California Workers' Compensation Institute
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July 18, 2013

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 – Third 15-day Comment Period
CCR Sections 9813.1, 10116.9 - 10133.60

Dear Ms. Gray:

These written comments on additional modifications to regulations proposed for permanent adoption to implement Senate Bill 863 provisions regarding Supplemental Job Displacement Benefit are presented on behalf of the members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 70% of California's workers' compensation premium, and self-insured employers with $42B of annual payroll (24% of the state's total annual self-insured payroll).

Insurer members of the Institute include ACE, AIG, Alaska National Insurance Company, AmTrust North America, Chubb Group, CNA, CompWest Insurance Company, Crum & Forster, Employers, Everest National Insurance Company, Farmers Insurance Group, Fireman's Fund Insurance Company, The Hartford Insurance Group, Insurance Company of the West, Liberty Mutual Insurance, 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, City of Santa Ana, City and County of San Francisco, 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~~.

Section 10117(b) -- Offer of Work
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 administrative director (AD) has returned to the previous trigger date – 60 days from the permanent and stationary date, yet the difficulties in determining and communicating the exact date that the injury or injuries became permanent and stationary still leads to anomalous results.

When a statute authorizes a state agency to adopt regulations, the purpose of that authority is to implement, interpret, make specific, or otherwise do what is reasonably necessary to effectuate the purpose of the statute. It is the express intent of the Legislature to ensure that regulations adopted by California state agencies, whether created in accordance with the APA or otherwise, are clear and written in plain language.

There is no need to allow this Catch 22 to be resolved by the WCAB on a case by case basis when the jurisprudence on this question is clear and the appeals board has addressed it in several relevant board panel decisions, most recently in Smith v Kern County Superior Court (2011) 76 CCC 1355.

The situation created by the proposed regulation 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 unintended result can be cured by setting the trigger from the date of "knowledge of the permanent and stationary date".

While Smith was a Board Panel Decision, the panel relied on a Supreme Court case, Torres v. Parkhouse Tire Service (2001) 66 CCC 1036, 26 Cal.4th 995, 1003. In Torres, the court stated:

> '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)

The panel in Smith interpreted the statute so as to avoid "the absurd consequences that literal compliance with the statute would lead to," noting that a retroactive finding of the permanent and stationary date is extremely commonplace in medical-legal reports. It cannot be argued that the Legislature intended the Supplemental Job Displacement Benefit (SJDB) to be provided to workers whose sole qualification is that the permanent and stationary date was communicated too late for the employer to make an appropriate job offer.

There is, therefore, no need for either the employer or the employee to live with the absurd consequences imposed by section 10117(b) as written. The recommended change will resolve a great deal of confusion and irrational consequences of a literal reading of the statute.

Sections 10117(f) and 10133.34(b)(4)
Recommendation
Add to each subdivision: When the employer offers regular, modified or alternative work to the employee that meets the conditions of this section and subsequently learns that the employee cannot lawfully perform regular, modified or alternative work, the employer is not required to provide the regular, modified or alternative work.

Discussion
It is the function of the DWC to adopt regulations to implement, interpret, and do what is reasonably necessary to effectuate the purpose of the statute. The law is clear on this issue from the case of Del Taco v. WCAB (Gutierrez) (2000) 65 CCC 342. While undocumented workers are unquestionably entitled to workers' compensation benefits, an employer is not permitted to offer reemployment to a worker who does not have the legal status to accept it. The statute requires that the employer must provide the SJDB or offer regular, modified, or alternative work. When a legitimate and timely offer of work is made, the employer has met its statutory obligation.

Even if the AD finds the proposed regulation to be redundant or merely a restatement of current law, the regulation serves two purposes: it clearly states the limit of the employer's obligations in this specific circumstance and it provides a notice to injured workers regarding their right to receive the SJDB. Clarity in this regard is worthwhile.

Section 10133.31 Requirement to Issue Supplemental Job Displacement Nontransferable Vouchers for Injuries Occurring on or After January 1, 2013
Recommendation
(f)(5) Purchase of computer equipment including, but not limited to monitors, software, networking devices, input devices (such as keyboard and mouse), peripherals (such as printers), and tablet computers of up to one thousand dollars ($1,000) payable upon submission of a Request for Purchase of Computer Equipment (page 4 of the DWC-AD Form 10133.32) and submitted with appropriate documentation of ~~either a written bid from a computer retailer or~~ itemized receipts showing the purchase(s) of computer equipment or an invoice for direct payment to the computer retailer. ~~If the employee receives funds based upon submission of a written bid, the employee shall submit itemized receipt(s) demonstrating the actual purchase to the claims administrator. If the employee fails to submit the itemized receipt(s) of the purchase(s) of computer equipment, $1,000 will be deducted from the $6,000 total allowable by the voucher.~~ The employee shall not be entitled to reimbursement for purchase of games or any entertainment media.

Discussion
It should not be necessary for the injured worker, in all cases, to have to pay this expense and seek reimbursement from the claims administrator but payment based on a "bid" is problematic as well. The selection of computer equipment can be negotiated with the retailer who can bill the claims administrator directly. So long as the invoice clearly relates to the injured worker, it can be paid directly to the retailer by the claims administrator. In this way the payment will be based on a purchase, rather than an intent to purchase.

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

Sincerely,

Michael McClain
General Counsel

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