

# The California Commission on Health and Safety and Workers' Compensation



## AB 1987 AND RETURN-TO-WORK INCENTIVES AND ALTERNATIVES

Prepared at the Request of  
**Assembly Member Pedro Nava**

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State of California  
Department of Industrial Relations

April 6, 2006

**Commission on Health and Safety and Workers' Compensation**  
**AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

**Introduction**

Assembly Member Pedro Nava has requested technical assistance from the Commission on Health and Safety and Workers' Compensation (CHSWC) regarding his bill, Assembly Bill (AB) 1987, with respect to incentives, alternatives, and costs. The March 8, 2006 letter from Assembly Member Nava to CHSWC is included as *Attachment A*.

AB 1987 proposes changes to the Supplemental Job Displacement Benefit (SJDB) of the workers' compensation system and addresses the issue of injured workers' return to work (RTW). This report discusses SJDB and RTW and also makes suggestions for modifications to AB 1987 for clarification and to facilitate early RTW for the benefit of both workers and employers.

**Background**

CHSWC concurs with AB 1987's encouragement of early RTW for injured workers. Studies conducted for CHSWC by RAND have determined that returning to work at the earliest appropriate time reduces the long-term wage loss of an injured worker.<sup>1</sup> In addition, return to sustained employment may minimize some of the costs borne by employers.

Workers with permanent partial disability experience significant and sustained losses over the years after an injury. The greatest losses occur when the disabled worker loses his/her job and either cannot find work that pays as much as paid previously or cannot find any work at all.

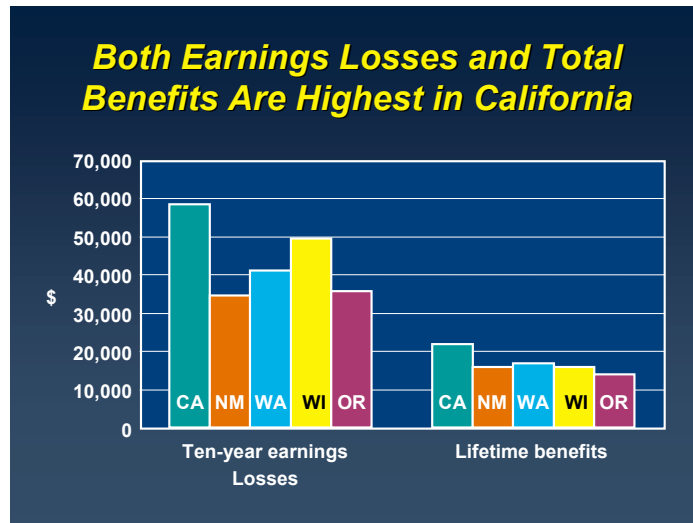
*Costs*

California costs for workers' compensation have been high as compared to other states. The CHSWC Study by RAND, "Earnings Losses and Compensation for Permanent Disability in California and Four Other States," indicates that when compared to other states, California had the highest average permanent partial disability benefits paid. These costs are improving with recent reforms, but more can be done to reduce losses to employees and costs to employers.

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<sup>1</sup> Reville, Robert T., Suzanne Polich, and Seth A. Seabury, and Elizabeth Giddens. "Permanent Disability at Private, Self-Insured Firms: A Study of Earnings Loss, Replacement, and Return to Work for Workers' Compensation Claimants." CHSWC Study by RAND. 2001. Boden, Leslie, Robert T. Reville and Jeff Biddle. "Timely Return to Work: Recent Findings." Presentation to CHSWC's California Forum on Workplace Health and Safety. February 2001.

Commission on Health and Safety and Workers' Compensation  
AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES



Source: CHSWC Study of Permanent Disability by RAND

### Outcomes

The higher costs paid by California employers do not necessarily result in better outcomes for California's injured workers, according to CHSWC research by RAND. That study found that while average benefits paid for permanent partial disability were highest in California, California injured workers are far more likely to be out of work after their injury, and in the long run, the benefits could not compensate the resulting lower earnings. Specifically, Californians with permanent partial disability claims lose more than 25 percent of their earnings from employment over the ten years after injury. In contrast, workers in Washington and Oregon lose less than 20 percent. These results are driven by poor RTW in California compared with the other states.<sup>2</sup>

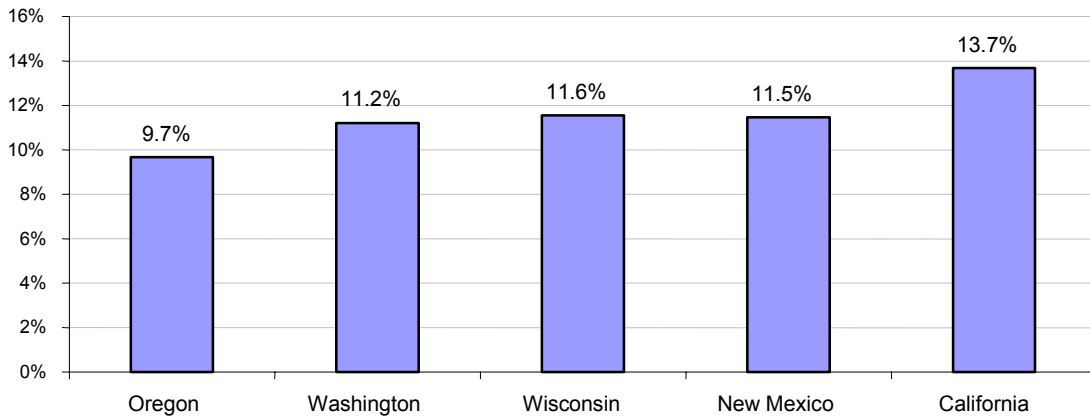
In addition, as seen in the chart below, CHSWC's study comparing RTW rates of permanent partial disability claimants in five states determined that California has the highest percentage of permanent partial disability claimants out of work three years after injury.<sup>3</sup>

<sup>2</sup> Reville, Robert T., Seth Seabury, and Frank Neuhauser. "Evaluation of California's Permanent Disability Rating Schedule. Interim Report." CHSWC Study by RAND. December 2003.

<sup>3</sup> Reville, Robert. "Comparing Return to Work of PPD Claimants Across States." RAND. Memorandum on April 23, 2002, via email.

**Commission on Health and Safety and Workers' Compensation  
AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

**Percentage of PPD Claimants Out of Work After Three Years**



Source: CHSWC STUDY of Permanent Disability (PD) by RAND

Preliminary findings of the CHSWC study by UC Berkeley, "Cross-state Comparison of Occupational Injury Rates and Time to Return to Work," indicate that California has the worst record in the nation for returning workers to employment after occupational injuries and illnesses. On average, California workers are on disability longer than any other state and they experience greater duration of restricted work days once back at work.

### **CHSWC Research on Return to Work**

Several CHSWC studies conducted by RAND and the University of California at Berkeley on RTW found that:

- Permanently disabled workers who return to work at the same employer have reduced levels of uncompensated wage loss over a five-year period.
- Better RTW at self-insured firms led to a lower proportion of earnings lost by permanent partial disability claimants. During the five years after injury, injured employees of self-insured firms lost a total of 23 percent of both pre- and post-tax earnings, compared to proportional losses of about 32 percent for injured employees of insured firms.<sup>4</sup>
- Injured workers have greater success at rehabilitation when they return to alternate or modified work with the same employer.
- Preliminary findings from a survey of RTW practices of private self-insured employers conducted by RAND found that worker participation in a formal RTW program decreases a worker's wage loss on average by approximately \$1,500 in the year after injury.

<sup>4</sup> Reville, Robert T., Suzanne Polich, and Seth A. Seabury, and Elizabeth Giddens. "Permanent Disability at Private, Self-Insured Firms: A Study of Earnings Loss, Replacement, and Return to Work for Workers' Compensation Claimants." CHSWC Study by RAND. 2001.

**Commission on Health and Safety and Workers' Compensation**  
**AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

## **Other Research**

Many other research studies emphasize the importance of early RTW interventions for injured workers. Some findings indicate that a supportive workplace response to injury needs to start as soon as the injury is first reported. An accommodating and flexible approach to RTW should follow promptly.<sup>5</sup>

Research evidence indicates that employers who promptly offer appropriately modified duties can reduce time lost per episode of back pain by at least 30 percent.<sup>6</sup>

## **Incentives**

Incentives to return to work with the at-injury employer include the following:

### *For Workers:*

1. High wages and benefits.
2. Job satisfaction.
3. Finds the modified or alternative work to be acceptable.
4. Likes the particular employer and job setting.

### *For Employers:*

1. High costs to train new employees.
2. Sees that productivity can be increased by fostering morale among employees.
3. Possible to find or create modified or alternative work.
4. Likes the particular employee.

## **Rules and Programs that Encourage Return to Work**

Currently, the California workers' compensation system includes the following rules and programs that encourage employers to offer work to their injured employees:

- A. California Return-To-Work Program,** authorized by Labor Code Section 139.48. Under this program, the state is to reimburse smaller employers for expenses incurred to make changes in the workplace to accommodate temporarily and permanently disabled employees. Until now, this program has not been funded, but we understand that it will be funded in the near future.
- B. Reduced temporary disability costs.** Temporary disability payments can end when the employer offers appropriate modified or alternative work while the worker is recovering from the injury.

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<sup>5</sup> "Return to Work in California – Listening to Stakeholders' Voices", Report for CHSWC by the Labor Occupational Health Program, UC Berkeley, 2001.

<sup>6</sup> Frank, et. al., "Preventing disability from work-related low-back pain", Canadian Medical Association Journal, June 16, 1998.

**Commission on Health and Safety and Workers' Compensation**  
**AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

- C. Reduced permanent disability payments.** Permanent payments are reduced by 15 percent if the employer offers appropriate regular, modified, or alternative work for 12 months within 60 days of a disability becoming permanent and stationary. The permanent disability payments are increased 15 percent if this offer is not made. The offer is made after the worker's condition has become "permanent and stationary" and the worker is eligible to receive permanent disability benefits. This rule applies to employers that have 50 or more employees.
- D. Vocational rehabilitation services and payments.** Vocational rehabilitation benefits of up to \$16,000 are available to workers injured before 2004. Employers who offer appropriate modified or alternative work for 12 months are not required to pay for vocational rehabilitation benefits. These benefits are offered to injured workers after the treating physician reports that the worker is medically precluded from returning to his or her pre-injury job or occupation. The physician can report this finding before the worker's condition becomes "permanent and stationary."
- E. Supplemental job displacement benefits (SJDB) or vouchers.** Vouchers for retraining expenses of \$4,000 to \$10,000 are available to workers injured in 2004 or later who sustain permanent disability. Employers who offer appropriate modified or alternative work for 12 months are not required to pay for a voucher. The amount of the voucher is based on the amount of the worker's permanent partial disability award, which means that the amount of the voucher cannot be determined until after the worker's condition becomes "permanent and stationary" and a workers' compensation judge has decided on the appropriate amount of permanent partial disability benefits.

### **Problems with Current Supplemental Job Displacement Benefits or Vouchers**

#### *Timing of Vouchers*

For workers whose employers do not offer modified or alternative work because incentives are insufficient or appropriate work is not available, vouchers can help workers in their efforts to be trained in another occupation and find employment elsewhere. However, the current statutes allow the employer (claims administrator) to provide vouchers very late in a claim, i.e., after a workers' compensation judge has made a final award of permanent partial disability benefits. Workers would greatly benefit from the vouchers being provided earlier in order to allow the worker to begin the retraining process as soon as possible.

#### *Proposal for Timing of Vouchers*

CHSWC recommends that for workers whose employers do not offer appropriate regular, modified, or alternative work lasting at least 12 months, the voucher be provided within 60 days of a disability becoming permanent and stationary or within 60 days of the two-year termination of temporary disability indemnity pursuant to Labor Code Section 4656, whichever applies. The first criterion is the same time in which employers must offer regular, modified, or alternative work in order to qualify for the 15 percent reduction in permanent disability benefits under Labor Code Section 4658(d). The second criterion is addressed to workers who are no longer entitled

**Commission on Health and Safety and Workers' Compensation**  
**AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

to temporary disability benefits after two years even though they have not returned to work and their disabilities are not yet permanent and stationary.

Alternative timing criteria for SJDB that have been considered but have been rejected are:

- a. When the treating physician reports that the worker will never be able to return to his or her pre-injury job or working conditions. This is equivalent to the medical test for "qualified injured worker" under the vocational rehabilitation system. This test was susceptible to frequent uncertainties and disputes. Furthermore, a large number of injured workers who were declared medically eligible for vocational rehabilitation benefits did not eventually sustain a permanent disability.
- b. 180 days after injury. This or any other fixed date would be either too early or too late for many workers and employers. Employers whose workers are still actively recovering 180 days after injury need more time to see what kinds of work the worker will ultimately be able to do before offering regular, modified, or alternative work lasting at least 12 months. As discussed above, workers who return to work with the same employer have better financial outcomes and greater success at rehabilitation than workers who seek employment elsewhere, so transitional work should be encouraged.
- c. After a final award of benefits, as provided in the current statutes. As discussed above, this is too late to produce optimal return on the investment in retraining.

CHSWC also suggests making the timing of the notice to injured workers regarding rights to the SJDB coincide with the timing of the notice about rights to permanent disability benefits: "together with the last payment of temporary disability or within 14 days of determining the amount of permanent disability payable, whichever is earlier."

*Proposal for Dollar Amounts of Vouchers*

Regarding the appropriate dollar amounts of vouchers, possible options include:

- a. Sliding scale based on amount of permanent disability, as set forth in the current statutes. This assumes that workers with more severe permanent disabilities are less able to change occupations and therefore need more resources for retraining.
- b. Sliding scale based on amount of pre-injury wages, with lower-wage workers receiving more. This assumes that lower-wage workers are less able to change occupations and therefore need more resources for retraining.
- c. Flat rate. This would be appropriate if there is no readily identifiable factor that correlates with difficulty in changing one's occupation. This would also be simple to administer.

Due to the lack of evidence to support either of the first two assumptions, CHSWC recommends a flat rate that is within the range of the current benefit.

**Commission on Health and Safety and Workers' Compensation**  
**AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

*Expiration of Vouchers*

Existing law does not provide for the expiration of vouchers. Claims administrators report potential problems of holding reserves open indefinitely. The purpose of the voucher, to support early RTW, is not served by prolonged delay in an employee's participation in retraining or skills-enhancement programs. Adequate time must be allowed, however, to accommodate class schedules, disabilities affecting participation, and the possibility of taking lower-wage employment while retraining. Therefore, CHSWC suggests that vouchers have an expiration five years from date of issuance.

*Clean-up Proposal for Supplemental Job Displacement Benefits in Carve-outs*

Labor Code Sections 3201.5 and 3201.7 permit labor unions and employers to create carve-outs that embody alternative systems for delivering benefits to injured workers and resolving disputes in workers' compensation claims. These sections were not updated to reflect the repeal of vocational rehabilitation and the advent of SJDB. CHSWC suggests language to update these sections.

**Recommendations for Modifications to AB 1987**

*Attachment B* contains "Suggested Modifications to AB 1987 to Accomplish Intent of Original Language." These suggested changes are intended to clarify and specify the original intent of AB 1987.

*Attachment C* contains "Suggested Modifications to AB 1987 to Accomplish CHSWC Recommendations." These suggested changes will implement all of the CHSWC recommendations on the timing and amount of the vouchers.



Commission on Health and Safety and Workers' Compensation  
AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES

Attachment A

Request from Assemblymember Pedro Nava

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Assembly  
California Legislature



PEDRO NAVA  
ASSEMBLYMEMBER, THIRTY-FIFTH DISTRICT

COMMITTEES:  
CHAIR, BUDGET SUBCOMMITTEE NO. 5  
ON INFORMATION TECHNOLOGY/  
TRANSPORTATION  
BUDGET  
HIGHER EDUCATION  
INSURANCE  
NATURAL RESOURCES  
JOINT LEGISLATIVE AUDIT  
JOINT LEGISLATIVE BUDGET

March 8, 2006

Christine Baker, Executive Officer  
Department of Industrial Relations  
Commission on Health and Safety and Workers' Compensation  
1515 Clay St., Room 901  
Oakland CA 94612

Dear Ms. Baker:

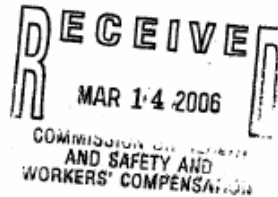
I would like to request technical assistance from the Commission on Health and Safety and Workers' Compensation regarding my bill AB 1987 regarding incentives, alternatives, and costs. Please give this immediate attention, if possible as I am hopeful of crafting amendments to the bill before its policy committee hearing in April.

Thank you for your help.

Sincerely,

PEDRO NAVA  
Assemblymember  
35<sup>th</sup> District

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**Commission on Health and Safety and Workers' Compensation  
AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

***Attachment B***

**Suggested Modifications to AB 1987 to Accomplish Intent of Original Language**

4658.7. If the treating physician finds that an injured employee will be unable to return to his or her usual and customary job duties, but may return to lighter work duties ~~that are not prior to the disability becoming~~ permanent and stationary, the injured employee shall be eligible for a supplemental job displacement benefit described in Section 4658.5 if the employer ~~is unable to provide~~ *does not offer, in the form and manner prescribed by the administrative director, alternate alternative work* or modified work within 60 days of the finding. The amount of the voucher under this section shall not exceed the amount specified in paragraph (1) of subdivision (a) of Section 4658.5, unless and until there is a determination of permanent partial disability, in which case Sections 4658.5 and 4658.6 shall apply.

PLEASE NOTE: These changes do not include any revisions that may be required if the policy targets are revised. These changes simply accomplish the intent of the original language. The reasons for these changes are:

1. "Duties" do not become permanent and stationary; "disabilities" do.
2. It matters whether the employer actually offers transitional work, not whether the employer would be *able* to provide it if the employer wanted to.
3. The offer should be in a specified form to minimize misunderstandings. The Administrative Director already regulates such offers of permanent work under Labor Code Sections 4658(d)(2) and (3), so it will be relatively simple to extend the regulations to cover offers of transitional work.
4. "Alternative work" is already defined in Section 4658.1, so that term is used in place of "alternate," which has not been defined.

**Commission on Health and Safety and Workers' Compensation**  
**AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

**Attachment C**

**Suggested Version of AB 1987 to Accomplish CHSWC Recommendations**

**3201.5.** *[Because the section on construction industry alternative dispute resolution carve-outs is so long, only the affected paragraph is shown.]*

(b) (1) Nothing in this section shall allow a collective bargaining agreement that diminishes the entitlement of an employee to compensation payments for permanent total or partial disability, temporary disability, vocational rehabilitation, a supplemental job displacement benefit, or medical treatment fully paid by the employer as otherwise provided in this division. The portion of any agreement that violates this paragraph shall be declared null and void.

**3201.7.** *[Because the section on other industry alternative dispute resolution carve-outs is so long, only the affected paragraph is shown.]*

(b) (1) Nothing in this section shall allow a labor-management agreement that diminishes the entitlement of an employee to compensation payments for permanent total or partial disability, temporary disability, vocational rehabilitation, a supplemental job displacement benefit, or medical treatment fully paid by the employer as otherwise provided in this division; nor shall any agreement authorized by this section deny to any employee the right to representation by counsel at all stages during the alternative dispute resolution process. The portion of any agreement that violates this paragraph shall be declared null and void.

**4650.** (a) If an injury causes temporary disability, the first payment of temporary disability indemnity shall be made not later than 14 days after knowledge of the injury and disability, on which date all indemnity then due shall be paid, unless liability for the injury is earlier denied.

(b) If the injury causes permanent disability, the first payment of permanent disability indemnity shall be made within 14 days after the date of last payment of temporary disability indemnity. When the last payment of temporary disability indemnity has been made pursuant to subdivision (c) of Section 4656, and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid.

(c) If the injury causes permanent disability, the employer shall provide to the employee a supplemental job displacement benefit as required in Section 4658.5 within 60 days of a disability becoming permanent and stationary or within 60 days of the last payment of temporary disability indemnity pursuant to Section 4656, whichever occurs first.

~~(e)~~(d) Payment of temporary or permanent disability indemnity subsequent to the first payment shall be made as due every two weeks on the day designated with the first payment.

~~(d)~~(e) If any indemnity ~~payment is not made~~ benefit or supplemental job displacement benefit is not paid or provided timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee, unless the employer continues the employee's wages under a salary continuation plan, as defined in subdivision (g). No increase shall apply to any payment due prior to or within 14 days after the date the claim form was submitted to the employer under Section 5401. No increase shall apply when, within the 14-day period specified under subdivision (a), the employer is unable to determine whether temporary disability indemnity payments are owed and advises the employee, in the manner prescribed in rules and regulations adopted pursuant to Section 138.4, why payments cannot be made within the 14-day period, what additional information is required to make the decision whether temporary disability indemnity payments are owed, and when the employer expects to have the information required to make the decision.

**Commission on Health and Safety and Workers' Compensation**  
**AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

~~(e)~~(f) If the employer is insured for its obligation to provide compensation, the employer shall be obligated to reimburse the insurer for the amount of increase in indemnity payments, made pursuant to subdivision (d), if the late payment which gives rise to the increase in indemnity payments, is due less than seven days after the insurer receives the completed claim form from the employer. Except as specified in this subdivision, an employer shall not be obligated to reimburse an insurer nor shall an insurer be permitted to seek reimbursement, directly or indirectly, for the amount of increase in indemnity payments specified in this section.

~~(f)~~(g) If an employer is obligated under subdivision (e) to reimburse the insurer for the amount of increase in indemnity payments, the insurer shall notify the employer in writing, within 30 days of the payment, that the employer is obligated to reimburse the insurer and shall bill and collect the amount of the payment no later than at final audit. However, the insurer shall not be obligated to collect, and the employer shall not be obligated to reimburse, amounts paid pursuant to subdivision (d) unless the aggregate total paid in a policy year exceeds one hundred dollars (\$100). The employer shall have 60 days, following notice of the obligation to reimburse, to appeal the decision of the insurer to the Department of Insurance. The notice of the obligation to reimburse shall specify that the employer has the right to appeal the decision of the insurer as provided in this subdivision.

~~(g)~~(h) For purposes of this section, "salary continuation plan" means a plan that meets both of the following requirements:

(1) The plan is paid for by the employer pursuant to statute, collective bargaining agreement, memorandum of understanding, or established employer policy.

(2) The plan provides the employee on his or her regular payday with salary not less than the employee is entitled to receive pursuant to statute, collective bargaining agreement, memorandum of understanding, or established employer policy and not less than the employee would otherwise receive in indemnity payments.

**4658.1.** As used in this article, the following definitions apply:

(a) "Regular work" means the employee's usual occupation or the position in which the employee was engaged at the time of injury, ~~and that meets all of the following conditions:~~

~~(1) Accommodates the employee's disability, if any.~~

~~(2) Offers wages and compensation equivalent to those paid to the employee at the time of injury, and~~

~~(3) Is located within a reasonable commuting distance of the employee's residence at the time of injury.~~

(b) "Modified work" means ~~regular work modified so that the employee has the ability to perform all the functions of the job~~ the employee's usual occupation or the position in which the employee was engaged at the time of injury that meets all of the following conditions:

~~(1) Is modified to accommodate the employee's disability, and that~~

~~(2) Offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and~~

~~(3) Is located within a reasonable commuting distance of the employee's residence at the time of injury.~~

(c) "Alternative work" means ~~work that the employee has the ability to perform, an occupation or position that meets all of the following conditions:~~

~~(1) Accommodates the employee's disability, that~~

~~(2) Offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and that~~

~~(4) Is located within reasonable commuting distance of the employee's residence at the time of injury.~~

(d) For the purpose of determining whether wages and compensation are equivalent to those paid at the time of injury, the wages and compensation for any increase in working hours over the average hours worked at the time of injury shall not be considered.

(e) For the purpose of determining whether wages and compensation are equivalent to those paid at the time of injury, actual wages and compensation shall be determined without regard to the minimums and maximums set forth in Chapter 1 (commencing with Section 4451).

(f) The condition that regular work, modified work, or alternative work be located within a reasonable distance of the employee's residence at the time of injury may be waived by the employee. The condition shall be deemed to be waived if the employee accepts the regular work, modified work, or alternative work and does not object to the location within 20 days of being informed of the right to object. The condition shall be conclusively deemed to be satisfied if the offered work is at the same location and the same shift as the employment at the time of injury.

**Commission on Health and Safety and Workers' Compensation**  
**AB 1987 AND RETURN-TO-WORK: INCENTIVES AND ALTERNATIVES**

**4658.5.** (a) Except as provided in Section 4658.6, if the injury causes permanent partial disability, ~~and the injured employee does not return to work for the employer within 60 days of the termination of temporary disability,~~ the injured employee shall be eligible for 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, ~~as follows:~~ The voucher shall be in the amount of \$7,000.00 and shall be effective for five years after the date it was provided to the employee.

- ~~—(1) Up to four thousand dollars (\$4,000) for permanent partial disability awards of less than 15 percent.~~
- ~~—(2) Up to six thousand dollars (\$6,000) for permanent partial disability awards between 15 and 25 percent.~~
- ~~—(3) Up to eight thousand dollars (\$8,000) for permanent partial disability awards between 26 and 49 percent.~~
- ~~—(4) Up to ten thousand dollars (\$10,000) for permanent partial disability awards between 50 and 99 percent.~~

(b) The voucher may be used for payment of tuition, fees, books, and other expenses required by the school for retraining or skill enhancement. No more than 10 percent of the voucher moneys may be used for vocational or return to work counseling. The administrative director shall adopt regulations governing the form of payment, direct reimbursement to the injured employee upon presentation to the employer of appropriate documentation and receipts, and any other matters necessary to the proper administration of the supplemental job displacement benefit.

(c) ~~Within 10 days of~~ Together with the last payment of temporary disability or within 14 days of determining the amount of permanent disability payable, whichever is earlier, the employer shall provide to the employee, in the form and manner prescribed by the administrative director, information that provides notice of rights under this section. ~~This notice shall be sent by certified mail.~~

(d) This section shall apply to injuries occurring on or after January 1, 2004.

**4658.6.** The employer shall not be liable for the supplemental job displacement benefit if ~~the employer meets either of the following conditions:~~

~~—(a) Within 30 days of the termination of temporary disability indemnity payments, within 60 days of a disability becoming permanent and stationary or within 60 days of the last payment of temporary disability indemnity pursuant to Section 4656, whichever occurs first, the employer offers, and the employee rejects, or fails to accept, in the form and manner prescribed by the administrative director, regular, modified, or alternative work, as defined in Section 4658.1, accommodating the employee's work restrictions, lasting at least 12 months.~~

~~—(b) Within 30 days of the termination of temporary disability indemnity payments, the employer offers, and the employee rejects, or fails to accept, in the form and manner prescribed by the administrative director, alternative work meeting all of the following conditions:~~

- ~~—(1) The employee has the ability to perform the essential functions of the job provided.~~
- ~~—(2) The job provided is in a regular position lasting at least 12 months.~~
- ~~—(3) The job provided offers wages and compensation that are within 15 percent of those paid to the employee at the time of injury.~~
- ~~—(4) The job is located within reasonable commuting distance of the employee's residence at the time of injury.~~