

A Shot of COVID & COLA

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The Award – Settlement is
Approved...Now What do I do?



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A Shot of COLA 2022 Benefit Adjustments



By Timothy Mussack



SAWW - COLA

DWC Newslines

October 25, 2021

DWC Announces Temporary Total Disability Rates

the California SAWW increased from \$1,383 to \$1,570—an increase of 13.5213 percent.



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COLA - Effects

- TTD
- Death Benefits
 - Can be impacted indirectly
- Life Time Benefits – 70% or Greater:
 - Life Pension
 - PTD (100%)



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COLA - Effects

- TTD
 - TTD Rate = $\frac{2}{3}$ of AWE **at time of injury**
 - Maximum and Minimum Earnings
 - Maximum and Minimum Earnings adjusted annually by SAWW/COLA increases
 - TTD Rate is capped by AWE ($\times \frac{2}{3}$)



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• 2 year rule

- Benefit paid 2 years after DOI subject to maximum and minimum earnings at time of payment.



COLA - Effects

TTD for 2022 DOI

\$346.42 minimum AWE x 2/3 =

- **\$230.95 minimum TTD rate**



\$2,309.56 maximum AWE x 2/3 =

- **\$1,539.71 maximum TTD rate**



COLA - TTD Rates

	Max AWE	Max TTD
2016	1692.65	1128.43
2017	1758.91	1172.57
2018	1822.91	1215.27
2019	1877.07	1251.38
2020	1949.15	1299.43
2021	2034.47	1356.31
2022	2309.56	1539.71



COLA - Effects

Death Benefits

- In the same manner as TTD
 - 2 year rule
 - Statutory Death Benefit
 - Dependent Minor



COLA and Death Benefits

- *Mierczynski vs. City of Fullerton* – WCAB Panel
- The WCAB Panel affirmed that COLA does not apply **directly** to Death Benefits.
The 4th District Court of Appeal denied review.

while the decision in *Phillips v. Sacramento Municipal Utilities District* (1998) 63 Cal. Comp. Cases 585 (Appeals Board en banc opinion), provides that benefits paid two or more years after date of injury are increased to rate in effect at time of payment, as WCJ found, such payments do not increase beyond amount supported by rate of earnings.



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Death Benefits

LC 4661.5 (the ‘two year rule’) should apply to Death Benefits, and that ruling remains in effect

Average Weekly Earnings at time of injury are relevant, and serve to set the final cap for Death Benefit rates. TTD/Death benefits are 2/3 of AWE, subject to maximums and minimums that do increase based on COLA.



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Death Benefits - Rate

LC 4702 (b)

“A death benefit in all cases shall be paid in installments **in the same manner and amounts as temporary total disability indemnity** would have to be made to the employee...” minimum \$224

LC 4661.5

...when any temporary total disability indemnity payment is made two years or more from the date of injury, the amount of this payment shall be computed in accordance with the [TTD AWE] in effect on the date each...payment is made...



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Death Benefits - Rate

COLA can affect Death Benefits indirectly, but COLA is not directly applied.

Example: 7/8/2016 injury and Death.

$AWE = \$2100 \times \frac{2}{3} = \$1400.$



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DOI: 7/8/2016 - AWE \$2100

	Max AWE	Max TTD	Death Benefit
2016	1692.65	1128.43	1128.43
2017	1758.91	1172.57	1128.43
2018	1822.91	1215.27	1215.17 – 7/8/18
2019	1877.07	1251.38	1251.38 – 1/1/19
2020	1949.15	1299.43	1299.43 – 1/1/20
2021	2034.47	1356.31	1356.31 – 1/1/21
2022	2309.56	1539.71	1400.00 – 1/1/22



Life Time Benefits



DOI 1/1/2003 and after

Increase current benefits by SAWW/COLA effective 1/1/2022

- **Does not affect benefits that have not begun to accrue.**

Rate Reduced by “Uniform Reduction”

- **Increase Rate Before Reduction, then apply Reduction**
 - Uniform Reduction
 - Uniform INCREASING Reduction



COLA Effects - Life Pension

Example: 2007 DOI

10/16/2010 Award

83% PPD Start date 7/19/2008

Life Pension Start 11/1/2020

- Life Pension Start Rate \$177.81

Attorney Fees are commuted “from the side” (By Uniform Reduction)



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COLA Effects - Life Pension

From the DEU Attorney Fee/Commutation Calculator:

The claims administrator is cautioned that when calculating the annual increase in PTD pursuant to LC 4659(c), the applicable SAWW adjustment is to be applied to the pre-reduced PTD rate, i.e. the rate before reduction for any prior commutations.



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COLA Effects - Life Pension

Method #1 is the Uniform Reduction Method.

“The weekly deduction remains constant or uniform for the life of the injured worker. The reduction becomes effective on the day after the date of commutation.”

5 Calculate LP rate after commutation.	
5a LP rate before commutation.....	\$177.81
5b Subtract weekly reduction in LP (4c from above).....	39.14
5c LP rate after commutation.....	<u>\$138.67</u>



COLA Effects - Life Pension

Method #2 is the Uniformly Increasing Reduction Method.

“The weekly reduction increases every year effective January 1st by the same fixed percentage equal to the "Assumed annual SAWW increase" listed above. The initial reduction becomes effective on the day after the date of commutation. For the convenience of the parties, the reductions for the current year plus the next fifteen years are shown below.”



Uniform Increasing Reduction

Year	Reduction:
2020	\$26.67
2021	\$27.47
2022	\$28.30
2023	\$29.14
2024	\$30.02
2025	\$30.92
2026	\$31.85
2027	\$32.80
2028	\$33.79
2029	\$34.80



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Uniform Increasing Reduction

- The Reduction increases annually by 3% for the duration of the Life Pension Benefit.
- Check the Award specifics for the amount of annual increase.
- Current 'standard' uniform increase is 3% annual.
- Older Awards might use 4% Annual Increase



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Uniform Increasing Reduction

With a Uniform Increasing Reduction, the rate before reduction is adjusted by COLA; the weekly reduction is also adjusted, by a fixed percent as established within the Award.

This method is far less common now, but had been used more frequently on Awards prior to 2014.



#1) Uniform (constant) Reduction

One formula for calculation of COLA increase:

2020 Start Rate = \$177.81
Minus \$39.14 = \$138.67 to the injured worker

2021 COLA = 4.3774%
\$177.81 x 1.043774 = \$185.59 (- \$39.14)

2022 COLA = 13.5213%
\$185.59 x 1.135213 = \$210.68 (- \$39.14)

The updated rate for 2022, before reduction = \$210.68.



#1) Uniform (constant) Reduction

The Uniform Reduction (\$39.14 in this example) is then subtracted from the updated rate before reduction.

The updated weekly **benefit beginning**

$$1/1/2021: \$185.59 - \$39.14 = \$146.45$$

$$1/1/2022: \$210.68 - \$39.14 = \$171.54$$



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#2) Uniform Increasing Reduction

Year Reduction (3% annual increase)

2020 \$26.67

2021 \$27.47

2022 \$28.30

2023 \$29.14

2024 \$30.02

2025 \$30.92



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Uniform Increasing Reduction

	Rate Before	Reduction	Benefit
	A	B	C
2020	\$177.81	\$26.67	\$151.14
2021	\$185.59	\$27.47	\$158.12
2022	\$210.68	\$28.30	\$182.38
2023	+ COLA	\$29.14	A minus B
2024	+ COLA	\$30.02	A minus B
2025	+ COLA	\$30.92	A minus B



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SAWW - Effects

Effect on Benefits

Direct Effect

- **LC 4453 (a) (10)**
- New TTD Maximum and Minimum Rates
 - DOI 1/1/2022
- **LC 4650 (c)**
- Life Pension (DOI on or after 1/1/2003)
- PTD (DOI on or after 1/1/2003)

Indirect Effect

- 2 Year Rule – LC 4661.5
- Ongoing or Accrued TTD
- Ongoing or Accrued Death Benefits - LC 4702 (b)



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A Shot of COVID

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SICK PAY



- SB 95 expired on 9/30/2021
- Replacement rule being considered
- TTD is owed if claim is accepted
- NO 3 day waiting period



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TESTING

What is a valid test? Antigen vs PCR



Labor Code 3212.88(m)(2)

Test defined as “Unless otherwise indicated, “test” or “testing” means a PCR (Polymerase Chain Reaction) test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA. “Test” or “testing” does not include serologic testing, also known as antibody testing. “Test” or “testing” may include any other viral culture test approved for use or approved for emergency use by the United States Food and Drug Administration to detect the presence of viral RNA which has the same or higher sensitivity and specificity as the PCR Test.”



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TESTING Continued

3212.88(m)(2)



"may include any **other viral culture test** approved for use or approved for emergency use by the United States Food and Drug Administration **to detect the presence of viral RNA** which has the **same or higher sensitivity** and specificity as the PCR Test."



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How do we know “sensitivity” of a test

- In the documents the test manufacturer submits to the FDA for approval
- Many available on the CDC website
- NIH found “The accuracy of the SARS-CoV-2 Roche/SD Biosensor rapid antigen test in diagnosing SARS-CoV-2 infections in a primary/secondary care testing facility was considerably lower compared with the manufacturer's data.”



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National Institute of Health Review

- 14 Studies, over 14,000 individuals
- Comparing the Antigen Test to the PCR Test
- Conclusion – “overall sensitivity” of antigen tests “inferior” to PCR tests
- PCR is about 98% sensitivity
- Antigen – BinaxNOW is at 81%, other antigen tests can get as high as 91.7%
- PQME Testimony/Reporting – Antigen tests are not as sensitive



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Antigen Tests

- looking for proteins given off by the virus

PCR

- looking for the RNA of the virus

CDC Website

- “may need confirmatory testing” after an Antigen test - “Less Sensitive”



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Why Not Accept Antigen Tests?

Does Not Detect Viral RNA (required by statute)

Not as Sensitive as PCR (required by statute)

At Home Test Reliability

When Antigen Tests May Be Accepted
IF provided by the employer



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What is a Place of Employment? Labor Code 3212.88(m)(3)

“A specific place of employment” means the building, store, facility, or agricultural field where an employee performs work at the employer’s direction. “A specific place of employment” does not include the employee’s home or residence, unless the employee provides home health care services to another individual at the employee’s home or residence.



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What to Look For:

If at home = NOT a place of employment



If employees interact, consider that a single place of employment



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Decision Time:

- 3212.87 – 30 days
- 3212.88 – 45 days
- No presumption – 90 days???



What should we do?

Make a decision within
the presumption timeframe



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Payan v West Coast Auto Sales Panel Decision

- Matter set for trial on whether presumption applied 3212.88
- Holding: Outbreak determination a complicated matter, more time given
- Presumption and Preponderance – set together



Outbreak: Definition:

(4) An “outbreak” exists if within 14 calendar days one of the following occurs at a specific place of employment:

Less Than 100 Employees:

(A) If the employer has 100 employees or fewer at a specific place of employment, 4 employees test positive for COVID-19.

100 or More Employees:

(B) If the employer has more than 100 employees at a specific place of employment, 4 percent of the number of employees who reported to the specific place of employment, test positive for COVID-19.



Vaccinations:



Federal Mandate for all employees Actual Two Mandates

- Blocked by US Supreme Court 1/13/2022
 - Healthcare Mandate Upheld the same day
 - When is the employer liable for vaccination injuries?



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