California Workers' Compensation Institute
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VIA E-MAIL to dwcrules@dir.ca.gov

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 9813.1, 10116.9 - 10133.60

Dear Ms. Gray:

This commentary on the proposed 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, Pacific Compensation Insurance Company, Preferred Employers 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 and County of San Francisco, 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 administrative director has done well to translate the statutory components of the Supplemental Job Displacement Benefit into a workable regulatory scheme to provide the benefit earlier in the process for those workers who cannot return to their job; to state the specific programs, equipment, and tools available; to establish the time limit for the use of the voucher; and to preclude the settlement of it. In certain areas, the division has stopped short of eliminating inconsistencies or clarifying ambiguities, while staying within the letter of the law but the regulator is constrained to craft rules that implement both the letter and the spirit of the law. Our comments are intended to bring additional clarity and efficiency to the process.

Section 10116 – Definitions

Recommendation

The reference to "physician" throughout the regulations needs to be changed to "the primary treating physician, qualified medical examiner or agreed medical examiner" to identify more precisely the physician who has the authority and responsibility to prepare the required forms and reports, and to be consistent with the pre-2013 regulations.

(m) "Permanent and stationary" means the point in time when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment, based on (1) an opinion from ~~a~~ the primary treating physician, AME, or QME; (2) a judicial finding by a Workers' Compensation Administrative Law Judge, the Workers' Compensation Appeals Board, or a court; or (3) a stipulation that is approved by a Workers' Compensation Administrative Law Judge or the Workers' Compensation Appeals Board.

(t) "Work restrictions" means permanent medical limitations on employment activity established by the primary treating physician, qualified medical examiner or agreed medical examiner.

Section 10117(c) If the claims administrator relies upon a permanent and stationary date contained in a medical report prepared by the employee's primary treating physician, QME, or AME, but there is subsequently a dispute as to an employee's permanent and stationary status …

Section 10133.33 Form [DWC-AD 10133.33 "Description of Employee's Job Duties Form"]

Prior to any medical evaluation declaring the employee permanent and stationary, the ~~physician~~ primary treating physician, qualified medical examiner or agreed medical examiner may be sent Form [DWC- AD 10133.33, "Description of Employee's Job Duties."]

Form 10133.36 – Physician's Return to Work and Voucher Report Recommendation

Form 10133.36 – ~~Physician's~~ Return to Work and Voucher Report of the Primary Treating Physician, Qualified Medical Examiner or Agreed Medical Examiner

The references to this form in the regulations need to conform to this revision: Sections 10133.31(1)(A) and 10133.34

Discussion

The current proposed regulations do not make it clear that only the authorized primary treating physician, qualified medical examiner or agreed medical examiner, can prepare the necessary medical reports and forms supporting the eligibility for the SJDB. The simple reference to "the physician" could be construed to mean any physician or any physician providing treatment. The term "primary treating physician" is defined in the statute and is, essentially, a term of art. Labor Code section 4658(b)(1) states that the offer is to be made within 60-days of the receipt of the first report from the **primary** treating physician, agreed medical examiner, or qualified medical examiner. This level of specificity is required to avoid disputes and delays.

Section 10117(b) -- Offer of Work; Adjustment of Permanent Disability Payments Recommendation

(b) Within 60 calendar days from the date that the employer has knowledge that the condition of an injured employee with permanent partial disability becomes permanent and stationary: …

Discussion

The situation created by a literal reading of the statute and never addressed by the regulations is that the claims administrator and employer may not become aware of the finally determined permanent and stationary date until the 60-day period to act has expired. This Catch 22 leads to absurd results and the WCAB has addressed such an anomaly arising from different areas of the statute. In numerous Board Panel Decisions, the WCAB has harmonized the statute and set forth a rationale that triggers the 60-day period from "knowledge of the permanent and stationary date".

A recent Board Panel Decision, Smith v Kern County Superior Court, is a perfect and complicated example. In short, there was considerable debate with the medical legal evaluator as to the correct permanent and stationary date, which was not finally determined until the evaluator's deposition was taken. At that point, the evaluating physician provided a retroactive finding of the applicant's permanent and stationary date that was well beyond the 60-day period for making a job offer in accordance with the statute. The Board, in order to avoid "an absurd result", resolved the matter by relying on the rules of statutory construction. The Board reasoned:

> "In the words of our Supreme Court [Torres v. Parkhouse Tire Service. Inc. (2001) 66 CCC 1036, 26 Cal.4th 995, 1003]:
>
> > 'In interpreting a statute where the language is clear, courts must follow its 'plain meaning.' [Citation.] "However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. In the end, we 'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' (emphasis added)
>
> We believe that only a construction consonant with the preservation of the defendant's due process rights would avoid the absurd consequences that literal compliance with the statute would lead to. As acknowledged by the WCJ, because of the retroactive finding of the applicant's permanent and stationary date, which is extremely commonplace in workers' compensation medical-legal reports, it would have been impossible for the defendant to make an offer of work within 60-days of the permanent and stationary date. In addition to retroactive findings of a permanent and stationary date, for varying reasons, physicians do not always promptly report their findings to the parties."

As the Board notes, the failure to promptly report the findings of the medical legal evaluator is commonplace in the workers' compensation system. There is no need for either the employer or the employee to live with absurd results and the recommended change to section 10117(b) will resolve a great deal of confusion and irrational consequences of a literal reading of the statute.

Section 10133.31(b)(1) and 10133.34(b)
Recommendation

10133.31(b)(1): The offer is made no later than ~~within~~ 60 days after receipt by the claims administrator of the Physician's Return-to-Work & Voucher Report (Form DWC-AD 10133.36).

10133.34(b): The injured employee shall be entitled to a supplemental job displacement benefit unless the employer makes an offer of regular, modified, or alternative work on Form [DWC-AD10133.35 "Notice of Offer of Regular, Modified, or Alternative Work For injuries occurring on or after 1/1/13" no later than ~~within~~ 60 days after receipt of Form [DWC-AD 10133.36 "Physician's Return-to-Work & Voucher Report."]

Section 10133.31(c) – Job Offer
Recommendation
Add: (c) An employee who has lost no time from work or has returned to the same job for the same employer, is deemed to have been offered and accepted regular work in accordance with the criteria set forth in Labor Code section 4658(b).

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

The statute presents an either or proposition for employers: either make a job offer within the statutory criteria or provide the voucher for retraining. But if an injured worker requires neither of those tools because he has, in fact, lost not time from work or has returned to his job with his current employer, then the worker is not eligible for the benefit and the regulations should state that clearly.

The administrative director has the opportunity to avoid a sham procedure in the case of workers who lose no time from work or return to work and have no need for a voucher or a job offer. The legislative policy underlying the SJDB has always been to assist injured workers in securing modified work with their current employers or obtaining a voucher for retraining. That policy has not changed with the revisions in SB 863.

In City of Sebastopol v. WCAB (Braga) (2012) 77 CCC 783, the District Court of Appeal struggled with this notion in a slightly different context – eligibility for the 15% permanent disability adjustment – and the court 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 SJDB 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 unnecessary and unreasonable to require the employer to make a sham offer of employment to avoid having to provide a benefit that the employee does not need simply because it is not clear that the statute recognizes this circumstance.

A clarifying regulation can avoid this by deeming the employee to have accepted an offer of continued regular employment without having to process a formal offer of regular work. If the administrative director fails to resolve this anomaly, then the employer must proceed with a sham and misleading job offer or litigate every case to obtain a WCAB decision reiterating the Smith rationale in order to avoid the consequences of following the literal reading of the statute, including potential audit penalties.

Section 10133.34(b)(3) – Offer of Work
Recommendation
(3) The offer of regular, modified, or alternative work must be for work lasting at least 12 months. An employer or claims administrator shall not be liable for the supplemental job displacement benefit pursuant to Section 4658.5, if the employee retires, is terminated for cause, or voluntarily terminates his or her regular work, modified work, or alternative work/employment.

Discussion
The consequences of leaving the employment voluntarily or for termination for cause needs to be clear to the injured worker.

Form 10133.32 – Non-Transferable Voucher Form
Recommendation
In the last sentence of this section add: "This voucher must be used before it expires (2 years after it is provided or 5 years from the date of your injury, whichever is later).

Form 10133.33 – Description of Job Duties
Recommendation
Add: NOTICE TO THE PARTIES

If the job description is not signed and returned within 10 days after receipt, the job description is deemed to be acceptable to the employee.

If a dispute occurs regarding the above description of the job duties, 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.

Discussion
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.

Recommendation
Form 10133.33 is suitable for an offer of regular work and can be completed before the permanent and stationary report. For an offer of modified or alternative work, the employer must await the description of the employee's physical limitations before an appropriate offer of re-employment can be made. It is recommended that a separate form be created for that purpose.

Form 10133.35 – Notice of Offer of Regular, Modified, or Alternative Work
Recommendation
The claims administrator type for employer should read "Self-insured Employer"

If employers are require to use this form when the injured worker has lost no time from work or has returned to work to his regular job, then that needs to be addressed in the area for the "Date job starts".

On page 3 of the form, there is a reference to "proof of service by mail," which should be eliminated or made optional because it serves no useful purpose and simply adds more paper to the system.

On page 4, where the injured worker is advised regarding the consequences of quitting his position, there should also be advice that if the position ends or the employee is laid off within the 12 month period, he may apply for an SJDB voucher at that time.

Form 10133.36 – Physician's Return to Work and Voucher Report
Recommendation
This form must provide an accurate assessment of actual work restrictions, as opposed to 'work preclusions' as outlined in the 1997 permanent disability rating schedule. The form should be revised to be consistent with the other physician reporting forms. It should be an optional form, available, if necessary, and not simply a redundant review of previous medical reports. The form can be used only if the reporting physician has not provided the necessary information in the PR-3 or PR-4 or other permanent and stationary report.

Discussion
The problem with Form 10133.36 is that with regard to the SJDB the employer requires specific, accurate work restrictions before key decisions can be made. There is considerable overlapping information with this form and the PR-3 and PR-4, yet the required information in these reports is inconsistent. Requiring the treating physician or the evaluating physician to reiterate this information on a different form may be unnecessary and redundant. It is likely, as well, that the reporting physician will seek payment for this redundant activity, which will needlessly add cost to the system.

Until all physicians use the form, employers must rely on the PR-3 or PR-4 to establish the permanent work restrictions at the earliest date. The evaluation of permanent work restrictions must, therefore, be consistent. Even when the form is in general use, the employer will have to address MMI reports from the PQME or AME that may include permanent work restrictions. It is also important to clarify that the use of Form 10133.36 is optional. The process should be allowed to begin whenever the employer has adequate information to make these determinations, whether they are based on the medical legal evaluator's report, a PR-3 or PR-4, or the Physician's Return to Work and Voucher Report. The audit unit should not be allowed to penalize the claims administrator for failing to use the RTW Report.

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

Sincerely,

Michael McClain
General Counsel

MMc/pm

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