

WORKERS' COMPENSATION

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presents

2023 Spring Education Conference

MCLE: 6 Hours

Legal Specialization: 6 Hours in Workers' Compensation Specialization

SJDB Vouchers

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12:45 p.m. – 1:45 p.m.

Speakers:

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Sharon Velzy, Presiding Judge Van Nuys

Conference Reference Materials

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Supplemental Job Displacement Benefits

**Kia Myers Holsey
John Hernandez
Judge Sharon Velzy**



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OVERVIEW

- Why are we talking about the SJDB?
- Evolution of job displacement benefits
- Current rules:
 - Eligibility
 - Benefit types and limits
 - Employer obligations
- Extinguishing employer SJDB liability:
 - SJDB expiration
 - Settlement of SJDB
- Relationship between SJDB and Return-to-Work Supplement

FIRST-GENERATION SJDB

Authority:

- Labor Code §§ 4658.5, 4658.6
- Regs. 10133.56, 10133.57
- *Weiner v. Ralphs Co.* (2009) 74 Cal. Comp. Cases 736 [“effective January 1, 2009, the WCAB lost jurisdiction over non-vested and inchoate vocational rehabilitation claims”]

APPLICABILITY: injuries on or after 1/1/2004 and before 1/1/2013

- **Vocational rehabilitation repealed**
- **Eligibility:**
 - Injury causes permanent partial disability and employee does not return to work for employer within 60 days of the termination of TD.
- **Nature of benefit:**
 - “[A] supplemental job displacement benefit in the form of a nontransferable voucher for education-related retraining or skill enhancement, or both, at state-approved or accredited schools” (Labor Code § 4658.5(b)).
 - Cap on vocational counseling fees (Labor Code § 4658.5(c)).
- **Benefit amount:**
 - Up to \$4,000 for 1%–14% PPD
 - Up to \$6,000 for 15%–25% PPD
 - Up to \$8,000 for 26%–49% PPD
 - Up to \$10,000 for 50%–99% PPD

SECOND-GENERATION SJDB

Authority:

- Labor Code § 4658.7
- *Sesena v. Residence Inn by Marriott* (2017) 82 Cal. Comp. Cases 1425 [“applicant is entitled to a separate voucher for each injury causing permanent partial disability”]

APPLICABILITY: injuries on or after 1/1/2013

- **Eligibility:** Injury causes permanent partial disability and employer does not make an offer of regular, modified, or alternative work.
- **Benefit amount:** up to \$6,000 regardless of level of PPD.
- **Job offer due date:** “no later than 60 days after receipt by the claims administrator of the first report received from either the primary treating physician, an agreed medical evaluator, or a qualified medical evaluator, in the form created by the administrative director pursuant to subdivision (h), finding that the disability from all conditions for which compensation is claimed has become permanent and stationary and that the injury has caused permanent partial disability.”
- **SJDB due date:** “within 20 days after the expiration of the time for making an offer of regular, modified, or alternative work.”

NATURE OF SECOND-GENERATION SJDB


(Labor Code § 4658.7(e); limits underscored)

The voucher may be applied to any of the following expenses at the choice of the injured employee:

- **(1)** Payment for education-related retraining or skill enhancement, or both, at a California public school or with a provider that is certified and on the state's Eligible Training Provider List (EPTL), as authorized by the federal Workforce Investment Act (P.L. 105-220), including payment of tuition, fees, books, and other expenses required by the school for retraining or skill enhancement.
- **(2)** Payment for occupational licensing or professional certification fees, related examination fees, and examination preparation course fees.
- **(3)** Payment for the services of licensed placement agencies, vocational or return-to-work counseling, and résumé preparation, all up to a combined limit of 10 percent of the amount of the voucher.
- **(4)** Purchase of tools required by a training or educational program in which the employee is enrolled.
- **(5)** Purchase of computer equipment, up to one thousand dollars (\$1,000).
- **(6)** Up to five hundred dollars (\$500) as a miscellaneous expense reimbursement or advance, payable upon request and without need for itemized documentation or accounting. The employee shall not be entitled to any other voucher payment for transportation, travel expenses, telephone or Internet access, clothing or uniforms, or incidental expenses.

WHAT IS A QUALIFYING JOB OFFER (Labor Code § 4658.1)

- “Regular work” means the employee’s usual occupation or the position in which the employee was engaged at the time of injury and that offers wages and compensation equivalent to those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee’s residence at the time of injury.
- “Modified work” means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee’s residence at the time of injury.
- “Alternative work” means work that the employee has the ability to perform, that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and that is located within reasonable commuting distance of the employee’s residence at the time of injury.
- In addition, the work offered must last at least 12 months (Labor Code § 4658.7(b)(2)).
- Offer must be made on Form DWC-AD 10133.35 (DWC-AD10133.53 for pre-2013 injuries).



If an employee's primary treating physician issues a PR-4 containing work restrictions but fails to complete a RTW form, which party is obligated to follow up with the doctor before the SJDB clock starts to run?

ASCERTAINING PERMANENT WORK RESTRICTIONS (Labor Code § 4658.7(b)(1))

Form DWC-AD 10133.36

“Physician’s Return-to-Work &
Voucher Report.”

www.dir.ca.gov/dwc/forms/SJDB/10133.36.pdf

Opus One Labs v. Workers' Comp. Appeals Bd. (Fndkyan) (2019) 84 Cal. Comp. Cases 634, 636 (writ denied): “defendant had the burden to obtain a Physician’s RTW form when defendant was apprised of applicant’s permanent disability status and work preclusions in the QME report.”

PHYSICIAN'S RELEASE TO RETURN TO WORK FORM

Employee's Name: _____
Physician's Name: _____

To be completed by Physician

After reviewing the attached job description and the specific tasks within the job description please complete either (A) or (B) as appropriate and sign and date below.

(A) The above named employee has been released by the above named physician to return to Full Duty as of _____ (Date) with **NO RESTRICTIONS**.

(B) The above named employee has been released by the above named physician to return to work on _____ (Date) **WITH THE FOLLOWING RESTRICTIONS** through _____ (Date):

<input type="checkbox"/> Check applicable boxes and provide limitations/restrictions.	<input type="checkbox"/> Walking	_____	hours per day
<input type="checkbox"/> Lifting (Max weight in lbs)	<input type="checkbox"/> Standing	_____	hours per day
<input type="checkbox"/> Repetitive Lifting	<input type="checkbox"/> Sitting	_____	hours per day
<input type="checkbox"/> Carrying	<input type="checkbox"/> Crawling	_____	hours per day
<input type="checkbox"/> Pushing/pulling	<input type="checkbox"/> Kneeling	_____	hours per day
<input type="checkbox"/> Pinching/pulling	<input type="checkbox"/> Squatting	_____	hours per day
<input type="checkbox"/> Reaching/Gripping	<input type="checkbox"/> Climbing	_____	hours per day
<input type="checkbox"/> Reaching over head			
<input type="checkbox"/> Reaching away from body			
<input type="checkbox"/> Repetitive Motion Restrictions:			
<input type="checkbox"/> Other Restrictions:			

These limitations/restrictions are: Temporary limitations/restrictions Permanent limitations/restrictions

IF THE ABOVE RESTRICTION CONSTITUTE MODIFIED DUTY AND SUCH DUTY IS NOT AVAILABLE, IT IS ASSUMED THAT THE EMPLOYEE WILL BE SENT HOME RATHER THAN RETURN TO WORK. My signature indicates that I have read and understand the employee's job description and the listed tasks within the job description and that my findings are based on my medical assessment of this employee's physical capabilities as compared to the essential functions of the job.

Physician's Name (Please Print): _____ Date: _____
Physician's Signature: _____

I AGREE THAT:
I will follow through with all of the restrictions listed above. I will notify my supervisor of any departure from these restrictions.

Employee's Signature: _____ Date: _____

JOB OFFER MUST BE MADE IN GOOD FAITH

- **What is a reasonable commuting distance?** Not 300 miles (*K-Mart v. Workers' Comp. Appeals Bd. (Cudd)* (1996) 61 Cal. Comp. Cases 1209).
- **Impossibility of continued employment not a defense.**
 - *Dennis v. State of California* (2020) 85 Cal. Comp. Cases 389, 406 [“an employer's inability to offer regular, modified, or alternative work does not release an employer from the statutory obligation to provide a SJDB voucher”]
 - See also *Jackson v. California Prison Industry Auth.* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 368; *Corona v. Kern High School Dist.* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 186.
- **Employee resignation not a defense.** *Morgan v. Living Spaces Furniture* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 250, *4 [“applicant's resignation from her employment with defendant does not preclude her entitlement to a SJDB voucher so long as she meets the statutory requirements”]. See also *Urias v. PT Gaming* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 76.

EXPIRATION OF SJDB


- **Pre-1/1/2013 injuries:** “A voucher issued on or after January 1, 2013, shall expire two years after the date the voucher is furnished to the employee or five years after the date of injury, whichever is later. The employee shall not be entitled to payment or reimbursement of any expenses that have not been incurred and submitted with appropriate documentation to the employer prior to the expiration date.” Labor Code § 4658.5(d).
- **Post-1/1/2013 injuries:** “The voucher shall expire two years after the date the voucher is furnished to the employee, or five years after the date of injury, whichever is later. The employee shall not be entitled to payment or reimbursement of any expenses that have not been incurred and submitted with appropriate documentation to the employer prior to the expiration date.” Labor Code § 4658.7(f).

EFFECT OF SETTLEMENT ON SJDB

- **Pre-1/1/2013 injuries** (first-generation SJDB): settlement permitted.
- **Post-1/1/2013 injuries** (second-generation SJDB)
 - General rule: “Settlement or commutation of a claim for the supplemental job displacement benefit shall not be permitted” Labor Code § 4658.7(g).
 - Exception: “where the parties establish there is a good faith dispute which, if resolved against applicant, would defeat his entitlement to all workers' compensation benefits, applicant may settle his claim by a Compromise and Release Agreement that also settles his potential right to the [SJDB]” *Beltran v. Structural Steel Fabricators* (2016) 81 Cal. Comp. Cases 1224, 1226.
 - Absent a *Beltran* finding, an injured worker may conduct post-C&R discovery to establish SJDB eligibility. *Singerman v. Nike* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 81.
 - But see *Mendoza v. Vintage Senior Living* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 19 [WCJ may make *Beltran* finding *nunc pro tunc* if it was warranted but not issued at time of C&R approval].

PENALTY FOR UNREASONABLE DELAY

- Labor Code § 5814 applies to SJDB in case of unreasonable delay or failure to issue. See, e.g., *Baugh v. Action Holdings* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 370. Noteworthy in *Baugh*:
 - F&A did not extinguish penalty claim even though SJDB was already late because there was a separate period of unreasonable delay post-trial.
 - No basis for awarding attorney fees because F&A did not mention SJDB.
- Penalty may not exceed 25% of SJDB amount actually used—not its maximum value. “A voucher has no monetary value until such time as it is converted when the injured worker receives training.” *Stonebraker v. Master Cooling Corp.* (2007) 2007 Cal. Wrk. Comp. P.D. LEXIS 90, *7.
- No penalty on delayed RTWS because it is not compensation. *McFarland v. Workers' Comp. Appeals Bd.* (2018) 83 Cal. Comp. Cases 371, 373.



If the defendant fails to include a *Rodgers* waiver in a C&R, will it be liable for an injury sustained by the employee while using the SJDB voucher?

ANSWER:

“An employer shall not be liable for compensation for injuries incurred by the employee while utilizing the voucher.”

- Pre-1/1/2013 injuries: Labor Code § 4658.5(e)
- Post-1/1/2013 injuries: Labor Code § 4658.7(i)


RETURN-TO-WORK SUPPLEMENT

- **Statutory purpose of Return-to-Work Supplement Program (RTWSP):** “making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss” (Labor Code § 139.48(a)).
- **Actual implementation:** “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” (Cal. Code Regs., tit. 8, § 17302; enacted 4/6/15).
- **Applicable regulations:**
 - RTWS amount is \$5,000 (Reg. 17308).
 - Employer must advise employee of RTWSP when SJDB is issued (Reg. 17303).
 - Only one RTWS unless new injury occurred after last RTWS payment (Reg. 17302(b)).
 - Application must be submitted to DIR online (Reg. 17305).
 - Application must be received by RTWSP within one year from service of SJDB on employee (Reg. 17304(a)).
 - Employee may appeal RTWSP decision to WCAB within 20 days of service of decision (Reg. 17309).



QUESTIONS?





If an employee claims that they were not properly reimbursed for tools purchased as part of an SJDB-funded class, where should the employee seek dispute resolution?

Kia Myers-Holsey

RTGR Law

Kia Myers Holsey is a Partner at RTGR Law. Her practice focuses on the defense of Workers' Compensation matters, including discrimination claims and serious and willful misconduct claims. She has extensive experience in Workers' Compensation, having worked in larger statewide law firms for several years.

Kia's experience also includes several years of civil employment litigation at a boutique law firm where she represented a large corporate employer in state and federal courts in employment discrimination cases, as well as EEOC and DFEH investigations.

Prior to attending law school, Ms. Myers Holsey was a police officer for 10 years. She worked various positions including Patrol Officer and Hostage Negotiator.

She is a member of the State Bar of California. She serves on the Executive Committee of the Workers' Compensation Section of the California Lawyers Association and on the DVICA governing board. She is also admitted to practice in federal United States District Court, Northern, Southern and Eastern Districts of California.

Kia received her Juris Doctor degree from Golden Gate University School of Law. She earned a B.A. in Law and Society from University of California Santa Barbara.

Hon. Sharon Velzy

Presiding Judge Van Nuys

Judge Sharon Velzy is the Presiding Worker's Compensation Judge for the State of California in Van Nuys. She served as a Workers' Compensation Judge for 10 years before becoming the Presiding Judge.

Judge Velzy attended college in San Diego where she graduated Summa Cum Laude. She began her legal career as a criminal defense attorney before becoming an attorney for the State of California handling workers' compensation cases. During her career, Judge Velzy has been a guest lecturer and has organized numerous statewide education programs.

She is currently serving as an officer on the Executive Committee of the Workers' Compensation Section of the California Lawyers Association and is the Chair of the Education Committee. She is a member of the Conference of California Workers' Compensation Judges and serves on the board as Treasurer. Judge Velzy is a past recipient of The State Bar of California Wiley M. Manual Award honoring her Pro Bono work.