

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR**

REVISED FINAL STATEMENT OF REASONS

**Subject Matter of Regulations: Return to Work Supplement Program
California Code of Regulations, Title 8, Article 1
Sections 17300-17310**

UPDATED INFORMATIVE DIGEST

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Rulemaking and Initial Statement of Reasons.

UPDATED AUTHORITY AND REFERENCE

The final sentence of the Authority and Reference section of the Notice of Proposed Rulemaking erroneously reads: “The Director is also acting under authority of sections 58-59 of the Labor Code.” That section should have read: “The Director is also acting under authority of sections 54, 55 and 59 of the Labor Code.”

**ADDITIONAL DOCUMENTS RELIED UPON
OR INCORPORATED BY REFERENCE**

The Rulemaking File for Regulatory Action Number 2015-0130-03S which was submitted to the Office of Administrative Law on January 30, 2015, and withdrawn on March 11, 2015, is incorporated herein by reference.

DETERMINATION OF MANDATE

The Director has determined that the proposed regulations do not impose a mandate on local agencies or school districts or a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code because the proposed regulations will not require local agencies or school districts to incur additional costs in complying with the proposal. Furthermore, these regulations do not constitute a “new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California constitution.”

DETERMINATION OF ALTERNATIVES

In accordance with Government Code section 11346.9, subdivision (a)(4), the Director has determined that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the Department’s attention would be more effective in carrying out the purpose for which the regulations are proposed, would be as effective and less

burdensome to affected private persons than the adopted regulations, or would be more cost effective to affected private persons and equally effective in implementing the provisions of Labor Code section 139.48. The Department invited interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearings or during the written comment period. To date, no reasonable alternative has been brought to the attention of the Director that would be as effective and less burdensome to affected persons than the proposed action.

MODIFICATIONS TO THE TEXT OF THE PROPOSED REGULATIONS AS ORIGINALLY NOTICED

The following modifications have been made to the originally noticed text of the proposed regulations in the final text submitted to the Office of Administrative law. These modifications were made available to the public for a 15-day comment period pursuant to Government Code section 11346.8, subdivision (c) between March 17 and April 1, 2015.

In summary, all of the proposed regulations were renumbered, from sections 25101 through 25111 to sections 17300 through 17310, and modified by adding Authority and Reference citations. Additional modifications have been made to the text of proposed sections 17301 (formerly 25102), 17302 (formerly 25103), 17303 (formerly 25104), 17307 (formerly 25108), and 17308 (formerly 25109).

1. Proposed section 17300 has been modified from the originally noticed text to read:

2510117300. General, Scope and Application of Article

(a) This article governs the return-to-work program established by Labor Code section 139.48. This program shall be called the Return-to-Work Supplement Program. The Return-to-Work Supplement Program is located at 1515 Clay Street, 17th Floor, Oakland, California, 94612.

(b) This program is intended to provide supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. This program is based on findings of studies done by RAND concerning permanent disability and in particular the study entitled Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments, RAND, February 2014.

http://www.dir.ca.gov/chswc/Reports/2014/Earnings_Losses_2014.pdf

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48, Labor Code.

2. Proposed section 17301 has been modified from the originally noticed text to read:

~~25102~~17301. Definitions

For the purpose of these rules:

- (a) “Supplemental Job Displacement Benefit” means the benefit provided under Labor Code 4658.7.
- (b) “Voucher” means ~~a the document evidencing the redeemable promise of payment provided under Labor Code section 4658, “Supplemental Job Displacement Nontransferable Voucher For Injuries Occurring on or After 1/1/13” (F~~form DWC-AD 10133.32) furnished by a claims administrator to an injured worker pursuant to section 10133.31.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48 and 4658.7, Labor Code.

3. Proposed section 17302 has been modified from the originally noticed text to read:

~~25103~~17302. Eligibility

- (a) To be eligible for the Return-to-Work Supplement, the individual must have received the Supplemental Job Displacement Benefit (SJDB) Voucher for an injury occurring on or after January 1, 2013.
- (b) An individual who has received a Return-to-Work Supplement may not receive a second or subsequent Return-to Work-Supplement, except where the individual receives a Voucher for an injury which occurs subsequent to receipt of every previous Return to Work Supplement.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48 and 4658.7, Labor Code.

4. Proposed section 17303 has been modified from the originally noticed text to read:

~~25104~~17303. Notice

~~Any Voucher issued more than~~Commencing 30 days after the effective date of these regulations, and continuing until the Administrative Director of the Division of Workers’ Compensation amends Form DWC-AD 10133.32 to include notice of the Return-to-Work Supplement application process, all Vouchers issued shall be accompanied by a cover sheet, prepared by the claims administrator, containing the following notice on page 6, proof of service, of form DWC-AD 10133.32, 2/5/14, or as an attachment to that form: “Because you have received this
Voucher and are unable to return to your usual employment you may be eligible

for a Return-to-Work Supplement. You must apply within one year from the date this Voucher was served on you. You should make a copy of the Voucher which you will need to apply for the Return-to-Work Supplement. Details about the Return-to-Work supplement program are available from the Department of Industrial Relations on its web site, www.dir.ca.gov, or by calling 510-286-0787.” The Director will arrange for publication on the Department web site of a notice targeted at eligible persons who received vouchers before the notice was included ~~on~~ with the voucher.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48 and 4658.7, Labor Code.

5. Proposed section 17304 has been modified from the originally noticed text to read:

2510517304. Deadline for Application

An application for the Return-to-Work Supplement must be received by the Return-to-Work Supplement Program within one year from the date the Voucher was served on the individual or within one year from the effective date of these regulations, whichever is later.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48, Labor Code.

6. Proposed section 17305 has been modified from the originally noticed text to read:

2510617305. Method of Application

An application must be submitted by electronic means through the Department of Industrial Relations web site. The Department will make access to this web site available at each Division of Workers’ Compensation Information and Assistance Office location in the state.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48, Labor Code.

7. Proposed section 17306 has been modified from the originally noticed text to read:

2510717306. Application Contents

The application shall be made on the electronic form on the Department of Industrial Relations web site and shall include a declaration under penalty of perjury that the information provided is true and correct. The application shall contain the individual’s first name, last name and middle name, social security number or tax ID number, address, telephone number and email address, if available, and the ADJ number of any workers’ compensation cases filed by the

individual, and the individual shall submit a .pdf or .tiff of the Voucher as an attachment to the application. The individual shall indicate whether the individual is a California resident or a non-resident.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48, Labor Code.

8. Proposed section 17307 has been modified from the originally noticed text to read:

~~25108~~17307. Processing of Applications and Decision on Applications

All completed and timely filed applications will be reviewed and a decision will be made on whether the individual is entitled to the supplement within 60 days of the receipt of the completed application. Applications satisfying the requirements of sections 17302, 17304, 17305 and 17306 will be approved. The individual will be notified by mail or, where available, email, of the decision. The decision is a final decision of the Director.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48, Labor Code.

9. Proposed section 17308 has been modified from the originally noticed text to read:

~~25109~~17308. Supplement Payment

The Return- to-Work Supplement Program will provide a supplement of \$5,000.00 to each eligible individual who submits a complete application by the deadline. The payment will be made within 25 days of the date the decision of the Director on the application and will be paid in one lump sum. Payment shall be made directly to the individual and is not assignable before payment. The amount of this supplement may be adjusted by the Director ~~from time to time~~ based on further studies conducted by the Director in accordance with Labor Code section 139.48 ~~and or based on consideration of the number of anticipated recipients.~~

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.

Reference: Section 139.48, Labor Code.

10. Proposed section 17309 has been modified from the originally noticed text to read:

~~25110~~17309. Appeal to the WCAB

An individual dissatisfied with any final decision of the Director on his or her application for the Return-to-Work Supplement may, file an appeal at the Workers' Compensation Appeals Board (WCAB) District Office. The appeal must contain the name of the individual, the ADJ number of the case in which a

voucher was provided, and a clear and concise statement of the facts constituting the basis for the appeal. A copy of the appeal shall be served on the Return-to-Work Program located at 1515 Clay Street, 17th Floor, Oakland, California, 94612. Any appeal must be filed with the WCAB within 20 days of the service of the decision. After an appeal has been timely filed, the Return-to-Work Program may, within the period of fifteen (15) days following the date of filing of that appeal, amend or modify the decision or rescind the decision and take further action. Further action shall be initiated within 30 days from the order of rescission. The time for filing an appeal will run from the filing date of the new, amended or modified decision. Any such appeal will be subject to review at the trial level of the WCAB upon the same grounds as prescribed for petitions for reconsideration.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.
Reference: Section 139.48, Labor Code.

11. Proposed section 17310 has been modified from the originally noticed text to read:

~~25111~~17310. False Claims

An application for benefits from the Return-to-Work Supplement Program is a claim for benefits from the state.

The application shall contain the following notice:

“WARNING: any person who knowingly makes or uses a false record or statement material to the claim is liable for treble damages plus a civil penalty of not less than \$5,500 and not more than \$11,000 plus the cost of the action pursuant to the False Claims Act, Government Code sections 12650-12656.”

This warning does not constitute a limitation on any penalties that may attach to any action in violation of the law.

Note: Authority cited: Sections 54, 55 and 139.48, Labor Code.
Reference: Section 139.48, Labor Code; and Sections 12650, 12651, 12652, 12653, 12654, 12655 and 12656, Government Code.

**SUMMARY OF AND RESPONSE TO WRITTEN COMMENTS
RECEIVED DURING THE 45-DAY PUBLIC COMMENT PERIOD**

The Department received eight letters or emails of written comments during the 45-day public comment period.

1. Ms. Hazel Ortega of Ortega Counseling Center commented, in summary, as follows:

a. Will the applicant attorney receive a fee from this fund or can the applicant attorney charge for work done to request this benefit for a client?

RESPONSE: Labor Code section 139.48, which establishes the return-to-work program, is silent on the issue of attorney fees, and these regulations do not contemplate the payment of attorney fees related to obtaining this benefit.

b. Do you have a phone number to call for questions regarding the voucher rules?

RESPONSE: We recommend contacting the Information and Assistance Officer at the applicable Workers' Compensation Appeals Board District Office.

2. Ms. Vanessa Gomez, Senior Operations Analyst, and Ms. Peggy Thill, Claims Operations Manager, of the State Compensation Insurance Fund Claims Medical and Regulatory Division, commented, in summary, that they appreciate the time and effort that the Department has put into these proposed regulations and that State Fund has no comment at this time.

RESPONSE: The Director thanks Ms. Gomez and Ms. Thill for their comments.

3. Ms. Diane Worley of the California Applicants' Attorneys Association ("CAAA") commented as follows:

a. "CAAA strongly supports the general framework of these draft regulations. We believe these draft regulations properly implement the intent of the Legislature in enacting Labor Code §139.48; specifically, to establish a simple and expeditious process to provide supplemental payments to injured workers with disproportionately low permanent disability benefits.

The February 2014 RAND study '*Identifying Permanently Disabled Workers with Disproportionate Earnings Losses for Supplemental Payments*' has two key findings: 1) all workers who have a permanent disability resulting from their work injury experience significant earnings losses, and 2) earnings losses are exceptionally severe for those workers who do not return to their old job after their injury.

The RAND study recommends that based on these findings eligibility for the supplemental compensation be based on the failure of an employer to provide a qualified offer of return to work. We agree that this is the most appropriate basis on which to determine eligibility."

RESPONSE: The Director thanks CAAA for its comment.

b. Comments on proposed section 17300 (formerly 25101). General, Scope and Application of Article:

"As this section lays the foundation for the implementation of the Return to Work Supplement Program, it is imperative that it incorporate the statutory language set forth in Labor Code §139.48. Therefore, we recommend that the following subdivision be added to this section.

(c) This program shall be funded by one hundred twenty million dollars (\$120,000,000) annually derived from non-General Funds of the Workers' Compensation Revolving Fund and it is the intent that all funds appropriated for this program be paid out each year to eligible applicants as defined in Section 25103. Moneys shall remain available for use by the return-to-work program without respect to the fiscal year."

RESPONSE: The Director disagrees with this comment. This commenter suggests incorporating the statutory language into the regulation. DIR declines to do so because the Government Code provides that regulations are not the place to simply repeat the language of the enabling statute.

c. Comments on proposed section 17301 (formerly 25102). Definitions:

"In order to eliminate potential confusion, we recommend that the definition of "voucher" in subdivision (b) be simplified, which can be accomplished by the following recommended revision.

(b) "Voucher" means the ~~document evidencing the redeemable promise of payment provided under Labor Code section 4658.7~~ "Supplemental Job Displacement Nontransferable Voucher For Injuries Occurring on or After 1/1/13" (Form DWC- AD 10133.32)"

RESPONSE: The Director thanks CAAA for this comment and has made the suggested revision to proposed section 17301, subdivision (b).

d. Comments on proposed section 17302 (formerly 25103). Eligibility:

"We support the proposal that eligibility for the Return to Work Supplement be based on the failure of an employer to provide a qualified offer of return to work after an injury. Receipt of the Supplemental Job Displacement Benefit Voucher is evidence that the injured worker did not receive this offer. We recommend that subdivision (a) be amended to add the word voucher for consistency and clarity.

(a) To be eligible for the Return-to-Work Supplement, the individual must have received the Supplemental Job Displacement Benefit (SJDB) Voucher for an injury occurring on or after January 1, 2013.

As Labor Code §139.48 has been in effect since enactment of SB 863 in 2012, for dates of injuries occurring on or after January 1, 2013, it is possible that an injured worker may have received more than one Voucher by the time these regulations are final, for injuries occurring in 2013 and 2014. However, no Return to Work Supplement will have been paid before receipt of the voucher from the second injury, as the implementing regulations were not finalized. Subdivision (b) as currently drafted, would bar otherwise eligible individuals from obtaining a second Return to Work Supplement payment, despite being unable to return to their pre-injury job. The number of injured workers who will be in this situation will obviously be very limited,

but these regulations must account for payments to be made to all eligible injured workers. Therefore, we recommend that subdivision (b) be amended to restrict payment of a second or subsequent Return to Work Supplement, to receipt of a voucher, and not receipt of a payment from the Return to Work Supplement Fund.

(b) An individual who has received a Return-to-Work Supplement may not receive a second or subsequent Return-to Work-Supplement, except where the individual receives a Voucher for an injury which occurs during employment obtained subsequent to receipt of a ~~every~~ previous Voucher ~~Return to Work Supplement.~~”

RESPONSE: The Director thanks CAAA for the suggested revision to proposed section 17302, subdivision (a) and has made the suggested revision. The Director declines to make the suggested revision to proposed section 17302, subdivision (b), however, because the hypothetical situation described seems likely to apply to few if any injured workers and only in the earliest implementation of the Return-to-Work Supplement. Beyond this initial period, the less specific proposed language could lead to confusion.

e. Comments on proposed section 17303 (formerly 25104). Notice:

“CAAA looks forward to working with the DIR to identify workers with post 1/1/13 injuries who received vouchers before the effective date of these regulations

With regard to the Notice requirements, we believe if informational material on the Return to Work Supplement is to be provided through the Department of Industrial Relations website, the Notice must set out an easily accomplished process for injured workers to access this material.

Although we support making as much information as possible available on the internet, it must be recognized that significant segments of the injured employee population do not have ready access to computers and the internet. Many employees, including older workers, laborers, or farm workers, do not use computers in their jobs and have little or no familiarity with computers. We understand that in some instances individual workers will have family members who have more understanding of computers and the internet, but the regulations should establish a process under which most workers can access the necessary forms and information without relying on other family members.

Therefore, we recommend that the regulations be amended to provide that an application shall be attached to the voucher. This will insure access to the Return to Work Supplement Program for those injured workers who do not have easy access to a computer.

Additionally, a significant number of workers in California do not speak English fluently, or at all, and currently most sections of the Department’s website are only in English. This will bar thousands of employees in California whose first language is other than English from accessing this information.

Labor Code section 124(b) states "Forms and notices required to be given to employees by the division shall be in English and Spanish."

Therefore, as these rules intend to have the Department's website become a primary source for injured workers to access information, there must also be a Spanish version of the website to comply with the statute. This will insure equal access for the large population in California of Spanish speaking injured workers.

Additionally, a Spanish language version of the Notice must be provided to comply with the statute.

We are also puzzled why the rules for the Notice would provide that it be placed "on page 6, proof of service, of form DWC-AD 10133.32". In order to make certain that workers are made aware of this important new fund, we recommend that the Notice be required to be prominently displayed on page 1, in bold print, and not hidden after the proof of service. As an alternative, the Notice could be provided as a cover attachment to the voucher.

Lastly, we recommend that the regulations require that a copy of the Voucher shall be provided to the Director by the claims administrator at the time it is issued, including the name and social security number of the injured worker. This will avoid any dispute with regard to eligibility in the application process.

Based on these recommendations, we suggest the following revisions to section 25104.

Any Voucher issued more than 30 days after the effective date of these regulations shall contain the following notice on page 1 6, proof of service, of form DWC-AD 10133.32, or as an a cover attachment to that form: "Because you have received this Voucher and are unable to return to your usual employment you may be eligible for a Return-to-Work Supplement. You must apply within one year from the date this Voucher was served on you. You should make a copy of the Voucher which you will need to apply for the Return-to-Work Supplement. Details about the Return-to-Work supplement program are available from the Department of Industrial Relations on its web site, www.dir.ca.gov, or by calling 510-286-0787." A copy of the Voucher shall be provided to the Director by the claims administrator at the time it is issued, including the name and social security number of the injured worker. The Director will arrange for publication on the Department web site of a notice targeted at eligible persons who received vouchers before the notice was included on the voucher. Notice will also include a copy of the application to apply for payments from the fund, which can be submitted by mail or electronically. Instructions on how to submit the form electronically or by mail shall be included on the application."

RESPONSE: The Director thanks CAAA for the suggested revision regarding the location and manner providing of notice in proposed section 17303. As originally noticed, proposed section 25104 (now 17303) required that the notice be placed either on page 6 of the Voucher or as an attachment to it. After carefully reviewing the Voucher language, we had

determined that page 6 was the best location because many of the other pages must be filled out by the recipient and returned. Page 6, which contains the proof of service, by contrast is retained by the recipient and reflects the date that the Voucher was issued which is a critical factor in determining eligibility and the timeliness of the application. After due consideration, however, the Director has determined that a more prominent location for the notice is necessary and is coordinating with the Administrative Director of the Division of Workers' Compensation to include that notice in a revised version of form DWC-AD 10133.32. Until that revision is made, notice will be provided via a cover sheet accompanying the voucher which will be prepared by the claims administrator.

The Director declines, however, to adopt the other suggested revisions to proposed section 17303. One of the significant goals in developing these regulations and the Return-to-Work Supplement application process was to keep administrative costs for this benefit to a minimum and to avoid placing any additional burdens on claims administrators in the provision of the benefit. After considering all of the alternatives, the Director determined that a fully electronic application process was the most cost effective and efficient. Maintaining alternative processes to allow application both on-line or by mail and requiring claims administrators to submit copies of the Vouchers to the Department would require the creation of paper files for each application which would add significantly to the administrative costs for the benefit and place an additional burden on claims administrators. While the Director realizes that not all injured workers may have internet access in their homes, the Department is addressing the access issue by setting up access kiosks at the Information and Assistance Offices at all Workers' Compensation Appeals Board District Offices. We note that free internet access is also available at many public libraries and other public locations. After the earliest implementation of the benefit to applicants who may be entitled to a Return-to-Work supplement, but have otherwise completed their interaction with the Board, applicants will become aware of the benefit and their entitlement to a Voucher while they are still involved in direct interaction with the Board and will be able to conveniently use the access kiosk at the applicable Board District Office if they do not have internet access at home. The Department will also be making efforts to reach out to individuals who have already qualified for the benefit but are no longer directly interacting with the system to facilitate their ability to apply for the benefit. After careful consideration, the Director believes that the benefits of an entirely electronic application system outweigh the alternatives.

Finally, as noted by CAAA's comment, Labor Code section 124, subdivision (b) states "Forms and notices required to be given to employees by the division shall be in English and Spanish." The Department intends to comply with this requirement in the implementation of this benefit and, because the requirement already exists in statute with regard to all forms and notices, the Director believes that it would be unnecessary and duplicative to repeat it in these regulations.

f. Comments on proposed section 17305 (formerly 25106). Method of Application:

"With regard to the proposed process for submitting an application, we recommend that the regulations also allow an application to be submitted by mail. Having alternative methods to apply will insure simple and easy access for all injured workers who are eligible. Allowing only electronic submission would be a hardship for some workers, particularly those with lower income, severe disabilities, and/or limited English-language skill. Providing that the worker can

complete the electronic filing at the district office may help some workers, but will require the worker to travel to the district office, which can be difficult and/or costly particularly for workers in rural areas. In order to make this program accessible to all workers, we believe there should be some provision for mailing a paper application, and therefore, we recommend the following revision.

An application ~~may~~ must be submitted by electronic means through the Department of Industrial Relations web site or by mail. The Department will make access to this web site available at each Division of Workers' Compensation Information and Assistance Office location in the state."

RESPONSE: The Director declines to adopt the suggested revisions to proposed section 17305 for the reasons expressed in response to CAAA's comments on proposed section 17303, above.

g. Comments on proposed section 17306 (formerly 25107). Application Contents:

"For the reasons set forth in our written comments to section 25106, we believe that having an electronic only means of submitting an application for the return to work supplement will deny equal access to applying for the supplemental payment for many eligible injured workers.

We also note that the requirement to provide a pdf or tiff copy of the Voucher with the application will require equipment (a scanner) that many workers will not have. In fact, it is likely some workers will not even know what a "pdf" or "tiff" is. The inevitable result will be mistakes and incomplete applications, which will only add delay, expense and friction to the process. We believe it would be more efficient to have the employer, upon issuance of the voucher, either provide the Division a copy of the voucher or identify the worker to whom the voucher was provided.

Lastly, there is no requirement in Labor Code section 139.48, that an injured worker be a resident of California at the time they apply for the return to work supplement. Therefore, the application should not request this information. Additionally, the application will include the injured worker's address and so this information is not needed.

CAAA's suggested revisions to section 25107 are below.

The application shall be made on either the electronic form on the Department of Industrial Relations web site or paper form to be submitted by mail and shall include a declaration under penalty of perjury that the information provided is true and correct. The application shall contain the individual's first name, last name and middle name, social security number or tax ID number, address, telephone number and email address, if available, and the ADJ number of any workers' compensation cases filed by the applicant. ~~and the applicant shall submit a pdf or tiff of the Voucher as an attachment to the application. The individual shall indicate whether the individual is a California resident or a non-resident."~~

RESPONSE: With regard to the fully electronic application process adopted by the proposed regulations versus the hybrid system proposed by CAAA, please see the response to CAAA's comments on proposed section 17303, above. With regard to submission of a copy of the Voucher in electronic format, applicants can request assistance or clarification from an Information and Assistance Officer. Scanning and printing facilities will be available at the Board access kiosks. In addition, most digital cameras and telephones with cameras can photograph the voucher either in one of the required formats or in a format that can be easily converted. With regard to including a question on California residency status, CAAA is correct that this information is not explicitly required by Labor Code section 139.48. We have been advised by Department Accounting, however, that a Payee Data Record (STD. 204), which includes California residency status as one of its fields, may need to be prepared before payment can be issued to some injured workers. This information will be collected for that purpose only and has no effect on eligibility for the Return-to-Work Supplement. For these reasons, the Director declines to adopt the suggested revisions to proposed section 17306.

h. Comments on proposed section 17307 (formerly 25108). Processing of Applications and Decision on Applications:

"It is important to recognize that most workers have no experience in the workers' compensation system, and consequently this process should be designed to assure that all eligible workers have a reasonable opportunity to receive this Supplemental Payment. Therefore, we recommend that a process be considered if an application is timely received but not complete.

We recommend that if an incomplete application is received that the worker be notified that the incomplete application will not be processed and informed that he or she will lose their right to receive this Supplemental Payment unless the application is corrected and timely submitted within a reasonable time period, such as 30 days.

Additionally, the Appeals Process should be explained in the final decision.

Suggested revisions to section 25108 are below.

All completed and timely filed applications will be reviewed and a decision will be made on whether the individual is entitled to the supplement within 60 days of the receipt of the completed application. The individual will be notified by mail and ~~or~~, where available, email, of the decision. The decision is a final decision of the Director . The Appeals Process will be explained in the final decision. If an application is received that is timely but incomplete, the applicant will be notified of the required information needed by mail, and, where available, email , and the application will be held for 30 days. If the required information is received within that time, the 60 day period for issuing a decision will relate back to the date the complete application was received. The notice that the application is incomplete shall inform the injured worker that he or she will lose their right to receive this Supplemental Payment unless the application is corrected."

RESPONSE: The Director declines to adopt the suggested revisions to proposed section 17307 because the programming of the on-line application system that has been developed makes it nearly impossible to submit an incomplete application. As specified in proposed section 17306, the only information necessary to complete the application is the individual's first name, last name and middle name, social security number or tax ID number, address, telephone number and email address, if available, the ADJ number of any workers' compensation cases filed by the applicant and an electronic copy of the Voucher. All of which should be readily known by or available to the applicant. Each of these pieces of information will go into a separate required field of the on-line application and the application cannot be submitted if any of these required pieces of information is missing. While there may be an occasional typographical error, it is not anticipated that the system will allow the submission of any incomplete applications. If the decision is to deny the benefit, the appeal process will be explained in the denial letter. This is the standard practice of the Department and the Director does not believe it is necessary to explicitly state it in every regulation.

i. Comments on proposed section 17308 (formerly 25109). Supplement Payment:

"CAA supports the adoption of the proposed \$5,000 initial payment under this program. This provides for a simple and expeditious process to provide supplemental payments to injured workers. It is our understanding that this figure has been proposed based on the estimate made by RAND that there could be up to 24,000 workers annually who qualify for the supplemental payment. If the RAND estimate turns out to be correct, the total annual payout under this program will equal \$120 million, the amount of annual funding as set forth in §139.48. However, because the program is new, it is very likely that the number of workers who actually apply for this program will be either greater or less than the RAND estimate. The draft regulation does permit adjustment of the payment amount, but provides no guidance as to how or when such adjustment should be made. In order to clarify this provision we recommend that language be added to specify that the intent of any such adjustment in the amount is to assure that the annual payout under the program will equal, but not exceed, the aggregate annual funding for this program.

Of even greater importance is how the return to work supplement funds will be paid out in the first year of the program, after the implementing regulations are adopted.

Labor Code section 139.48 provides for an assessment of \$120 million annually. As this mandate has been in effect since 2012, \$120 million should have been assessed in 2013 and 2014. In 2015, another \$120 million dollars will be assessed. Consequently, in early 2015 when these regulations are finalized, there should be \$360 million in total assessments in this Fund. We recommend that the draft regulations describe how this fund will be implemented in the first year. This should provide a full disclosure by the Director as to how much money will be in the fund in 2015, so amendments to this section can fully account for how the supplemental payments will be made, and carried over to the next year, as it is virtually certain that there will be excess funds after \$5000 is paid to every eligible injured worker who applies in 2015.

We suggest the following revisions to section 25109, pending further clarification from the Director on the current amounts that have been assessed, and available in the Workers' Compensation Revolving Fund.

The Return-to-Work Supplement Program will provide a supplement of \$5,000.00 to each eligible individual who submits a complete and timely application by the deadline. The payment will be made within 25 days of the date the decision of the Director on the application becomes final and will be paid in one lump sum. Payment shall be made directly to the individual and is not assignable before payment. The amount of this supplement may be adjusted by the Director from time to time based on further studies conducted by the Director in accordance with Labor Code section 139.48 and with consideration of the number of anticipated recipients in order to ensure that the aggregate annual payments under this Return-To-Work Supplemental Program equal, but do not exceed, the annual funding for this program as provided under Labor Code §139.48."

RESPONSE: The Director appreciates CAAA's support of the determination to set the initial benefit rate at \$5,000.00. The Director disagrees, however, with CAAA's assertion that the amount available in the Return-to-Work Supplement fund for 2015 should be \$360 million.

Pursuant to Labor Code 62.5 and the published annual assessment methodology for the Workers Compensation Administration Revolving Fund ("WCARF"), adjustments are made to the annual assessment amount for each fund within the WCARF to ensure that the revenue received is sufficient to meet annual operational and cash flow needs and cover system costs. Following the assessment methodology, the beginning fund balance for each fiscal year, which consists of any surplus remaining from the prior fiscal year, is subtracted from the current year's assessment amount to ensure that the aggregate assessment for that year for each fund does not exceed the amounts appropriated by the annual Budget Act, plus any program/system and cash flow needs.

In accordance with Labor Code 139.48, the 2013/14 and 2014/15 assessments each included an assessment of \$120 million for the Return-to-Work Supplement program. Any unspent monies at the conclusion of these fiscal years, however, including but not limited to any unspent Return-to-Work funds, increased the beginning balance of the WCARF for the next fiscal year and was subtracted from the following year's assessment. Consequently, the amount available for the Return-to-Work program in the 2014/15 fiscal year is \$120 million. This will remain true in all future fiscal years, as any unspent funds will be subtracted from the next year's assessment of \$120 million for this program.

The language in Labor Code section 139.48 stating "*Monies shall remain available for use by the return-to-work program without respect to fiscal year*" does not mean that unspent Return-to-Work program monies aggregate from year-to-year. Rather, it simply means that \$120 million is to be set aside for this purpose each year out of the funds appropriated by the annual Budget Act for the WCARF. In order for the funds to aggregate from year-to-year, as suggested by CAAA, the Legislature would need to specify the carryover from the prior fiscal year in the Budget Act as a carryover appropriation for this purpose. It has not done so and, therefore, the Department's

determination is that the Return-to-Work fund for the current fiscal year consists of \$120 million as specified by Labor Code section 139.48.

Finally, because the amount in the Return-to-Work program fund is not variable, as suggested by CAAA, the Director does not believe that the additional language suggested with regard to adjustment of the benefit amount is necessary.

4. Dr. Rob Cottle, Acting Chair of the International Association of Rehabilitation Professionals (“IARP”) California Legislative Committee, commented, in summary, as follows:

a. “We recognize that this is a new program that operates in addition to and somewhat outside of the normal Workers’ Compensation benefit delivery system, but that it most integrate with that benefit delivery system as smoothly as possible. The Division appears to have accomplished that integration.”

RESPONSE: The Director thanks Mr. Cottle for his comment.

b. Access to the application process must be broad and more readily available and language, computer access, and other similar factors must be dealt with at this time and not left to a future date when a class of otherwise eligible injured workers is disenfranchised.

RESPONSE: The Director has thoroughly considered these concerns and believes that they are addressed by the on-line application process that we have developed. For a more thorough response on these issues, see the response to CAAA’s comments on proposed section 17303, above.

c. IARP encourages the Director to include in regulations a description of the specific process that the Division will follow to inform the State Controller's Office that payment is to be made, a timeframe for that communication, and time frame for delivery.

RESPONSE: The Director does not believe that Mr. Cottle’s recommendation is necessary. Section 17308 of the proposed regulations already states that payment of the Return-to-Work Supplement “will be made within 25 days of the date of the decision of the Director on the application.” As initially implemented, checks for this benefit will be generated internally by the Department without the involvement of the State Controller’s Office. The State Controller’s Office may become involved in this process in the future, but, if that happens, the interaction between the two agencies would be governed by an interagency agreement and would not be an appropriate subject for regulation.

5. Mr. Douglas Gorman of Contra Costa County Risk Management commented, in summary, as follows:

a. Mr. Gorman asks for clarification as to whether the Division of Workers’ Compensation (“DWC”) will revise the voucher itself to include the notification language regarding the Return-to-Work Supplement and how to apply or whether the employer will be required to add notification language to the training vouchers themselves. Mr. Gorman

expresses the preference that DWC revise the voucher to include the required notification language.

RESPONSE: The Director thanks Mr. Gorman for his comment. As originally noticed, proposed section 25104 (now 17303) provided both options suggested by Mr. Gorman. As discussed in response to CAAA's comments on proposed section 17303, above, the Director is coordinating with the Administrative Director of the Division of Workers' Compensation to include the notice in a prominent location in a revised version of form DWC-AD 10133.32. Until that revision is made, however, notice will be provided via a cover sheet accompanying the voucher which will be prepared by the claims administrator.

b. Per Labor Code section 10133.31, subdivision (b), doctors (PTP/QME/AME) are required to utilize DWC form 10133.36 "Physician's Return to Work & Voucher Report" and identify work capacities and activity restrictions that are relevant to regular/modified/alternative work. Mr. Gorman's observation, to date, is that usage of this form has been "zero". The concern is that a delay in determining available mod/alt work and associated delay in determining that an employee is entitled to the training voucher is a delay in the employee being able to pursue the RTW supplement. The proposed rule directly ties the RTW supplement eligibility to receipt of the SJDB, the doctor problem as noted is a RTW supplement problem. Is the DWC making efforts to encourage/require doctors to start utilizing form 10133.36 other than indicating on the form that completion is mandatory?

RESPONSE: The Director acknowledges Mr. Gorman's concern and anticipates that compliance will increase with education and exposure to the form. Because form 10133.36 is governed by a separate statute and regulations, however, it is beyond the scope of the proposed regulations.

6. LatinoComp commented, as follows:

"First, given the benefit decreases wrought by SB 863 and implementing regulations the \$120 Million RTW Fund was promised to off-set some of these benefit decreases. The RTW Fund was an integral part of SB 863 and designed to compensate ALL injured workers who suffered greater than anticipated earnings losses due to the industrial injury. Based on the February, 2014 RAND Corporation white paper (RAND 02114 White Paper), virtually all injured workers who do not return to their same job or similar, suffer extreme loss of earnings (90% and above) irrespective of their actual level of permanent disability. RAND 02114 White Paper Table 4. Unfortunately, the levels of reimbursement from the RTW Fund discussed in the study are only a fraction of these uncompensated losses. RAND 02114 White Paper Table 5 (ranging from \$4,950.00 to \$11,662.00).

Second, the RAND 02114 White Paper ASSUMES, without citation to data, that the number of injured workers who receive the SJDB will double based on the existence of potential funds from the RTW Fund. This assumption is not supported by any facts. The only basis cited for this assumption is that under the OLD vocational rehabilitation programs which ended ten (10) years ago approximately 40% of the injured workers participated in that program. However, that program was vastly different from the current SJDB and RTW Fund. Under Vocational

Rehabilitation, the injured workers received a weekly stipend called Vocational Rehabilitation Maintenance Allowance (VRMA) while participating in retraining AND that program allowed for a total of \$16,000.00 to be spent on retraining, not the current \$6,000.00 for SJDB post 01/01/2013 injuries. This erroneous assumption, in effect, cuts in half the amount of the RTW Fund payment to each worker. This is simply not supported by any evidence, study or data.

Third, an additional barrier exists to injured workers receiving the SJDB currently - DWC Form 10133.36. Absent that form, an injured worker cannot get the SJDB and the employer is under no obligation to provide the SJDB (and thus no eligibility for the RTW Fund). In our collective experience, due to the newness of the form, the majority of treating doctors, QME's and AME's are NOT filling out this form, thereby precluding the injured workers from getting the SJDB and, per the proposed Regulations, barring them from getting their share of the RTW Fund.

Therefore, LatinoComp proposes that alternative eligibility bases be provided for the RTW Fund in addition to the SJDB receipt. In addition, since in our view the number of injured workers who receive the SJDB will, at best remain at 20%, and probably decrease over current levels, that the amount of the RTW Fund per 'eligible' injured worker be at the maximum identified by the RAND 02114 White Paper or \$11,662.00."

RESPONSE: The Director acknowledges LatinoComp's concerns regarding current use of form 10133.36 and anticipates that compliance will increase with education and exposure to the form. Because form 10133.36 is governed by a separate statute and regulations, however, it is beyond the scope of the proposed regulations. As discussed in the Initial Statement of Reasons, other bases for eligibility have been considered, but we have determined that receipt of a Supplemental Job Displacement Voucher is the best option. Please note that other commenters, such as CAAA, have expressed their support for this approach. With regard to the benefit amount, the Director has determined that, in the interest of ensuring that the benefit is available to as many injured workers as possible, it is wisest to start with a more conservative initial benefit amount of \$5,000.00, which is at the lower end of the spectrum in the Rand report. While comparisons to the former VRMA program are, of necessity, inexact, because the details and focus of the two programs are different, the Director believes that the Rand report provides sound analysis and a sound basis for the initial implementation of the Return-to-Work Supplement program. As specified in Labor Code section 139.48 and proposed section 17308, however, the benefit amount is subject to adjustment based on further studies. Again, please note that other commenters, again including CAAA, have expressed their support for the initial \$5,000.00 benefit amount.

7. Mr. Jason Schmelzer of the California Coalition on Workers' Compensation, Mr. Jeremy Merz of the California Chamber of Commerce, Mr. Michael Shaw of the California Manufacturers & Technology Association, Ms. Faith Conley of the California State Association of Counties, and Mr. Paul Smith of the Rural County Representatives of California, commented, in summary, as follows:

a. “We would like to commend the Department of Industrial Relations’ (DIR) efforts to implement the RTW Fund in a way that limits administrative costs, litigation, and claims administrator involvement.”

RESPONSE: The Director thanks these individuals for their comment.

b. “Employers that supported SB 863 continue to believe that the RTW Fund would be funded through the assessment to the level of \$120 million. Then as injured workers became eligible for benefits and the Fund was depleted, employers would be assessed the amount needed to return the balance to \$120 million.”

RESPONSE: The Director agrees with this comment. In brief, the Return-to-Work fund will be funded through the assessment to the level of \$120 million each fiscal year less any surplus from the prior fiscal year. For a more detailed discussion of this topic, see the response to CAAA’s comments on proposed section 17308, above.

c. “Our organizations are concerned that the proposals referenced above could ultimately lead to oversubscription of the benefit, depletion of the fund, and lead to calls for increasing the \$120 million cap. We respectfully request that the Director exercise the authority granted under the proposed regulations to adjust the benefit level to an appropriate amount based on the resources available.”

RESPONSE: The Director acknowledges the commenters’ concern. We believe that this is already addressed by the initial benefit amount of \$5,000.00 which is contained in the proposed regulations and which falls at the lower end of the spectrum of uncompensated losses in the Rand study. The Director thanks the commenters for their support of a conservative initial benefit amount.

d. “Our coalition strongly believes that the State of California should be assessed for the RTW Fund if state employees are to be eligible for supplemental payments under this program. If not, California’s public and private sector employers will be subsidizing the state’s participation in a program that is meant to augment benefit payments to injured workers.”

RESPONSE: With Labor Code section 139.48, the Legislature established the Return-to-Work Supplement benefit for injured workers generally and specified that it is to be funded from the non-General funds of the Workers’ Compensation Administration Revolving Fund. The exclusion of certain workers from eligibility for the benefit or discussion of funding from additional sources is beyond the scope of these proposed regulations and would exceed the statutory authority granted by section 139.48.

8. Ms. Grace Beatty (Boissiere) commented, in summary, as follows:

Ms. Beatty summarizes the circumstance of her own Workers’ Compensation case which she states resulted in a finding of no permanent disability and asks what position her case is in when it comes to Labor Code section 139.48. She also states: “This benefit is needed and it was unjust to deny total and permanent disability which may be the issue for myself and others.”

RESPONSE: The Director cannot comment or express an opinion on the impact of Labor Code section 139.48 or the proposed regulations on specific cases or factual situations in the context of the regulatory promulgation process.

SUMMARY OF AND RESPONSE TO ORAL COMMENTS RECEIVED AT THE PUBLIC HEARINGS

The Department received nine oral comments at the public hearings on December 8, 2014, in Oakland, California and December 9, 2014, in Los Angeles, California.

1. Diane Worley of CAAA, expressed strong support for the general framework of the proposed regulations and stated that CAAA believes that the proposed regulations properly implement the intent of the Legislature in enacting Labor Code section 139.48. Ms. Worley also noted that she had submitted written comments on behalf of CAAA with some suggested recommendations to make the ability to apply to the Return to Work fund equally accessible for all injured workers.

RESPONSE: The Director thanks Ms. Worley and CAAA for their support and has responded to CAAA's written comments above.

2. Bert Arnold, President-Elect of CAAA, commented in summary as follows:

a. Mr. Arnold acknowledged the work the Department has done in putting the proposed regulations together in a way the CAAA really supports and in a manner that should make the funds available expeditiously for the benefit of injured workers.

RESPONSE: The Director thanks Mr. Arnold for his comment.

b. Mr. Arnold expressed concern that notice to the injured worker is on the sixth page of the Voucher and suggests that the notice should either be on page 1 or that it be addressed in a cover letter with the Voucher.

RESPONSE: Please see our response to CAAA's comments on proposed section 17303, above.

c. Mr. Arnold suggested allowing submission of a written application by mail as an alternative to the on-line application process.

RESPONSE: Please see our response to CAAA's comments on proposed section 17303, above.

d. Mr. Arnold noted that the proposed regulations do not require the notices to be in Spanish as well as English

RESPONSE: Please see our response to CAAA's comments on proposed section 17303, above.

e. Mr. Arnold suggested that since it was almost 2015 and no Return-to-Work benefits have been issued yet, there should be \$240 million dollars in the fund and an additional \$120 million should be added after the first of the year.

RESPONSE: The Director disagrees with this comment. As explained above, in response to CAAA's comments on proposed section 17308, the Return-to-Work fund will be funded through the assessment to the level of \$120 million each fiscal year but unspent funds from the prior fiscal year are not rolled forward to increase the fund above \$120 million.

3. Debbie Freeman commented in summary as follows:

a. Ms. Freeman's major concern was that very few injured workers are even entitled to the Voucher because doctors are not filling out the form that triggers the process. She urged educating doctors to fill out the form so that the injured worker can get the Voucher.

RESPONSE: The Director acknowledges Ms. Freeman's concern and anticipates that compliance will increase with education and exposure to the form. Because form 10133.36 is governed by a separate statute and regulations, however, it is beyond the scope of the proposed regulations.

b. Ms. Freeman notes that there is currently no information about the Return-to-Work benefit online and suggests that the best way to communicate to injured workers that they could be entitled to this benefit is to update the Department website to educate injured workers about this benefit that they are possibly entitled to.

RESPONSE: When the proposed regulations take effect, there will be a page on the Department website explaining the Return-to-Work Supplement benefit and application process. In addition, the Department will be reaching out to eligible persons who received Vouchers prior to the effective date of these regulations as specified in proposed section 17303.

4. Bruce Wick of the California Professional Association of Specialty Contractors observed that employers pay a lot of money for Workers' Compensation insurance and it seems that there is little left at the end for workers and direct medical providers. Mr. Wick stated that he appreciates the Return-to-Work Fund as implemented in the proposed regulations, as opposed to other alternatives that were considered, because employers pay money into the fund and that money goes directly to workers without any administrative or other money taken away from it. He concluded by expressing his support of the proposed regulations as they stand.

RESPONSE: The Director thanks Mr. Wick for his comments.

5. Robert McLaughlin of CAAA commented in summary as follows:

a. The proposed regulations are simple and efficient which means there will be a low cost for administering this program which Mr. McLaughlin thinks is an excellent idea.

RESPONSE: The Director thanks Mr. McLaughlin for his comment.

b. Mr. McLaughlin emphasizes that the \$120 million needs to be paid out each year, because it is clear that the Legislative intent is to make sure that \$120 million gets to the injured workers that need it the most.

RESPONSE: The Director agrees with Mr. McLaughlin's comments and believes that the proposed regulations have been designed to most effectively meet that goal.

c. Mr. McLaughlin notes that since eligibility for the Return-to-Work Supplement commenced on January 1, 2013, there will be approximately three years of back-payments to deal with by the time these regulations take effect and benefits begin to be paid out. In reviewing the \$5,000.00 benefit each year, Mr. McLaughlin suggests that the Director needs to take into account that there may be "a mouse going through a snake effect" in distributing benefits to the backlog of potentially eligible injured workers. Mr. McLaughlin also notes that he has done his best to keep track of clients who may be eligible for this benefit, however, some of those clients have left the state or the country and may be difficult to locate.

RESPONSE: Because eligibility for the Return-to-Work Supplement is based on dates of injury on or after January 1, 2013, the Director does not believe that there will be a large backlog of applications to address when these regulations take effect because the Department's assumption is that it will typically take a few years after the date of injury to receive a Voucher and become eligible for the benefit. Because we cannot predict with certainty, however, this is another good reason in support of the initial \$5,000.00 benefit amount set by proposed section 17308.

d. In regard to the accessibility of the application process, Mr. McLaughlin expressed concern that notification of the Return-to-Work Supplement would be on page six of the Voucher rather than the front page and that it is important to make sure that all eligible workers, including those who may have left the state, are notified of their potential right to this benefit. With regard to the online application process, Mr. McLaughlin notes that he has clients in Imperial County who do not have internet access and who need to drive as much as two-and-a-half-hours to the San Diego District Office which may not be financially viable for them. He suggests looking into making computer banks at EDD offices and other locations available to injured workers and also suggests allowing workers to submit applications by mail as an alternative to the online application. Finally, Mr. McLaughlin asked what would be done to make the DIR website accessible to non-English speakers and noted as an example that the EDD website has a Google button that allows the page to be translated into 81 different languages.

RESPONSE: Please see the response to CAAA's comments on proposed section 17303, above, which addresses the same issues.

6. Christel Schoenfelder of CAAA commented in summary as follows:

a. Ms. Schoenfelder related the experiences of two of her clients who settled their cases in 2014 and received Vouchers. One has been waiting nearly seven months to apply for the Return-to-Work Supplement and the other has been waiting nearly five months and both must continue waiting until these regulations go into effect. Because the one year Statute of Limitations to apply for the benefit begins to run on the effective date of the regulations, which Ms. Schoenfelder understands will be announced on the Department website, she is concerned that clients may not readily learn when and how they can actually access the fund monies.

RESPONSE: As discussed above, the Department will be making efforts to reach out to individuals who received Vouchers before the effective date of these regulations and thus did not receive notice of the Return-to-Work Supplement and application process.

b. Ms. Schoenfelder explained that both of the injured workers whose circumstances she described are females over the age of 40. She respectfully requests that the Department of Industrial Relations track the gender of the applicants for this fund money to determine whether there is a disproportionate amount of female applicants. If the data reveals such an imbalance, she believes that is something that the Commission on Health and Safety and Workers' Compensation should study.

RESPONSE: While the collection of such data might well prove interesting and useful, the Information Practices Act, Civil Code section 1798, et seq, limits the Department to collecting “only personal information which is relevant and necessary to accomplish a purpose of the agency required or authorized by the California Constitution or statute or mandated by the federal government. (Civil Code section 1798.14.) In this case, gender is not information specified by the enabling statute or required for administration of the benefit. Consequently, the Director does not believe that such information can be collected or analyzed in this context.

7. Brent Graham, past President and current Legislative Chair of Latino Comp, commented in summary as follows:

a. Mr. Graham expressed concern over the ability of Spanish speakers and other non-English speakers to even comprehend that they are entitled to participate in the Return-to-Work Fund as the regulations don't require that the notice or application be available in Spanish.

REPSONSE: Labor Code section 124, subdivision (b) states “Forms and notices required to be given to employees by the division shall be in English and Spanish.” The Department intends to comply with this requirement in the implementation of this benefit and, because the requirement already exists in statute with regard to all forms and notices, the Director believes that it would be unnecessary and duplicative to repeat it in these regulations.

b. Mr. Graham contends that because two years have passed since the effective date of Labor Code section 139.48, there should presumably be \$240 million should be in the Return-to-Work fund available for people to apply for.

RESPONSE: The Director disagrees with Mr. Graham's comment. As explained in detail in response to CAAA's comments on proposed section 17308, Return-to-Work funds that are not exhausted in a prior fiscal year do not roll forward to increase the amount of the fund above \$120 million.

c. The balance of Mr. Graham's comments repeated the written comments submitted on behalf of Latino Comp.

RESPONSE: Please see the response to Latino Comp's comments, above.

8. Bernardo Delatorre, President of Comp., commented in summary as follows:

a. Mr. Delatorre commented that it will be simple and easy for most workers to acquire a Return-to-Work Supplement. He suggested, however, that the process could be simplified even further by providing a printed application form for workers who do not have internet access. He further recommended that the application form be made available in the language that the injured worker speaks.

RESPONSE: Please see the response to CAAA's comments on proposed section 17303, above, which addresses the same issues.

b. Mr. Delatorre also expressed concern that doctors are not completing form 10133.36 which prevents carriers from sending injured workers the Vouchers which establish eligibility for the Return-to-Work Supplement. To address this problem, Mr. Delatorre suggests that the report of any doctor finding an injured worker permanent and stationary after January 1, 2013, should not be considered substantial evidence, nor would the doctor be paid for the report, unless the doctor has also completed form 10133.36. In the alternative, Mr. Delatorre suggests that the process be changed so that form 10133.36 would not be required to get a Voucher.

RESPONSE: The Director acknowledges Mr. Delatorre's concerns regarding current use of form 10133.36 and anticipates that compliance will increase with education and exposure to the form. Because form 10133.36 is governed by a separate statute and regulations, however, it is beyond the scope of the proposed regulations.

9. Tommy A. Ruedaflores of Comp. and Latino Comp commented in summary as follows:

a. Mr. Ruedaflores comments that there shouldn't be a lot of restrictions for our injured workers in order to get what they're due. Form 10133.36 constitutes another barrier that is so new that most AME doctors, QME doctors or treating doctors, don't even fill them out.

RESPONSE: The Director acknowledges Mr. Ruedaflores' concerns regarding current use of form 10133.36 and anticipates that compliance will increase with education and exposure

to the form. Because form 10133.36 is governed by a separate statute and regulations, however, it is beyond the scope of the proposed regulations.

b. Mr. Ruedaflores states that many of his clients are illiterate and will make an appointment with him just so he can read a letter from the insurance company that other members of the client's family could not decipher. For this reason, injured workers may not be able to comprehend the forms they receive without assistance and this is an additional burden on the worker to get what he deserves. He also recommends that, rather than a formal application, injured workers should be allowed to send a simple notice or letter to the carrier stating "I would like to be entitled to my Return-to-Work fund monies, please tell me what I need to do."

RESPONSE: In developing the proposed regulations, we have made every effort to keep the application process as simple and straightforward as possible without putting any unreasonable burdens on the applicant. If an injured worker does not understand a form they receive or needs assistance with the application process we recommend that they contact the Information and Assistance Officer at the nearest District Office who is trained to assist them with these and many other Workers' Compensation issues.

c. Mr. Ruedaflores states that it has come to his understanding that some Vouchers are being settled in the context of compromise and release agreements even though it is illegal to do so and sometimes this is done without the client's understanding.

RESPONSE: The contents and approval of settlement agreements are beyond the scope of this rulemaking.

d. Mr. Ruedaflores suggests that because two years have passed since the effective date of Labor Code section 139.48, there should now be \$240 million should be in the Return-to-Work fund and that it will climb again in at the beginning of the next fiscal year. For that reason, there should be enough funding to provide Return-to-Work benefits to workers whether they use a voucher or not. He feels that there should not be a barrier or a notice requirement by a doctor to get these funds that were promised to us by our great California legislature back in 2012. After representing injured workers for many years, Mr. Ruedaflores urges the Department to keep it simple. Don't put more burdensome requirements on people that are necessary and don't assume the representative or their doctor is going to follow all procedural requirements. It shouldn't be that stringent, that burdensome and that difficult. He concluded by stating "We always get benefits through letters or notices on their cases or injuries and that's the way it should be done and there will be enough funds, \$240 million and counting, to compensate those injured workers."

RESPONSE: The Director disagrees with Mr. Ruedaflores' comment. As explained in detail in response to CAAA's comments on proposed section 17308, Return-to-Work funds that are not exhausted in a prior fiscal year do not roll forward to increase the amount of the fund above \$120 million.

SUMMARY OF AND RESPONSE TO WRITTEN COMMENTS RECEIVED DURING THE 15-DAY PUBLIC COMMENT PERIOD

The Department received four emails and letters of written comments during the 15-day public comment period.

1. Ms. Hazel Ortega of Ortega Counseling Center notes that her office has helped hundreds of injured workers with dates of injury post January 1, 2013, and asks if the Return-to-Work Supplement is a retroactive benefit?

RESPONSE: While not strictly speaking a retroactive benefit, any injured worker who has received an SJDB Voucher for a date of injury on or after January 1, 2013 remains eligible to apply for a Return-to-Work Supplement within the later of either one year after the date the Voucher was served on them or one year after the effective date of these regulations. This gives all potentially eligible injured workers who received Vouchers prior to the effective date of these regulations a period of at least one year to apply for the benefit.

2. Mr. Douglas Gorman of Contra Costa County Risk Management commented as follows:

a. “In my capacity with Risk Management for Contra Costa County, I process SJDB Training Vouchers. I look forward to clarification of how retroactive eligibility for the RTW Supplement will be handled; i.e., employees with early 2013 DOI who long ago received Training Vouchers, in some cases over a year ago: will they still be eligible to receive the RTW Supplement even though the one-year limit for claiming this benefit post-receipt of voucher has passed (see Section 17302 Eligibility)?”

RESPONSE: Yes. Please see our response to Hazel Ortega immediately above.

b. “And as an Administrator for the SJDB Voucher process, am I responsible for sending out the Notice (Section 17303) to those who previously received the SJDB Training Voucher? I do see the language in 17303 regarding this Notice requirement commencing 30 days after effective date of new regulations; but again, how do we handle cases of early recipients (with DOI 1/1/13 and later) of the Training Voucher relative to our responsibility for notification of RTW Supp right?”

RESPONSE: As specified in proposed section 17303, claims administrators are only required to provide notice prospectively via a cover sheet accompanying Vouchers issued 30 days or more after the effective date of these regulations. The Department is responsible for making efforts to provide notice to individuals who received SJDB Vouchers prior to the effective date of the notice requirement in proposed section 17303.

3. Ms. Peggy Thill, Claims Operations Manager, of the State Compensation Insurance Fund Claims Medical and Regulatory Division, commented, in summary, that State Fund appreciates the time and effort that the Department has put into these proposed regulations and has no comment at this time.

RESPONSE: The Director thanks State Fund for its comments.

4. The California Applicants' Attorneys Association ("CAAA") commented, in summary, as follows:

a. "We appreciate that one of our comments resulted in the notice of the Return to Work Fund supplement application process being prominently displayed on a cover sheet which accompanies the Voucher rather than on page 6, proof of service on Form DWC-AD 10133.32."

RESPONSE: The Director thanks CAAA for its comment.

b. "CAAA strongly supports making certain all eligible injured workers have the opportunity to apply for supplemental payments from this fund. Unfortunately very few modifications were made to this version of the Return to Work Supplement regulations to achieve this goal. We understand that only comments directly concerning the proposed modifications to the text of the regulations will be considered and responded to in the Final Statement of Reasons. Therefore, our specific comments below will first focus on section 17308 as a modification was made to this regulation. However, we believe we must also continue to make several general comments and recommendations that were not previously incorporated into revisions made to these regulations as we believe these changes are necessary to assure that this program is implemented as intended by the Legislature, and to comply with existing laws and regulations."

RESPONSE: The Director thanks CAAA for all of its comments and assures CAAA that all of its suggestions have been seriously considered. While we will only be responding to the comments in CAAA's letter that are related to the noticed modifications to the text of the proposed regulations, we refer CAAA to our thorough responses to its earlier substantially similar comments on pages 7 through 16 above.

c. Comments on proposed section 17308. Supplement Payment:

"CAAA strongly objects to the modification in this section deleting the phrase "...and or based on consideration of the number of anticipated recipients."

CAAA previously supported the adoption of the proposed \$5,000 initial payment under this program. This provides for a simple and expeditious process to provide supplemental payments to injured workers. It is our understanding that this figure was proposed based on the estimate made by RAND that there could be up to 24,000 workers annually who qualify for the supplemental payment. If the RAND estimate turns out to be correct, then the total annual payout under this program will equal \$120 million, the amount of annual funding as set forth in §139.48. However, this section has been modified to delete the language "based on consideration of the number of anticipated recipients" for adjusting future payment amounts which is contrary to the findings of the RAND study. Further, it contradicts the Initial Statement of Reasons which states "Specific Purpose: This section establishes the amount of the Return-to-Work Supplement and sets out the time frame for payment. This section further allows the Director to adjust the amount

of the payment based on further studies of wage loss and permanent disability and also based on consideration of the number of anticipated recipients.”

Because the program is new, it is very likely that the number of workers who actually apply for this program will be either greater or less than the RAND estimate. The draft regulation must permit adjustment of the payment amount, based on consideration of the number of anticipated recipients which may differ from original estimates. Further, in order to clarify this provision we also recommend that language be added to specify that the intent of any such adjustment in the amount of the payment is to assure that the annual payout under the program will equal, but not exceed, the aggregate annual funding for this program, as follows:

‘The Return- to-Work Supplement Program will provide a supplement of \$5,000.00 to each eligible individual who submits a complete and timely application by the deadline. The payment will be made within 25 days of the date the decision of the Director on the application becomes final and will be paid in one lump sum. Payment shall be made directly to the individual and is not assignable before payment. The amount of this supplement may be adjusted by the Director based on further studies conducted by the Director in accordance with Labor Code section 139.48 and with consideration of the number of anticipated recipients in order to ensure that the aggregate annual payments under this Return-To-Work Supplemental Program equal, but do not exceed, the annual funding for this program as provided under Labor Code §139.48.’

In conclusion, this proposed regulation must clearly reiterate the Director’s authority to set the benefit amount pursuant to Labor Code section 139.48 based on studies which may consider, among other things, the number of individuals applying for the benefit in order to maximize distribution of the funds authorized by the Legislature to fund this benefit.”

RESPONSE: The Director thanks CAAA for its comments and shares CAAA’s concern about assuring maximum distribution of the funds authorized by the Legislature to fund Return-to-Work Supplement benefits. While the number of actual and anticipated recipients are important factors that will be considered in any future studies conducted to evaluate and adjust the benefit amount, our decision to delete the phrase “and or based on consideration of the number of anticipated recipients” from proposed section 17308 was based on advice from the Office of Administrative Law that the inclusion of that phrase in the regulation could be interpreted as claiming authority in excess of that granted by the Legislature in Labor Code section 139.48 which expressly authorizes the Director to determine the benefit amount “based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation.” To avoid any misinterpretation, the proposed regulation was modified to simply reference the Director’s authority to conduct further studies to adjust the benefit amount under section 139.48.

d. The balance of CAAA’s comments generally restate comments previously made during the 45-day comment period which are unrelated to the noticed modifications to the text of the proposed regulations.

RESPONSE: Please see our responses to CAAA’s earlier comments on pages 7 through 16 above.