Burger, Fries & COLA

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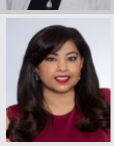
Tahmeena Ahmed, Esq. Executive Managing Partner tahmed@bradfordbarthel.com			

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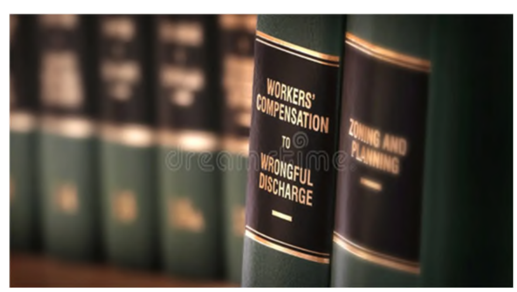
Pertinent Statutes

- LC 4656 (c) (1), (c) (2) and (c) (3)
- LC 4659 (c)
- LC 4661.5
- LC 4702 (b)



Pertinent Case Law

- Hawkins v Amberwood Products, 72 ccc 807
- Hofmeister v WCAB 49 ccc 438
- Phillips v Municipal Utilities District 63 ccc 585
- Baker v WCAB 52 Cal. 4th, 434, 76 ccc 701
- Brower v David Jones Construction (SCIF) (En Banc) 79 ccc 550
- Rader V Ticketmaster 1/8/26, ADJ7138762

COLA- Cost of Living Adjustment Summary

- COLA is based upon any increase in the SAWW from year to year
- The State Average Weekly Wage (SAWW) is calculated using the US Depart. of Labor average weekly wage reported in the 1st quarter (usually March 31st) compared to the prior years first quarter.
  - https://oui.doleta.gov/unemploy/data_summary/DataSummTable.asp (Then click on Unemployment Insurance Data. CAUTION: Recommend waiting for the official announcement from the DWC)

COLA/SAWW

- For the year 2026, the DWC announced that in the 12 months ending March 31, 2025, the CA State Average Weekly Wage (SAWW) increased from $1704.00 to $1,789.00, resulting in a 4.98826% increase.

- NOTE: 2023 saw a decrease in the SAWW of -0.454%. When a year sees a decrease in SAWW, we do not decrease benefits. They remain the same with no COLA increase (i.e no increase in COLA in 2024)

SAWW-COLA

Increase in SAWW allows for COLA in 2026 of **4.98826%**
Which translates to an increase in our TTD benefit rates.

AWE/TTD rate for 2026 based on this increase is:

- Min rate: $396.91 min AWE x ⅔ = $264.61 min TTD rate
- Max rate: $2646.16 max AWE x ⅔ = $1764.11.00 max TTD rate

COLA – TTD Rates

	Max AWE	Max TTD
• 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
• 2023	2428.72	1619.15
• 2024	2428.72	1619.15
• 2025	2520.43	1680.29
• 2026	**2646.16**	**1764.11**

Recent SAWW-COLA History

YEAR	SAWW	SAWW Increase
2026	**$1789.00**	**4.98826%**
2025	$1704.00	3.77588%
2024	$1642.00	0%
2023	$1651.00	5.15924%
2022	$1570.00	13.5213%
2021	$1383.00	4.377%

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Statutes with indirect relationships with COLA

- The following statutes have an indirect relationship with COLA in that they deal with the timeframes and duration of payment of temporary disability that could and are often impacted by the percentage increase in the SAWW.

LC 4656 (c) (1)

- Aggregate disability payments for a single injury occurring on or after 4/19/04, causing TD shall not extend for more than 104 compensable weeks within a period of two years from the date of commencement of TD payment.
- An indirect relationship to COLA, in which COLA can be applicable, due to when this payment may be made

Hawkins v Amberwood Products (2007) 72 ccc 807

- Holds 104 weeks begins on the date the first TTD check is issued, not the date it is first owed.
- EDD paid benefits from 7/26/04-3/31/05. SCIF reimbursed EDD and then made its first payment of TTD 5/3/06 and argued that their liability to pay anymore ended 7/26/06 due to the 104 cap.
- WCAB found EDD benefits not TTD under the statute ruling that the “commencement” date of TTD was actually 5/3/06 with 104 cap starting on that date.
- Bottom line you cannot apply retro TTD to 104 cap when DOI is between 4/19/04 and 1/1/08

then came LC 4656 (c) (2)

- Aggregate disability payments for a single injury occurring on or after 1/1/08 causing TD
- Shall not extend for more than 104 compensable weeks
- Within a period of five years from the date of injury

LC 4656 (c) (2)

We take the position that retroactive TTD payments would count against the 104-week cap including payments made to EDD, which were found as disability payments *(Harris-Boyd v Northwest Airlines (Board Panel) 2010 Cal Wrk Comp PD Lexis 89)*

- *Note: In order to claim credit against the 104-week cap, EDD must have been reimbursed first. (Richter v. Frontier Communications, 2024, Cal Wrk.Comp. P.D. Lexis 20, 89 ccc 381, Board Panel)*

Claims Practice Tip…

- If you are unable to obtain a final lien amount from the EDD, here are a few options:
- Coordinate with Applicant's Attorney: Communicate with the A/A to see if they can obtain the payment details. The injured worker can also download the EDD app, which provides a precise record of benefits paid. Also, EAMS (Filenet) should have documents if EDD has filed.
- Issue Payment Based on Lien Documentation: If you have the ending lien amount based on what EDD actually paid, you can reimburse EDD for that amount. Then advise AA of the payment and claim credit.
- EDD Contact: While the EDD has an 800 number, it is notoriously difficult to reach a representative to confirm a total lien amount. If you are confident in the lien value and the applicable rate, it may be best to pay what you believe is owed and allow the EDD to respond if they dispute the rate.

Exceptions under LC 4656 (c) (3)

Amputations
Severe burns
chronic lung disease
HIV
Acute & Chronic hepatitis B and C
High-velocity eyes injuries
Chemical burns to the eyes
Pulmonary fibrosis
Chronic lung disease

The IW may continue to receive TTD up to 240 compensable weeks within 5 years from the date of injury

Benefits impacted by COLA/SAWW

- TTD benefits-min and max earnings (LC 4453 (a) (10))
- Life Pension (LC 4659 (c)(3)) 70%-less than 100%
- Permanent Total Disability (LC4659 (c))
- Death Benefits to a certain extent, which we will discuss (LC 4702 (b))
- Temporary Total Disability per LC 4661.5
  - Does not apply to TPD

LC 4661.5 (aka 2-year rule)

Whenever TTD payments are made 2 years or more from the DOI, the amount of this payment shall be computed in accordance with the TD AWE as specified in effect on the date each TTD payment is made

Bottom line, you are to pay at the rate in effect at the time the payment is made if the AWE warrants.

LC 4661.5 cont…

- Regardless of the period you are paying
- TTD need not be continuous for this benefit to apply. Periods of TTD can be broken
- Statute impacted by SAWW increase subject to max rates
  - Indirect relationship to COLA
  - But…TTD cannot be paid more than the max rates in effect at the time of the payment
  - Caution: 2-year rule applies to min rates as well

Hofmeister v WCAB 49 ccc 438 (1984) 49 ccc 438

FACTS:

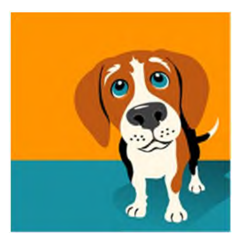
- Denied case
- no TD made
- AOE/COE found at trial with retroactive benefits awarded in 1983 for period 9/20/79-8/27/81

Issue
- Rate of TTD

Holding:
- LC 4661.5, eff. 1/1/79, controls awarding Hofmeister benefits at the rate in 1983 and found that the date of payment determines the rate of the delayed TD benefits

Example of 2-year rule application

If a payment of TTD is being made to cover a “split” period



DOI: 1/3/2024
AWE: $2650.00
First lost time date: 12/22/25
Current TTD rate (before 2-year rule applied) $1619.15 (max for 2024)
Max AWE for 2026: $2646.16

Pay period: 12/22/25-1/5/26. Because the payment is being made after the DOI’s 2-year anniversary (of 1/3/26), the entire payment, regardless of the period before the 2-year anniversary date (of 12/22/25-1/2/26) is payable at the 2026 max rate of $1764.11

And there's more:

Once an IW meets their DOI "anniversary" date (2 years from DOI) **you do not wait another 2 years** to increase benefits again. They increase every Jan. 1 thereafter, but only IF their AWE warrants the bump

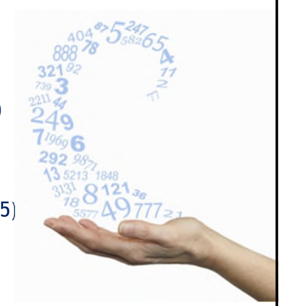
EXAMPLE: (*escalating TTD impacted by SAWW increases*)

DOI: 12/13/22
No lost time until surgery 12/4/2024
2-year date from DOL: 12/13/24
AWE: $2640.00

1st Pay period 12/5/24-12/18/24
Still off work in January 2025

So, payments are calculated as follows:
Pay **12/5/24-12/18/24 on 12/19/24:** 2 wks x $1619.15 = $3238.30
Due to Injured workers' AWE of $2640.00, they were entitled to max rate in 2024 of $1619.15

Next pay period **12/19/24-1/1/25** TTD rate: $1680.29 (max in 2025)
And still TTD on 1/1/26, so the $1680.29 you have been paying gets increased to only **$1760.00** (As AWE does not warrant bump up to max rate of $1764.11: (**$2640.00 x ⅔ = $1760.00**)
(MAX Rates: 2024: $1619.15/2025: $1680.29/2026: $1764.11)



Claims Practice Tips

Get wage statement to ensure accurate AWE

To avoid having to increase TTD, settle outstanding issues before the 2-year hits

Document when 2-year anniversary date is and set diary before that date to determine if benefits will need to be increased

Ensure to properly reserve timely for this increase so that there are no delays with payments.

On AOE/COE issues, make very sure you want to try those where injury is over 2 years old.

Watch 104-week cap so that you do not overpay!

Watch for applicant attorney demand letters stating increase due per *Hofmeister* as that is flag that they are looking at this

Death Benefits COLA or no COLA?

- Installments paid in the same manner and amount as TTD. Because of this, they are subject to a sort of SAWW increase, but not COLA.
  - Subject to increases under LC 4661.5, like TTD, but <u>cannot be paid more than the current maximum rates for TTD</u>
  - AWE at time of injury are relevant and serve to set final cap of death benefit rates. TTD and Death benefits are ⅔ AWE, subject to the max and min rates that do increase based upon COLA

Death Benefit Rate

COLA can affect death benefits indirectly, but COLA is not applied

Examples: 7/8/2017 injury/death

1) AWE = $1200.00 x ⅔ = $800.00
2) AWE = $2100.00 x ⅔ = $1400.00

DOI: 7/8/2017 - AWE $1200

	Max AWE	Min AWE	Death Benefit
•2017	1758.91	263.82	800.00
•2018	1822.91	273.44	800.00
•2019	1877.07	281.57	800.00 – 7/8/19
•2020	1949.15	292.37	800.00 **- 1/1/20**
•2021	2034.47	305.16	800.00 **- 1/1/21**
•2022	2309.56	346.42	800.00 **- 1/1/22**
•2023	2478.72	364.29	800.00 **- 1/1/23**
•2024	2478.72	364.29	800.00 **- 1/1/24**
•2025	2520.43	378.05	800.00 – 1/1/25
•2026	**2646.16**	**396.91**	**800.00 – 1/1/26**

DOI: 7/8/2017 - AWE $2100

	Max AWE	Max TTD	Death Benefit
•2017	1758.91	1172.57	1172.57
•2018	1822.91	1215.27	1172.57
•2019	1877.07	1251.38	1251.38 – 7/8/19
•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**
•2023	2478.72	1619.15	1400.00 **- 1/1/23**
•2024	2478.72	1619.15	1400.00 **- 1/1/24**
•2025	2520.43	1680.29	1400.00 - 1/1/25
•2026	2646.16	1764.11	1400.00 - 1/1/26

Phillips v Municipal Utilities District 63 ccc 585

- Death benefits are adjusted per the max TTD rates per LC 4661.5.
- Court found that with regards to awards or F&A's, dependents are not entitled to a bump up in rates per LC 4661.5 if the award was issued before 4/8/97, Objective: avoid flood of retro benefits
- Any award/F&A issued after 4/8/97, the death benefit will be subject to a bump under LC 4661.5 **without petition** if the AWE of the deceased warrants the increase (subject to max limits).

PTD/Life Pension LC 4659 (c)

- Requires cost of living adjustments (COLAs) for those injured workers with dates of injury on of after 1/1/2003
- Who become **entitled** to receive LP or PTD to have that payment increased annually commencing 1/1/04 and each January 1 thereafter, by an amount equal to the percentage increase in the SAWW as compared to the prior year.
- COLA increases apply on PTD and Life Pension regardless of the AWE and are not subject to the limits of maximum TTD rates.

Baker v WCAB, Supreme Court of CA 52 Cal. 4th 434, 76 ccc 701 (2011)

Finding:

- COLA adjustments apply prospectively and not to retroactive benefits that may be due. They are to commence on the Jan 1 following the date the IW first **becomes entitled** to receive (and actually receives) such benefits.
- CAUTION: **Baker is limited in scope**
- CA Supreme Court ruled that IW's collecting WC benefits with PTD awards and life pensions are only eligible for prospective cost-of living adjustments after they begin receiving benefits.
- "Entitlement" is key: "entitled to receive" often means MMI even if there is a delay in the awarding of PTD/LP. (exception could be disputes over PTD)

Brower v David Jones Construction (SCIF) 79 ccc 550 (2014)

Issue of when PTD benefits commence after the termination of TTD at an earlier date per LC 4656 (c) and how to calculate the COLA under LC 4659 once PTD payments begin.

FACTS:

- DOI 12/20/2005. Injury to low back, left knee and psyche
- TTD paid beyond 104 weeks until 1/31/2008 then PDA's commenced at $270.00/wk
- Though not MMI, applicant demanded PD at PTD rate due to medical indicating that there was serious doubt the applicant would return to the open labor market

Brower v David Jones Construction (SCIF) 79 ccc 550 (2014)

HOLDING:

- When TD stops per LC 4656 (c), before the IW is determined to be MMI, defendant shall commence paying PPD based upon a reasonable estimate of the IW's level of impairment
- Once MMI and deemed PTD, defendant shall pay PTD retroactive to the date of its statutory obligation to pay TD has terminated.
- COLA begins on the first day in January after the IW becomes entitled to receive PTD

Example of Retroactive benefits under Brower

Example Facts:
DOI: 1/1/2015
AWE: $3000.00
TTD rate: $1103.29
TTD ended 5/23/2017
Found PTD at end of 2022 per award

PTD start date 5/24/2017 at rate of $1103.29 until 1/1/2018.
Because COLA is to commence on the Jan. 1 following when the applicant becomes entitled to PTD (5/24/17) the PTD rate would increase in 2018 and progress each year thereafter

Example of Escalating retroactive PTD with COLA

Calculation:

5/24/2017 to 12/31/2017 = 31 weeks and 5 days @ $1103.29 allows for **$34,990.05**

1/1/2018 to 12/31/2018 (COLA rate 3.642%) thus **$1103.29** x 3.642% = $1143.47 x 52 weeks = **$59,460.53**

1/1/2019 to 12/31/2019 (COLA rate 2.971%) thus **$1143.47** x 2.971% = $1177.44 x 52 weeks =**$61,227.00**

1/1/2020 to 12/31/2020 (COLA rate 3.84013%) thus **$1177.44** x 3.84013% = $1222.66 x 52 weeks = **63,578.32**

1/1/2021 to 12/31/2021 (COLA rate 4.3774%) thus **$1222.66** x 4.3774% = $1276.18 x 52 weeks=**$66,361.36**

1/1/2022 to 12/31/2022 (COLA rate 13.5213%) thus **$1276.18** x 13.5213% = $1448.74 x 52 weeks = **$75,334.48**

Retroactive COLA

Total owed in retroactive PTD: $360,951.74

Note: Calculate the COLA first, per above, and then apply any PDA's that you may have paid in that period. Taking credit for any PDA's before the COLA calculation will open you up to penalties.

Claims Practice Tips

- Early determination of PTD potential and settlement!!!
  - Disclosure of Exposure!
- Get structured broker on early and start talking settlement.
- Watch warning signs of IW not going back to work, MD saying he does not think applicant can work in the open labor market.
- comorbidities impacting industrial injury
- With all the retroactive benefits owed in this example, a structured settlement for that portion was not possible. If determination of PTD early we can try and take advantage of a structure option allowing us to save money in the long run

Commutations and lifetime benefits

Life Expectancy tables are needed for PTD and LP projections

➔ Commutation Table 1 applies to benefits with a fixed end date (PPD)
➔ Commutation Table 2 (for a male) or Table 3 (for a female) applies to lifetime benefits

At times, attry fees might be paid from accrued/unpaid PD without commutation

COLA is applied to the current benefit rate BEFORE any reduction

Commutations cont…

Most common commutation methods are:

- Off far end
  - EX: taking lump sum payment from the final remaining payments of PD award
- Uniform (Constant) reduction “from the side”
- Since PTD and LP benefits are paid for the worker’s entire life, the total amount owed cannot be calculated based on a finite period
  - Side commutation is used

Example Of COLA Application on LP

FACTS:

10/16/2010 Award; 2007 DOI; 83% PPD; Start date 7/19/08
Life pension start date 11/1/2020
Life pension start rate $177.81

Attorney fees are commuted “from the side” by the Uniform Reduction method.

Disclaimer from DEU: On Unit’s commutation calculator gives the following warning: “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.”

Method #1: Uniform Constant Reduction Method

FACTS:

10/16/2010 Award; 2007 DOI; 83% PPD; Start date 7/19/08
Life pension start date 11/1/2020
Life pension start rate $177.81
(Weekly deduction remains constant(uniform) for life of IW)

In 2020 LP Start Rate: $177.81 (per DEU commutation based on Uniform Reduction $39.14 is amount)

Commutation template

1	**Determine exact age in years as of date of commutation (DOC).**		
1a	# of days from DOB through DOC		21250
1b	Divide by average number of days per year	)	365.24
1c	Exact age on DOC		58.181
2	**Determine number of years between DOC and LP commencement.**		
2a	Total weeks of PD		641.25
2b	Multiply by 7 days per week	x	7
2c	Total days of PD		4488.8
2d	Subtract #days from PD commencement through DOC inclusive	-	2794.0
2e	Number of days from DOC to LP commencement		1694.8
2f	Divide by average number of days per year	)	365.24
2g	Period in years from DOC to LP commencement (i.e. deferral period)		4.640
3	**Determine PV of life pension for exact age and deferral period.***		
3a	Enter PV for age 58 and deferral period 4		553.39
3b	Enter PV for age 59 and deferral period 4	-	533.23
3c	Difference of 3a and 3b		20.16
3d	Multiply by fractional portion of 1c	x	0.181
3e	Interpolation adjustment for age		3.65
3f	Enter PV for age 58 and deferral period 4		553.39
3g	PV for age 58 and deferral period 5	-	510.86
3h	Difference of 3f and 3g		42.53
3i	Multiply by fractional portion of deferral period (from 2g)	x	0.640
3j	Interpolation adjustment for deferral period		27.22
3k	PV for age below 1c and deferral period below 2g (3a from above)		553.39
3l	Subtract sum of 3e and 3j	-	30.87
3m	PV for exact age and deferral period on DOC		522.52

* Take values from Table 2 - Present Value of Life Pension for a Male, or Table 3 - Present Value of Life Pension for a Female, as dictated by gender.

4	**Calculate amount of reduction in LP rate necessary to produce lump sum.**		
4a	Amount to be commuted		$20,449.65
4b	Divide by 3m	)	522.52
4c	Amount of weekly reduction in LP		$39.14
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		$138.67
6	**Additional interest due for payment after date of commutation:**		
	Additional interest due for each day late:		$5.60

Method #1: Uniform Constant Reduction

2020 LP: $177.81-$39.14 =$**138.67** to IW

1. 2021 COLA (4.3774%) kicks in 1/1/21: $177.81 x 1.043774 = $185.59
   a. applying uniform reduction: $185.59-$39.14 = **$145.45** to IW
2. 2022 COLA (13.5213%) kicks in 1/1/22: $185.59 x 1.135213 = $210.68 before reduction
   a. applying uniform reduction: $210.68-$39.14 = **$171.54** to IW

Method #1: Uniform Constant Reduction Method continued…

3. 2023 COLA (5.51924%) kicks in 1/1/23: $210.68 x 1.0515924 = $221.55
   applying uniform reduction: $221.55-$39.14 = **$182.41** to the IW
4. 2024 COLA (no increase applied due to decrease in SAWW in 2023) so IW will continue to receive **$182.41** in 2024
5. 2025 COLA (3.77588%) kicks in 1/1/25: $221.55 x 1.0377588 = $229.92
   applying uniform reduction: $229.92-$39.14 = **$190.76**
6. 2026 COLA (4.98826%) kicks in 1/1/26: $229.92 x 1.0498826 = $241.39
   applying uniform reduction: $$241.39-$39.14 = **$202.25**

Rader v Ticketmaster 1/8/26, ADJ7138762, Appeals Board significant panel decision

- 100% PTD Stipulated Award-$39,444.71 in attorney fees commuted off side by Uniform Reduction Method
- Aggregate reductions in applicant's PTD payments (via URM) exceeded amount of attorney fees awarded
- Holding: Because Defendant took credit from Applicant's weekly payment of PTD in an amount equivalent to the dollar amount of commuted attorney's fees, applicant is thereafter entitled to the full amount of his award without further reduction for attorney's fees for the remainder of his life.
- Any amount withheld more than the attorney's fee must be reimbursed to the applicant

The End

Hopefully there was not a lot of yawning!

Questions?

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