Supplemental Job Displacement Benefit	RULEMAKING COMMENTS 2nd 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
10117(b)	Commenter recommends the following revised language: (b) Within 60 calendar days from ~~the date that the ***employer has knowledge that the*** ~~ receipt of the Physician's Return-to-Work & Voucher Report (Form DWC-AD 10133.36) that indicates the work capacities and activity restrictions that are relevant to regular work, modified work, or alternative work ~~condition of an~~ where the injured employee ~~with~~ has permanent partial disability and becomes permanent and stationary: Commenter opines that this revised language will more clearly specify when the 60 days to offer work begins. Historically, it has been a fairly common experience to receive the necessary documents many days or even weeks after the event. Commenter states that this recommended change uses the same language as is found in Sections 10133.31(b) and 10133.34(b), and will make all of the sections dealing with this issue consistent with each other.	Steven Suchil Assistant Vice President American Insurance Association June 21, 2013 Written Comment	Disagree. This proposal is inconsistent with Labor Code section 4658(d)(2) which requires a job offer to be made "within 60 days of a disability becoming permanent and stationary." The language of the statute is unambiguous, and the Division may not adopt regulations that give an entirely different meaning than the plain language of the statute.	No change.
10117(b)	Commenter states that this subsection previously provided that for	Peggy Thill Claims Operations	Disagree. This proposal is inconsistent with Labor Code	No change.

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	employers who meet the criteria outlined in subsection (a), permanent disability benefit payments would be increased or decreased by 15% depending on whether the employer made an appropriate job offer within 60 calendar days of *knowledge* that the employee's condition had become permanent and stationary. The current modified regulations remove the provision that the employer have knowledge that the condition has become permanent and stationary and instead, the 60-day timeframe for making a job offer commences on the injured employee's P&S date. In the event the primary treating physician or AME/QME provides a retroactive permanent and stationary date, serving an offer of regular, modified, or alternative work on the employee within 60 calendar days of the P&S date is unreasonable since part (and, in some cases, all) of the 60 days may have already lapsed. Commenter recommends re-inserting the deleted text in §10117(b) to provide that the timeframe for offering regular, modified, or alternative work for injuries occurring between January	Manager State Compensation Insurance Fund June 21, 2013 Written Comment	section 4658(d)(2) which requires a job offer to be made "within 60 days of a disability becoming permanent and stationary." The language of the statute is unambiguous, and the Division may not adopt regulations that give an entirely different meaning than the plain language of the statute.	

	1, 2004 and December 31, 2012 commences when the employer has *knowledge* that the employee has reached permanent and stationary status.			
10133.31(b)(1)	Commenter recommends the following revised language: (b) If the injury causes partial permanent disability, the employee shall be entitled to a Supplemental Job Displacement Benefit unless the employer makes an offer of regular, modified, or alternative work pursuant to section 10133.34. (1) Upon receipt of the first <u>PTP, AME, QME</u> Physician's Return-to-Work & Voucher Report (Form DWC-AD 10133.36), the claims administrator shall forward the form to the employer. Commenter opines that adding the three physician designations should prevent the need for processing this form when it is received from other sources. It also comports with the Instructions of Form DWC-AD 10133.36 and the physician signature line which asks for a designation of	Steven Suchil Assistant Vice President American Insurance Association June 21, 2013 Written Comment	Disagree. Form DWC – AD 10133.36's instructions discuss who is responsible for filling out the Physician's form.	No change.

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	PTP, AME, or QME.			
10133.31(c)	Commenter opines that injured workers who have permanent disability (PD) from their injuries should get written notices from their employer(s) letting them know: (1) that they have a job to come back to or (2) that they don't, their employment is over and they will receive the SJDB. The whole point of these notices was to end fights about whether or not modified work was given to the injured worker. If the injured worker never missed work (or returned to their same job) AND has no permanent disability, then they aren't even eligible for a SJDB. But if they do have PD, then they either need to be put back to work or get the SJDB. Commenter states that this regulation takes away from injured workers of all of the benefits of Labor Code 4658.7(b). Employers who don't give the notices and don't provide the regular or modified work for twelve months will avoid providing the SJDB by claiming the injured workers never missed work or went back to their	Jesse Ceniceros, President Votersinjuredatwork June 18, 2013 Written Comment	Disagree. The purpose of supplemental job displacement vouchers is to provide benefits to those that have been displaced from their jobs. Vouchers should not be provided to those that have lost no time from work and have been working.	No change.

	regular jobs. Or injured workers will never know that they even have the right to SJDB since these employers will not send out notices. There isn't a penalty if they don't. Commenter states that this is definitely not what the Legislature had in mind when it passed 4658.7 and set up the SJDB system for 2013 injury cases. Commenter opines that injured workers are not going to quit his/her job to get a SJDB. If they can do their job, they will keep doing it as long as the employer keeps them and will never need or use the SJDB. Commenter requests that this subsection be removed as it was never part of this law.			
10133.34(b)(4)	Commenter states that this subsection, when read in conjunction with the entire SJDB/voucher system, indicates that an undocumented injured worker who suffers an injury resulting in permanent partial disability will NOT be offered regular, modified or alterative work if the employer "subsequently learns" of that undocumented status. Since the employer is excused from offering	Bret Graham, President LatinoComp June 19, 2013 Written Comment	Agree.	10133.34(b)(4) is deleted.

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	work, there is then no responsibility to provide the SJDB/voucher to the undocumented injured worker. Commenter states that this limitation of rights for the undocumented worker is NOT contained in Labor Code 4658.7. In fact, it is contrary to both the letter and spirit of LC 1171.5 which makes an injured workers' immigration status irrelevant for purposes of eligibility to receive workers' compensation benefits. The Legislature is presumed to be aware of all other law when it enacted LC 4658.7 to provide SJDB for injuries after 01/01/2013. <u>An injured workers' undocumented status should not be a bar to receipt of the SJDB.</u> Moreover, the 9th Circuit Court of Appeal rejected such an approach in dealing with undocumented workers' rights in <u>Rivera v. NIBCO</u>, 364 F.3d 1057, 1072 (2004 9th Circuit): > Regrettably, many employers turn a blind eye to immigration status during the hiring process; their aim is to assemble a			

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	workforce that is both cheap to employ and that minimizes their risk of being reported for violations of statutory rights. Therefore, employers have a perverse incentive to ignore immigration laws at the time of hiring but insist upon their enforcement when their employees complain. We have placed the burden of proof squarely on employers who seek to assert an after-acquired evidence defense. Similarly, the Supreme Court of New Mexico recently reached a similar result in the workers' compensation context rejecting the employer's argument that the undocumented worker could never be awarded increases in PD based on "modifiers" similar to the Age, Occupation and FEC/Ogilvie factors used in California: It would create a perverse			

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	incentive for employers to hire undocumented workers over other workers, especially in high-risk jobs that often result in workers' compensation claims. An employer could hire undocumented workers, knowing that in the event of injury the employer would likely pay a much lower amount in workers' compensation benefits due to ineligibility for modifier benefits. This would again upset the balance the Legislature created in the WCA—this time tipping it in favor of the employer as opposed to the worker. Gonzalez v. Performance Painting; Builders Trust of New Mexico, (New Mexico Supreme Court 05/30/3013 Docket No. 32,844) The Gonzalez court placed the burden on the employer to show that it had complied with all immigration laws,			

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	requirements and I-9 documentation BEFORE allowing it to assert the defense that it could not offer the undocumented worker regular or modified work. ("where the employer is culpable for improperly hiring the worker in the first place, the worker should not shoulder all the responsibility . . . [w]here the pre-injury employer knew or should have known of the injured worker's undocumented status, the employer cannot make a bona fide rehire offer [and is responsible for payment of the additional modified PD].") Under the current language of this Proposed Regulation, employers who have knowingly (and illegally) hired and retained undocumented workers will avoid payment of the SJDB by simply conducting, for the first time, an "I-9 audit" applicable only to the injured worker. Commenter opines that this is against both the letter and the spirit of, among other statutes, the California Workers' Compensation laws in general and LC 1171.5 specifically. Commenter states that the Legislature has made NO changes to those laws which would provide			

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	any statutory basis for this Proposed Regulation which deny undocumented injured workers the benefits they would otherwise be entitled to under the workers' compensation system.			
10133.34(b)(4)	Commenter objects to this proposed subsection. Commenter opines that this rule invites employers to deny TD to workers that were "legal enough" to be hired and work and be injured, but suddenly become "illegal" when the employer has to pay TD. Commenter states that this is wrong and is in violation of the spirit of the Labor and Insurance code which states that immigration status is not to be considered in providing benefits.	Jeffrey Dittrich, Esq. June 19, 2013 Written Comment	Agree.	10133.34(b)(4) is deleted.
10133.34(b)(4)	Commenter opines that this subsection is a back-door method of writing discrimination into state law and that it would give the state's blessing to exploitation by some employers who "discover" discrepancies in a worker's documentation only at the time of an injury. Commenter states that it would bar benefits based on immigration status and begin a downward spiral of immigration-related restrictions in California policy. Commenter references Labor Code	Kenneth D. Martinson, Esq. June 29, 2013 Written Comment	Agree.	10133.34(b)(4) is deleted.

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	section 1171.5 and Government Code section 11135.			
10133.34(b)(4)	Commenter opposes this subsection for the following reasons: 1. The proposed modifications unduly punish injured employees while protecting employers who knowingly employ undocumented workers. Under California law undocumented workers are eligible for workers' compensation benefits. See Farmers Brothers Coffee, v. WCAB (Rafael Ruiz), 133 Cal. App. 4th 533, 542-544 (2005). The proposed regulation would allow employers to circumvent the spirit of workers' compensation by allowing employers to extend an offer for supplemental work to an undocumented worker, and subsequently revoke the offer having learned that the employee is undocumented. California's labor law is at the forefront of protecting the rights of undocumented workers. See Cal. Labor Code 1171.5(a). California law provides in relevant part: "All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all	Nicole Marquez, Esq. Worksafe June 26, 2013 Written Comment	Agree.	10133.34(b)(4) is deleted.

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	individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state." 2. Proposed modifications make undocumented workers vulnerable to workplace abuses and mistreatment. Currently, undocumented workers are disproportionately represented in occupations with high levels of occupational hazards. *Matthew Hall & Emily Greenman*, The Occupational Costs of being illegal: Legal Status and Job Hazard among Mexican and Central American immigrants 2-3 (2012). These workers may not always report these incidents due to fear of retaliation based upon immigration status. It is well documented that unscrupulous employers use workers' immigration status to instill fear of deportation when workers exercise their rights. See NELP California Report May 2013, Workers' Rights on Ice: How Immigration Reform can Stop Retaliation and Advance Labor Rights. Moreover, immigrant workers have some of the highest number of workplace fatalities. *Worksafe*, Dying at Work, (2011, 2012, and 2013).			

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	3. Proposed modifications unfavorably affect lawful, eligible workers. By allowing disparate treatment of documented and undocumented workers, the DIR is harming all workers. This regulation makes undocumented workers extremely vulnerable because they will feel unable to protest unsafe working conditions, which, thereby potentially expose lawfully documented workers. This will overall harm all employees, both documented, and undocumented. In addition, because of undocumented workers inability to properly complain or protest, unscrupulous employers will find a cost incentive to hire undocumented workers as opposed to lawful workers because undocumented workers will be less likely to complain about workplace hazards, thereby driving down the workers' compensation premiums and also relieving employers from the economic burden of providing the job displacement benefit.			
10133.34(b)(4)	Commenter opposes this subsection. Commenter opines that the Supplemental Job Displacement	Jesse Ceniceros VotersInjuredatWork June 25, 2013 Written Comment	Agree.	10133.34(b)(4) is deleted.

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	Benefit (SJDB) voucher is a crucial benefit for thousands of California injured workers each month. It is such a valuable lifeline in part because it provides relatively swift access to key support services that facilitate injured workers' resilience, wellbeing, and workforce reentry, at their own initiative. Commenter opines that any effort to infringe on California workers' rights under our state constitution to cure and relief of the effects of their work-related injury—or to exclude them altogether from the scope of this guarantee—harms injured workers and undermines our state's hard-won standard of rewarding work and equal protection under law. Commenter states that the proposed regulation is a needless erosion of this standard, in that no binding legal precedent or prevailing evidence dictates or disposes any such policy. To the contrary, the proposed regulation creates a loophole in workers compensation enforcement and California law and an incentive for unscrupulous behavior by			

	employers in the state that would have the effect of rewarding exploitative behavior in our workforce and punishing injured workers at precisely the most vulnerable moment of their lives. Such a regulation would create a malignant precedent of its own, with far-reaching negative implications in state law and society.			
10133.34(b)(4)	Commenter fears that workers' compensation benefits for undocumented injured WORKERS are going to be denied by under the proposed subsection. Commenter opines that these immigrants are hard-working people who, in many cases, through no fault of their own, do not have the proper "papers" to obtain valid government issued ID. They are working anyway to support themselves and their families and not seeking free handouts. When they are seriously injured they need some type of training so they don't have to rely on government assistance to survive. Commenter opines that this proposal would deny them that. This is at a time when both state and Federal laws are	Reynaldo Barrera Nicole Barrera Written Comment July 1, 201	Agree.	10133.34(b)(4) is deleted.

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	recognizing and expanding immigrant rights.			
DWC AD Form 10133.36	Commenter is concerned that the form, as proposed, will confuse the physicians responsible for completion. Instead, commenter recommends that the DWC attempt to harmonize this form with the functional capacity assessment portion of the PR4. Commenter opines that physicians have experience utilizing this form and are less likely to experience problems if harmonization occurs. Alternatively, commenter proposes that this form be harmonized *and* combined with the PR4 so that a claims administrator can tear off the RTW portion and send it to the employer. Commenter opines that the result would be less confusion and streamlined paperwork for physicians and a quicker resolution of important details for injured workers and employers.	Jason Schmelzer CCWC Jeremy Merz CalChamber June 21, 2013 Written Comment	Disagree. Form 10133.36 is required by Labor Code section 4658.7 and is a mandatory attachment to a P&S report which can be from a QME and not just a treating physician.	No change.
DWC AD Form 10133.36	Commenter opines that even though there have been significant positive modifications made to this form during the rulemaking period, he continues to believe that the PR-4 provides more comprehensive	Steven Suchil Assistant Vice President American Insurance Association June 21, 2013	Disagree. Form 10133.36 is required by Labor Code section 4658.7 and is a mandatory attachment to a P&S report which can be from a QME and not just a treating	No change.

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	information and makes much of this form redundant or could even create areas of dispute. Commenter suggests deleting this as a mandatory form and allowing use of either the PR-4 or the Physician's Return-to-Work & Voucher Report.	Written Comment	physician.	
General Comment	Commenter has no further additions or amendments to the written testimony that he provided during the first 15 Day Comment period.	Michael McClain General Counsel June 21, 2013 Written Comment	No comment necessary.	No change.