gardener by Piedmont Lumber and Mill, insured by State Compensation Insurance Fund, sustained injuries arising out of and in the course of employment to her lumbar spine and psyche, causing left foot drop and weight gain which caused no permanent disability but there was need for further medical treatment to cure or relieve from the effects of these injuries.

On November 9, 2010 the Appeals Board received a letter from applicant's attorney's office requesting service of the present value calculations from the Disability Evaluation Unit.

On November 18, 2010 the parties were served with the calculations from the Disability Evaluation Unit which were used to determine the present value of the applicant's award of permanent disability and reasonable attorney's fees.

On November 23, 2010 the applicant's attorney filed a Petition for Reconsideration on the grounds that the Appeals Board's decision on the awarded attorney's fee was without and in excess of its powers and the evidence does not justify the findings of fact.

On November 24, 2010 the applicant's attorney filed a second Petition for Reconsideration on the same grounds and attached a letter to the applicant dated November 19, 2010.

On December 2, 2010 defendant filed a Petition for Reconsideration in "Case No. 2894653 SRO134623; 6469998". In the Petition the defendant appeals on the grounds that by the order, decision or award the Appeals Board acted without or in excess of its powers, the evidence does not justify the findings of fact, and the findings of fact do not support the order, decision or award.

On December 9, 2010 the applicant filed an Answer to defendant's Petition for Reconsideration "SRO134544/ADJ2290591".

II

DISCUSSION

As noted above, it appears that the defendant has filed its Petition for Reconsideration in SRO134623 in which it was found that the applicant's injury did not cause any permanent disability. However, based upon a review of the defendant's Petition for Reconsideration, it appears that it was intended to be filed in SRO134544 in which it was found that applicant's injury caused permanent total disability of 100%. It is further noted that the applicant's Answer to Petition for Reconsideration was filed in SRO134544. In the defendant's Petition for Reconsideration, the defendant argues that the "Findings and Award" does not comply with Labor Code §5313 or Board Rule §10782 and that the trial judge did not indicate how it was found that applicant was 100% permanently totally disabled.

As noted in the Opinion on Decision, the finding that the applicant's injuries caused permanent total disability was based upon a review of the applicant's trial testimony, the testimony of the applicant's daughter, the testimony of Jeff Malmuth, and the reports of Dr. Morley, Dr. Baumbacher, and Dr. Fishman. (See, Joint Opinion on Decision, page 2, lines 16-20). It is further noted that in making this finding, reliance was placed upon the factors of disability described in the reports from the Agreed Medical Examiners and the expert testimony of Jeff Malmuth who testified and reported that in the final analysis the constellation of the applicant's injuries and impairments prevent her from returning to the labor force (See, Applicant Exhibit 2, Deposition Testimony of Jeff Malmuth, at pages 11-12, 20-26, 28-29, 30-31; Joint Opinion on Decision at page 2, lines 19-

24). Therefore, there can be no reasonable doubt as to the evidence relied upon by the trial judge in determining that the applicant's injuries caused permanent total disability of 100%.

Defendant is well aware of the applicant's trial testimony that the applicant last worked on modified duty in approximately September 2005 (Summary of Testimony, page 4, lines 13-14). The applicant's trial testimony further indicates that she underwent spinal surgery including the implantation of rods and screws and that the surgery decreased her pain level to a 3 or 4 on a scale on 10, but that there has been nerve damage which effects her legs and that the pain in her left leg is at a level 7 or 8 on a scale of 10 (See, Summary of Testimony, page 4, lines 17-25). The applicant further testified that she wears a leg brace and uses a cane and has a service dog and uses a walker (See, Summary of Testimony, page 4, lines 27-30).

The applicant further testified that she has problems with a "foot drop" regarding her left foot; does not feel stable on her leg because of nerve damage; and that she has tremors in her legs which vibrate and shake. (See, Summary of Testimony, page 4, lines 33-42—page 5, line 4). The applicant further testified that the longer she stands the more it happens and that when she stands for more than 15 minutes this increases the chances of having a tremor. (See, Summary of Testimony, page 5, lines 4-7). The applicant further testified that as a result of the foot drop problems, she has fallen without warning and injured other parts of her body including both of her knees. (See, Summary of Testimony, page 5, lines 8-10).

The applicant further testified to taking Norco four times a day as a pain medication which makes her feel a little "fuzzy". (See, Summary of Testimony, page 5, lines 16-18). The applicant further testified that if she takes the Norco she is unable to read stories to her grandchildren; is not able to be attentive; and finds it difficult to focus (See, Summary of Testimony, page 5, lines 16-21).

The applicant further testified that she has slept in a recliner for five years and cannot remember when she had a good night's rest (See, Summary of Testimony, page 5, lines 30-31). The applicant further testified that during the day she dozes on and off and naps and wakes up because of pain (See, Summary of Testimony, page 5, lines 34-37).

The applicant further testified that she volunteered at her granddaughter's preschool from October 2008 through March 2009, working three hours a day four days a week (See, Summary of Testimony, page 7, lines 8-15). The applicant further testified that her attendance at her granddaughter's preschool was "sporadic" and that she made it through about half of the classes which lasted three hours a day. (See, Summary of Testimony, page 9, lines 12-21). The applicant further testified that while at her granddaughter's preschool, she used her medication sparingly to accommodate her attendance. (See, Summary of Testimony, page 9, lines 21-22).

The trial testimony also included the testimony of the applicant's daughter, Lacy Koll, who testified that on a bad day the applicant cries to the point where she calls the witness and that there are times the applicant is heavily medicated and sleeps all the time. (See, Summary of Testimony, page 10, lines 4-6). Ms. Koll further testified that after an hour or two with the children the applicant becomes irritable and complains; has more bad days than good days; and, that when the applicant is medicated she is not as talkative and may not make sense, loses focus and is easily distracted. (See, Summary of Testimony, page 10, lines 9-13).

The trial record further contains the testimony of defendant's vocational expert, Howard Stauber. Mr. Stauber testified that he did not have the opportunity to meet sooner with the applicant and, therefore, could not do a more thorough labor market survey. (See, Summary of Testimony, page 11, lines 22-23). Mr. Stauber had the time to contact four employers including Home Depot but did not tell Home Depot the applicant needed a walker, a cane or a dog. (See, Summary of

Testimony, page 13, lines 10-12). Mr. Stauber testified to having reviewed Dr. Baumbacher's report and that a moderate impairment and Work Function Impairment 4 indicated a diminished ability but did not eliminate the ability to perform those work functions. Nonetheless, Mr. Stauber testified that he was not sure that the applicant would have the ability to keep or do a job over a long time. (See, Summary of Testimony, page 13, lines 23-24). Mr. Stauber further testified that he did not feel the applicant's use of medication would be a problem and that the applicant's reliability for the jobs would be adequate. (See, Summary of Testimony, page 13, lines 37-40). Mr. Stauber, however, testified that if the applicant's attendance at a job was the same as her attendance at the preschool, that that would be a problem for the employer. (See, Summary of Testimony, page 14, lines 5-8).

The trial record further contains the deposition testimony of Jeff Malmuth (Applicant Exhibit 2). In his deposition, Mr. Malmuth testified that he came up with three sets of opinions based on different scenarios in this case. Mr. Malmuth testified that he gave an opinion as to "straight Ogilvie", an opinion with "Montana factors", and an opinion as to whether or not the applicant could actually be expected to both return to and maintain work in the open labor market, and whether or not she could be expected to actually return to the labor force. (See, Applicant Exhibit 2, Deposition of Jeff Malmuth, pages 9-12). Mr. Malmuth further testified that he believed it more likely than not the applicant is not likely to return to the labor force due to the constellation of her injuries and impairments and the functional loss secondary to her industrial injuries. (See, Applicant Exhibit 2, Deposition of Jeff Malmuth, page 11, lines 14-24).

On pages 20-26 of his deposition testimony, Mr. Malmuth testified as to the problem in a "nutshell". Mr. Malmuth indicated that Dr. Morley's restriction of the applicant to sedentary work with the allowance to alternate "sit/stand as needed by pain," indicated to him that if someone

needed to alternate between sitting and standing with the frequency of greater than more than 30-40 minutes it would adversely effect their ability to be productive. Mr. Malmuth also considered Dr. Baumbacher's opinion that the applicant had a limitation consistent with a "slowed pace of job performance," which he indicated would impact the applicant's ability to do work that requires maintaining a minimum standard of productivity. (See, Applicant Exhibit 2, Deposition of Jeff Malmuth, at page 22, lines 19-25, page 23, lines 1-2).

Mr. Malmuth further testified that the applicant's use of medication and the side effects from the medication would adversely effect her ability to maintain enough concentration and focus to work accurately over time (See, Deposition of Jeff Malmuth, page 25, lines 19-25, page 26, lines 1-2). Mr. Malmuth further testified that the applicant's medication use, or at least the side effects of the medication in combination with a sedentary sit/stand at will limitation in combination with the psychiatric evaluator's recognition that the applicant is going to have to be in a "slow pace" job, constituted a "constellation of factors" having a "synergistic effect" that led to his opinion that the applicant is likely not going to return to the labor market. (See, Applicant Exhibit 2, Deposition of Jeff Malmuth, page 26, lines 8-21).

Mr. Malmuth further testified that it was his opinion that given the "totality of the effects" on the applicant regarding her orthopedic limitations, psychiatric impairments, and vocational history and considering her "residual functional capacity" that the applicant is unlikely to return to the labor force in any type of competitive capacity. (See, Applicant Exhibit 2, Deposition of Jeff Malmuth, pages 28-29, 30-31).

The finding of permanent total disability, in accordance with the opinion of Mr. Malmuth, is further supported by the reports from the medical evaluators. In Dr. Morley's Supplemental Report, dated January 22, 2008 (Appeals Board Exhibit 3), Dr. Morley concluded that he would limit the

applicant to an allowance of alternate sit/stand as needed by pain with no lifting greater than 20 lbs. and no frequent lifting greater than 10 lbs. Dr. Morley indicated that these restrictions generally limit the person being restricted to sedentary work with an allowance for an alternate sit/stand as needed by pain. (See, Report, page 2).

In the report of the Agreed Medical Examiner Dr. Baumbacher, dated November 12, 2008 (Appeals Board Exhibit 1) the applicant's injury was found to have caused a Depressive Disorder, Anxiety Disorder, and a Pain Disorder Associated with Both Psychological Factors and a General Medical Condition. Dr. Baumbacher further noted that the applicant's injuries had caused a moderate impairment in regards to "Concentration, Persistence, and Pace" and a moderate impairment in "Deterioration and Decompensation in Complex or Work-like Settings" (See, Report, page 38). Dr. Baumbacher determined the applicant's injury to her psyche had caused a GAF Score of 60 and a whole-person impairment of 15%. (See, Report at page 38).

Labor Code §4662 allows a determination of 100% permanent total disability "in accordance with the fact". Senate Bill 899 which mandated the use of the 2005 Permanent Disability Rating Schedule did not alter Labor Code §4662 regarding the determination of 100% permanent total disability based on the facts of each case. In this case the applicant's trial testimony, the testimony of her daughter, the well-reasoned opinions of Dr. Morley and Dr. Baumbacher, and the credible, thorough, and persuasive testimony of Mr. Malmuth, support a finding that the applicant's injuries have combined to cause a level of permanent disability at which she experiences a total loss of earning capacity, which satisfies the requirement of permanent total disability as defined in the 2005 Permanent Disability Rating Schedule.

As noted above, applicant's attorney has also filed a Petition for Reconsideration from the finding that $33,217.95 is a reasonable attorney's fee. Applicant's attorney argues that he has been

denied due process and that the Opinion on Decision fails to comply with Labor Code §5313. The applicant's attorney also argues that under a present value calculation based on "COLA increases," the present value of the applicant's award warrants an attorney's fee at 12% of between $95,864 and $97,754. Applicant's counsel argues that awarding an attorney's fee without increasing the future value of the case by the COLA statute is unreasonable and that the case was complex and that a reasonable attorney's fee should be awarded.

It is well settled that when awarding an attorney's fee, the Appeals Board's basic statutory injunction is that the fee awarded must be, "reasonable". (Labor Code §4903(a), Labor Code §4906(a)(d)). In determining what constitutes a "reasonable" attorney's fee, the Appeals Board takes into consideration four factors: (1) the responsibility assumed by the attorney, (2) the care exercised by the attorney, (3) the time expended by the attorney, and (4) the results obtained by the attorney.

In addition, pursuant to Board Rule 10775, the Appeals Board must make reference to the attorney's fees guidelines contained in its Policy and Procedure Manual. (See Board Rule 10775, Policy and Procedure Manual, section 1.140). The Appeals Board's attorney's fee guidelines provide that in "cases of average complexity, it may allow an attorney's fee corresponding to 9-12% of the applicable benefits and in cases of above average complexity the Appeals Board may allow an attorney's fee that is in excess of 12% of the applicable benefits."

It is further noted that in the Policy and Procedure Manual, Section 1.140, Attorney's Fee, Lien for," that the Appeals Board emphatically rejects the theory that the applicant in a case of below average complexity should pay a higher fee to provide an offset for the cases in which an attorney may handle at a loss. The Appeals Board further notes that there is no reason for the

deserving widow, the blind, the paraplegic, or other employee with a major disability to underwrite the case of the employee with a minor or questionable claim.

Furthermore, in cases of "average complexity" although the Appeals Board may take into consideration the actuarial present value of the employee's permanent total disability, the Appeals Board should not award a fee that is grossly disproportionate to an attorney's fee in a case with 99-¾% permanent disability of similar complexity. (See, Goler vs. W & J Sloane Co. (1979) 44 Cal. Comp. Cases 1065 (WCAB en banc); Lawrence Drasin and Associates vs. WCAB (Pilkenton) (1992) 57 Cal. Comp. Cases 142; Wheeler and Beaton vs. WCAB (Tomlinsonn) (1965) 65 Cal. Comp. Cases 1075; Bloom vs. WCAB (Elliot) (1994) 59 Cal. Comp. Cases 53 (writ denied); Church vs. Orange County Department of Education (1999) 27 Cal. Workers Comp. Reporter 318 (Board Panel Decision).

In determining what is a "reasonable attorney's fee" the Appeals Board must further act in a manner consistent with the basic and overriding purpose of the California Workers Compensation system, i.e., to extend adequate benefits to industrially injured employees and to compensate for the effects of their injuries. Therefore, although the fees should be fixed in a manner that does not discourage competent attorneys from accepting employment in workers' compensation matters, it must be remembered that a fee comes out of the benefits awarded to the injured employee, or to his or her dependents, and that the legislature has expressly limited the Board to awarding only a "reasonable" fee.

Therefore, by limiting an attorney's fee to a "reasonable" amount, the legislature: (1) furthers the expressly declared social public policy of this state that there be adequate provision for the general welfare of any and all industrially injured workers and those dependent upon them for support, and (2) gives recognition to the fact that: "...ordinarily the amount of workers'

compensation benefits recovered by the injured worker or his or her dependents is for necessary support, and lies between them and destitution. If back payments of indemnity have accrued, usually all of it is necessary to cover debts incurred during the period of litigation. If the fee comes out of future payments, again it competes with the claimants requirements for bread and butter." (See, 1A Hanna, California Law of Employee Injuries and Workers' Compensation (2nd Edition) 1988 revised) Section 16.03(3), pages 16-18.

In determining what is a reasonable "attorney's fee" Board Rule §10778 requires that any request for an increase in an 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. Failure to so notify the applicant may constitute grounds for dismissal of the request for an increase in fee.

It is further noted that any lien claimant, including an injured worker's attorney, has the burden of producing evidence to support the lien and to file a fully itemized lien to support and justify the amount of the lien sought (See, Labor Code §§4903.1(c) and Board Rule 10770(a).

Labor Code §5101 further indicates that when commuting permanent disability benefits to a lump sum, the Appeals Board shall estimate the present value thereof, assuming interest at the rate of 3% per annum, and disregarding the probability of the beneficiaries 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. (See, also Title 8, California Code of Regulations §§10169, 10169.1)

In the present case, the issue of attorney's fees was raised in the Pre-Trial Conference Statement and again at the time of trial. In both instances, the applicant's attorney did not raise an

increase of attorney's fee under Board Rule 10778. In addition, applicant's counsel did not present any indication that he had complied with Board Rule 10778. The applicant's attorney, therefore, having waived any potential entitlement to an increased attorney's fee under Board Rule 10778, the attorney's fee awarded was made in compliance with cases "of average complexity".

In the present case, in determining the reasonable attorney's fee, consideration was given to a finding of a reasonable attorney's fee that would not be grossly disproportionate to a finding of 99% permanent disability which would have had a value of $242,257.50 and a fee of $29,070.90.

In the present case, the fee awarded of $33,217.95 was also based upon a present value of $276.816.22 which was determined in accordance with Labor Code §5101 and Title 8, California Code of Regulations §§10169, 10169.1,

It is further noted that applicant's attorney argues that a calculation by the prior manager of the DEU, Blair McGowan, indicates that under a "COLA" calculation, the present value of the case is between $798,874.07 and $814,619.87. It is assumed by the undersigned that Mr. McGowan's referenced calculation is based on a formula assuming annual cost of living increases of 4.7%. It is further noted that it is understood that Mr. McGowan's method for calculating the present value of a case under Labor Code § 4659(c) was intended merely as a tool to allow parties to estimate the potential present value of a case for settlement purposes and was not intended to support any finite award of attorney's fees.

It is further noted that there appears to be no substantial evidence to support the assumption of an annual increase of 4.7% in the cost of living adjustment given the current state of the economy. Pursuant to Table 14, between the years of 2004 to 2010, only one year has exceeded a 4.7% increase in the State Average Weekly Wage (SAWW), and there was one year with a drop in the SAWW. It is further noted that there will be no increase in benefits for the 2011 year because of

a decline in the SAWW (See, DWC Newsline, dated October 14, 2010). In addition, it is noted "past performance is no guarantee of future performance" and that the assumption of a 4.7% annual cost of living adjustment to the applicant's permanent total disability benefit is purely speculative.

To allow an attorney's fee based upon the assumption of an annual 4.7% increase in the cost of living adjustment, when no corresponding cost of living adjustment is made to the applicant benefit or when the adjustment is made at a lesser rate than the 4.7%, will result in a net decrease in the weekly benefits payable to the applicant because the attorney will have received a fee based on a higher "COLA" adjustment than the injured worker will have actually been paid.

The applicant's attorney, as a lien claimant, has the burden of producing evidence to support his lien. The applicant's attorney has failed to present any evidence that a fee of $33,217.95 is so low that it will discourage competent attorneys from accepting workers' compensation cases.

Based upon a review of each of the Petition for Reconsideration and a review of the Joint Opinion on Decision, it continues to be found that the Joint Opinion on Decision fully supports the Findings and Award made in each of these cases and the Joint Opinion on Decision is, therefore, adopted and incorporated herein by reference as follows:

> "Based upon a review of the medical reports filed herein, and relying on the reports of Dr. Morley, Dr. Baumbacher, and Dr. Fishman, it is found that the applicant did not sustain injury arising out of and in the course of employment to her upper back or any injury causing sexual dysfunction, high blood pressure, sleep loss, or headaches.
>
> Based upon a review of the applicant's trial testimony, the testimony of the applicant's daughter, and the testimony of Jeff Malmuth, and relying on the reports of Dr. Morley, Dr. Baumbacher, and Dr. Fishman, it is found that the applicant's injury has caused a total loss of her future earnings capacity, resulting in permanent total disability. In making this finding, reliance is placed upon the factors of disability described in the reports from the Agreed Medical Examiners and the expert testimony of Jeff Malmuth who testified and reported that in the final analysis the constellation of the applicant's injuries and impairments prevent her from returning to the labor force (See, Deposition Testimony at pages 11-12, 20-26, 28-29, 30-31).

Based upon the above medical reports from Dr. Morley and Dr. Baumbacher, it is found that the applicant's permanent disability has been caused by the applicant's initial injury of May 7, 2005 and that there is no apportionment of permanent disability.

Based upon the reports of Dr. Morley, Dr. Baumbacher, and Dr. Fishman, it is found that there is need for further medical treatment to cure or relive from the effects of the admitted injuries.

Based upon a review of the trial record, it is found that the record needs to be more fully developed before any finding can be made as to the lien claim of the Employment Development Department.

Based upon the above findings, and review of the reports and deposition testimony of Mr. Malmuth, it is found that the applicant is entitled to reimbursement for the cost of the report, vocational analysis, and testimony prepared by Mr. Malmuth; the amount to be reimbursed to the Law Office of Richard Meechan and to Mr. Malmuth shall initially be left to the informal adjustment of the parties, or should informal adjustment fail, to be determined by the Appeals Board upon the filing of a subsequent petition.

Based upon the above findings and review of the issues presented for decision, and the results obtained, it is found that an attorney's fee of $33,217.95 is a reasonable attorney's fee which is based upon 12% of the present value of the award of permanent total disability.

Based upon the above findings, all other issues are moot."

III

RECOMMENDATION

It is respectfully recommended that the applicant's attorney's Petition for Reconsideration be denied and that the defendant's Petition for Reconsideration be denied.

12/22/10
Date

James Johnson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

(See attached Proof of Service)
JRJ/jl