



California Workers' Compensation Institute
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November 16, 2012

VIA E-MAIL to dwcrules@dir.ca.gov

Ms. Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation, Legal Unit
Post Office Box 420603
San Francisco, CA 94142

RE: Supplemental Job Displacement Benefit -- CCR Sections 10118 - 10133.60

Dear Ms. Gray:

This commentary on the draft regulations for the Supplemental Job Displacement Benefit (SJDB) is presented on behalf of members of the California Workers' Compensation Institute. Institute members include insurers writing 80% of California's workers' compensation premium, and self-insured employers with \$36B of annual payroll (20% of the state's total annual self-insured payroll).

Insurer members of the Institute include ACE, Alaska National Insurance Company, AmTrust North America, Chartis Insurance, Chubb Group, CNA, CompWest Insurance Company, Crum & Forster, Employers, Everest National Insurance Company, Farmers Insurance Group, Fireman's Fund Insurance Company, The Hartford, Insurance Company of the West, Liberty Mutual Group, Meadowbrook Insurance Group, Pacific Compensation Insurance Company, Preferred Employers Insurance Company, SeaBright Insurance Company, Springfield Insurance Company, State Compensation Insurance Fund, State Farm Insurance Companies, Travelers, XL America, Zenith Insurance Company, and Zurich North America.

Self-insured employer members are Adventist Health, Agilent Technologies, Chevron Corporation, City of Santa Ana, City of Santa Monica, City of Torrance, Contra Costa County Schools Insurance Group, Costco Wholesale, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, Foster Farms, Grimmway Enterprises Inc., Kaiser Foundation Health Plan, Inc., Marriott International, Inc., Pacific Gas & Electric Company, Safeway, Inc., Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Southern California Edison, Sutter Health, University of California, and The Walt Disney Company.

Recommended changes are indicated by underscore and strikeout.

Introduction

The Division, under considerable time constraints, has produced a set of straightforward regulations that elucidate the essential changes set forth in the statute: to provide the benefit earlier for workers who cannot return to work, to establish a specific time limit for the use of this benefit, and to preclude the settlement of the benefit.

The proposed regulations recognize the new trigger date for commencing the benefit -- 60 days from after receipt of the first report finding that the disability has become permanent and stationary and that the injury has caused permanent partial disability. The division has created clear-cut processes and precise instructions for delivering this benefit. Our comments are intended to bring clarity to this process, as well.

Section 10133.31(c) – Job Offer

Recommendation

Section 10133.31 should clarify that if prior to the P&S report the injured worker lost no time from work due to the industrial injury or returned to his regular job, then the Supplemental Job Displacement Benefit does not apply and no return-to-work offer need be made.

Add: (c) Subdivision (b) shall not apply to an employee who has continued to perform or returns to his/her regular work in which the employee was engaged at the time of injury.

Discussion

In Braga, the District Court of Appeal struggled with this notion in a slightly different context – eligibility for the 15% permanent disability adjustment – and held:

“There would seem to be no reason to create a return to work incentive when the employee is currently working at his or her regular job and has lost no time from work as a result of the injury which ultimately renders him or her permanently disabled. An injured employee, like Braga, who is ultimately entitled to PDI and remains on his or her regular job with no time lost from work, does not “return to work” in any common understanding of that phrase. Therefore, the employer needs no incentive to return that employee to work, and we fail to see any statutory purpose served by application of section 4658(d)(2) and (3) to such situations.”

The same rationale applies with regard to the Supplemental Job Displacement Benefit in that the employee has not been displaced. When an injured worker continues to perform or returns to his regular job prior to the time allowed for the job offer, it is unreasonable and unnecessary to require the employer (and the employee) to engage in the process outlined in these regulations.

Section 10133.31(e)(5) -- Computer Equipment

Recommendation

(5) Purchase of computer equipment (including, but not limited to monitors, software, networking devices, input devices such as keyboard and mouse, peripherals such as printers, and tablet computers) of up to one thousand dollars (\$1,000) reimbursable after cost is incurred and submitted with appropriate documentation. The employee shall not be entitled to reimbursement for purchase of games, telephones, or any entertainment media.

Discussion

It should be clear that the inclusion of computer equipment in the list of available equipment for the Supplemental Job Displacement Benefit is related to retraining, the injured worker's job search, and the enhancement of the worker's occupational skills.

Section 10133.31(e)(6) -- Incidental Expenses

Recommendation

While the statute requires no document for the reimbursement of incidental expenses, the regulations should establish a process for the delivery of this benefit.

(6) Up to five hundred dollars (\$500) as a miscellaneous expense reimbursement or advance, payable upon written request with a copy of the voucher and without need for itemized documentation or accounting. The employee shall not be entitled to any other voucher payment for transportation, travel expenses, telephone or internet access, clothing or uniforms or incidental expenses.

Discussion

A written request with a copy of the voucher clearly determines eligibility for this payment.

Form 10133.36 – Physician's Report

Recommendation

The Physician's Report of Permanent and Stationary Status and Work Capacity (Form DWC-AD 10133.36) should be a completely separate document. The reference to the optional use of the Job Description on Form 10133.36 at the bottom of this form should be eliminated.

~~(B) If the claims administrator provides the physician with a job description of the employee's regular work, proposed modified work, or proposed alternative work, the physician shall complete the bottom portion of the Physician's Report of Permanent and Stationary Status and Work Capacity (Form DWC-AD10133.36.)~~

Discussion

Section 4658.7(1)(a) notes that the use of the job description is situational and optional. In many cases, the Physician's Report of Permanent and Stationary Status and Work Capacity will be sufficient for the employer to begin the process of determining whether the injured worker can be returned to his usual job, whether modified or alternate work is available, or whether the voucher should be offered. Including questions relating to the job description may cause confusion, may be premature, and may delay the physician's permanent and stationary report.

Section 10133.60 – "Regular Work"

Recommendation

The references to offers of work should include "regular work" as well as modified or alternative work.

(a) For injuries occurring on or after January 1, 2004, the claims administrator's liability to provide a supplemental job displacement voucher shall end if either (a)(1) or (a)(2) occur:

(1) the claims administrator offers regular, modified or alternative work to the employee, meeting the requirements of this subsection ~~Labor Code §4658.6, on DWC-AD Form 10133.53 "Notice of Offer of Modified or Alternative Work"~~.

(A) If the claims administrator offers regular, modified or alternative work to the employee for 12 months of seasonal work, the offer shall meet the following requirements:

1. the employee was hired on a seasonal basis prior to injury; and
2. the offer of regular, modified or alternative work is on a similar seasonal basis to the employee's previous employment;

**Form 10133.33 – Description of Job Duties
Recommendation**

This Form should contain a notice to the employee that if the Job Description is not signed within a reasonable period of time, the return-to-work process cannot proceed. In the Notice of Work Offer, Form 10133.35 such a warning is provided:

NOTICE TO THE PARTIES

If the offer is not accepted or rejected within 30 days of the offer, the offer is deemed to be rejected by the employee.

If a dispute occurs regarding the above offer or agreement, either party may request the Administrative Director to resolve the dispute by filing a Request for Dispute Resolution (Form DWC-AD 10133.55) with the Administrative Director.

A similar warning should be provided with the Description of Job form. The employee should be advised that the job description must be signed within a reasonable period (10 days after receipt) and that if a dispute occurs the employee may request assistance from the AD or the Information and Assistance Office.

Thank you for considering our testimony. Please contact me if further clarification is needed.

Sincerely,

Michael McClain
General Counsel, California Workers' Compensation Institute

MMc/pm

cc: Destie Overpeck, DWC Acting Administrative Director
CWCI Claims Committee
CWCI Medical Care Committee
CWCI RTW Group
CWCI Legal Committee
CWCI Regular Members
CWCI Associate Members