Supplemental Job Displacement Benefit	RULEMAKING COMMENTS 3rd 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
10117	Commenter objects to this section as wrong and corrupt as it allows an employer up to 12 months to offer modified work but only allows the employee 20 days to make a decision. Commenter, reflecting upon his own experience as an injured worker, states that he could have ended up committing suicide and so could many others who lose everything they have because all their benefits are taken away from them. Commenter states that the focus is not on helping the employee at all, yet they are the victims of an injury that devastated their life and the lives of their kids and family members. Commenter questions when the division will assist in doing the right thing for the injured employee.	Anonymous Injured Worker July 11, 2013 Written Comment	Disagree. Employers have 60 days from permanent and stationary status to make an offer of work.	No change.
10117(b)	Commenter objects to the striking of the language "employer has knowledge that the". Commenter opines that it is not uncommon for a physician to find a retroactive P&S date or to take 60 days or more to produce a report. In those cases, the claims administrator and the employer will have no reasonable opportunity to determine if permanent work restrictions can be accommodated.	Beth Harville, Claim Supervisor Patriot Risk Services July 8, 2013 Written Comment	Disagree. Labor Code section 4658(d)(2) requires a job offer to be made "within 60 days of a disability becoming permanent and stationary."	No change.

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	Existing law requires that the employer engage in the interactive process with the employee to attempt to find accommodation. This conflicts with the proposed language which does not necessarily allow ANY time to perform this process. If the employer has no requirement of having knowledge, they are unduly compromised in this process. Commenter opine that there is no harm to the employee by allowing that the employer needs to be aware of a situation before they can be reasonably expected to act.			
10117(b)	Commenter recommends the following revised language: (b) Within 60 calendar days from the date that the <u>employer has knowledge that the</u> condition of an injured employee with permanent partial disability becomes permanent and stationary: … Commenter states that 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	Michael McClain General Counsel California Workers' Compensation Institute July 18, 2013 Written Comment	Disagree. The language of Labor Code section 4658(d)(2) is unambiguous and the division may not adopt regulations that give a different meaning than the plain language of the statute.	No change.

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	exact date that the injury or injuries became permanent and stationary still leads to anomalous results. Commenter opines that 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. Commenter opine that 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. Commenter states that 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			

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	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. Commenter opines that there is no need for either the employer or the employee to live with the absurd consequences imposed by section 10117(b) as written and that his recommended change will resolve a			

	great deal of confusion and irrational consequences of a literal reading of the statute.			
10117(f)	Commenter opines that this subsection should be retained. Commenter states that it provides necessary information to affected parties, but most specifically to the injured employee.	Steven Suchil Assistant Vice President American Insurance Association July 11, 2013 Written Comment	Disagree. Case law, *Del Taco v. WCAB (2000) 79 Cal. App.4th 1437*, addressed the issue and it is redundant and unnecessary to reiterate case law in regulations.	No change.
10117(f) and 10133.34(b)(4)	Commenter objects to the striking of the language "When the employer offers…and subsequently learns that the employee cannot lawfully perform…" in both of these regulations. Commenter states that case law in the last decade or more has found that an employer is not to be penalized when they are able to offer work but cannot actually provide it to the employee due to the employee's inability to legally work in the United States. The 2nd DCA has ruled that requiring an employer to provide a benefit that cannot be provided legally violates the U.S. Constitution's equal protection clause. Adding this language with regard to both the 15% adjustment and the voucher simply codifies the findings that have already been established. Commenter is	Beth Harville, Claim Supervisor Patriot Risk Services July 8, 2013 Written Comment	Disagree. Case law, *Del Taco v. WCAB (2000) 79 Cal. App.4th 1437*, addressed the issue and it is redundant and unnecessary to reiterate case law in regulations	No change.

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	aware that this issue has become politicized by those attempting to establish rights that do not exist which has likely resulted in these language strikes. Commenter opines that it is irresponsible for this rule-making body to ignore the established case law in order to appease a particular interest group. Ignoring the issue in these rules will not resolve the issue and defendants will be forced to re-litigate a question that has already been answered. Further, the proposed language does not restrain an employee who was knowingly employed without proper documentation to assert this fact in an effort to get around the strict language of the regulation. Commenter opines that striking this rule for everyone is an excessive move that will lead to an increase in avoidable litigation.			
10117(f) and 10133.34(b)(4)	Commenter recommends that these subsections be retained with the following recommended language: <u>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</u>	Michael McClain General Counsel California Workers' Compensation Institute July 18, 2013 Written Comment	Disagree. Case law, *Del Taco v. WCAB (2000) 79 Cal. App.4th 1437*, addressed the issue and it is redundant and unnecessary to reiterate case law in regulations.	No change.

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	perform regular, modified or alternative work, the employer is not required to provide the regular, modified or alternative work. Commenter state that 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. Commenter opine that 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			

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	specific circumstance and it provides a notice to injured workers regarding their right to receive the SJDB. Commenter opines that clarity in this regard is worthwhile.			
10117(f) and 10133.34(b)(4)	Commenter supports the change to delete the language in these subsections. Commenter opines that the rules require a simple analysis for the employer as to whether the injured worker after a period of temporary disability can be offered regular work, or with their work restrictions be accommodated with modified or alternative work. If not, then the displaced worker shall be entitled to a supplemental job displacement voucher education-related retraining or skill enhancement. This mandate is consistent with Labor Code Sections 4658 and 4658.7, and neither of these statutory sections allow for denying access to the voucher when an employer subsequently learns that the employee cannot lawfully perform the work offered.	Mark Gerlach California Applicants' Attorneys Association July 18, 2013 Written Comment	No comment necessary.	No change.
10133.31(f)(5)	Commenter recommends that the language remain as it was before. Commenter is concerned about the	Janet Selby Workers' Compensation Program Manager	Disagree. Case law, *Del Taco v. WCAB (2000) 79 Cal. App.4th 1437*, addressed the issue and it is redundant and	No change.

	fact that injured workers were allowed to purchase computer equipment without any evidence that they were engaged in any sort of training or skill enhancement. Commenter opines that with these new modifications, injured workers will now be allowed to get the funds up front with nothing more than a bid from the computer supplier. They are supposed to provide receipts (no timeframe specified), but the only "penalty" for failure to do this is a $1000 reduction in the voucher funds. Commenter opines that this is not really a penalty if the injured workers are not engaged in training and have no intent to do so. They could receive $1000 and spend it on anything without significant consequences. The statute under Labor Code section 4658.7(e)(5) states that the $1000 is to be used for purchase of computer equipment. Commenter opines that the regulations should ensure that these funds are not used for anything other than what the statute allows.	Municipal Pooling Authority July 8, 2013 Written Comment	unnecessary to reiterate case law in regulations	
10133.31(f)(5)	Commenter opines that it is completely unfair for the employer to always have to fork money over and	Barbara Banez July 9, 2013 Written Comment	Agree in part. Injured workers can either purchase a computer and seek reimbursement or	10133.31 (f)(5) has been amended: <u>(5) Purchase of</u>

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	for employees not to be deterred with committing a falsehood and never purchasing a computer with the money. Commenter requests the Division create a penalty or deterrent against submissions of bids and not purchasing a computer with the money or requiring the applicants to execute an affidavit that they will purchase a computer with the money and that if they violate the rule, they can be prosecuted for the falsehood.		submit an invoice and payment will be made directly to the computer retailer rather than to the injured worker.	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) ~~reimbursable after cost is incurred~~ 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~~ invoice payable to a computer retailer or itemized

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				receipts showing the purchase(s) of computer equipment. ~~If the employee receives funds based upon submission of a written bid, the employee shall submit itemized receipt(s) demonstrating the actual purchase of computer equipment 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~~. At the time the voucher is provided, the claims administrator or employer may give the employee the option to obtain computer equipment directly from the employer. The employee shall not be entitled to reimbursement for purchase of games or any entertainment media.
10133.31(f)(5)	Commenter recommends the following revised language: 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	Steven Suchil Assistant Vice President American Insurance Association July 11, 2013 Written Comment	Agree in part. Injured workers can either purchase a computer and seek reimbursement or submit an invoice and payment will be made directly to the computer retailer rather than to the injured worker.	10133.31 (f)(5) has been amended, See above.

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	thousand dollars ($1,000) ~~reimbursable after cost is incurred~~ 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*~~ ***invoice payable directly to the*** ~~from~~ a computer retailer or itemized receipts showing the purchase(s) of computer equipment. Commenter opines that the difficulty with the proposal as written is that if there is insufficient money remaining in the employee's voucher account to both advance the money for the bid and retain a sufficient amount to cover the advance. There is also the potential for requests for additional funding for other items after the computer bid is advanced that would draw down the amount beyond what would cover the advance. Commenter recommends an alternate solution that would require an invoice rather than a "bid" that would then require payment directly to the retailer. If the above recommendation is not accepted commenter requests that the			

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	second part of this subsection be amended as follows: 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, *the amount advanced* ~~*$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. Commenter opines that requiring this advance, and the Claims Administrator then holding an equal amount of money as security against the advance, is likely to lead to many disputes as additional bills are submitted and at some point denied because of insufficient funds due to the need to withhold the amount of the advance until receipts are received. Commenter strongly recommends that his proposal to require an invoice rather than a bid, and that the payment be made directly to the retailer, be			

	accepted.			
10133.31(f)(5)	Commenter recommends the following revised language: 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	Michael McClain General Counsel California Workers' Compensation Institute July 18, 2013 Written Comment	Agree in part. Injured workers can either purchase a computer and seek reimbursement or submit an invoice and payment will be made directly to the computer retailer rather than to the injured worker.	10133.31 (f)(5) has been amended, See above.

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	employee shall not be entitled to reimbursement for purchase of games or any entertainment media. Commenter opines that 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. Commenter opines that in this way the payment will be based on a purchase, rather than an intent to purchase.			
10133.31(f)(5)	Commenter states the proposed language was added to this section permitting injured workers to receive up to $1000 for purchase of a computer upon submission of a "written bid" from a computer retailer. Previous versions of this proposed regulation only permitted the injured worker to receive reimbursement upon submission of an itemized receipt	Jeremy Merz CalChamber Jason Schmelzer CCWC July 18, 2013 Written Comment	Agree. Injured workers can either purchase a computer and seek reimbursement or submit an invoice and payment will be made directly to the computer retailer rather than to the injured worker.	10133.31 (f)(5) has been amended, See above.

	documenting the purchase of computer equipment. Commenter recognizes that some injured workers may be unable to incur the expense of a computer and seek reimbursement; however, commenter finds the proposed solution to this issue problematic - funds should not be distributed upon the intent to purchase a computer. Rather, commenter states that the regulations should direct the injured worker to submit an invoice to the claims administrator for direct payment to the computer retailer. Commenter opines that this will allow an injured worker to select computer equipment without having to pay out of pocket and it will ensure funds are used for the intended purpose.			
10133.31(f)(5)	Commenter states that previously under §10133.31(f)(5) of the proposed regulations, an injured employee could be reimbursed up to $1,000 for the purchase of computer equipment with the submission of appropriate documentation of the purchase to the claims administrator. Under the current modified regulations, rather than being reimbursed for the cost, an	Peggy Thill Claims Operations Manager State Compensation Insurance Fund July 18, 2013 Written Comment	Agree in part. Injured workers can either purchase a computer and seek reimbursement or submit an invoice and payment will be made directly to the computer retailer rather than to the injured worker.	10133.31 (f)(5) has been amended, See above.

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	injured employee is also permitted to request up to $1,000 prior to purchasing equipment if he or she provides the claims administrator a written bid from a computer retailer, with receipts to be submitted after the purchase. In the event the injured employee fails to submit an itemized receipt documenting the purchase, the claims administrator can deduct $1,000 from the total allowable amount of the voucher. Commenter opines that section 10133.31(f)(6) of the proposed regulations already provides that the injured employee may request up to $500 for miscellaneous expenses without the need for itemized documentation or accounting. As written, the modified regulations increase the amount the injured employee may receive without documentation of how the funds are spent to $1,500. Commenter opines that since the Supplemental Job Displacement Benefit is intended to be used by a qualified injured employee for education-related training and/or skill enhancement, the current proposed regulations essentially create			

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	the potential for $1,500 of the voucher to be used for something other than its intended purpose. To reasonably ensure the SJDB voucher is used for education-related training and/or skill enhancement as intended, commenter recommends that the injured employee be required to provide itemized receipts documenting the purchase of computer equipment prior to being reimbursed for the cost. As an alternative, commenter recommends allowing the computer vendor to directly bill the claims administrator for the cost of the computer up to $1,000.			
10133.31(f)(5)	Commenter supports the proposed change to this subdivision which is amended to allow injured workers to submit written bids from a computer retailer to obtain payment for the purchase of computer equipment because they may not have the funds to purchase the equipment up-front. If the injured worker receives funds based upon submission of a written bid, the injured worker will be required to submit receipts. Failure to submit receipts will result in a $1,000 deduction from the total amount	Mark Gerlach California Applicants' Attorneys Association July 18, 2013 Written Comment	No response necessary.	No change.

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	allowable by the voucher. Commenter opines that this change is consistent with the statutory rule laid out in Subdivision (e) of Labor Code section 4658.7, which sets out a list of specific expenses that the voucher may be used for at the choice of the employee, which includes the purchase of computer equipment, up to $1,000. Commenter opines that the proposed change clearly improves access to this benefit for injured workers seeking to return to the labor market. Access to a computer is extremely important to virtually every person seeking work in the modern economy. Job listings are frequently posted only on-line, and many job listings show only an email or internet address. Furthermore, listings for office jobs generally require computer literacy and familiarity with specific business programs, and even jobs that previously were considered "manual labor" now require some knowledge of computers.			
10133.34(b)(4)	Commenter opines that it is unclear to him why this subsection is being	Steven Suchil Assistant Vice	Disagree. Case law, *Del Taco v. WCAB (2000) 79 Cal.*	No change.

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	deleted as it provides necessary information to affected parties, but most specifically to the injured employee. Commenter recommends that the language not be removed.	President American Insurance Association July 11, 2013 Written Comment	*App.4th 1437,* addressed the issue and it is redundant and unnecessary to reiterate case law in regulations.	
10133.34(b)(4)	Commenter would like to thank the Division for not moving forward on the proposed modifications to 8 CCR 10133.31 & .34 (b)(4), which sought to limit the partial permanent disability benefits of undocumented workers. This proposed modification would have relieved employers of responsibilities when and if they learn that an employee is undocumented and cannot lawfully perform regular, alternative or modified work. Commenter opposed the modification because it would have: (1) unduly punished injured employees while protecting employers who knowingly employ undocumented workers; (2) made undocumented workers vulnerable to workplace abuses and mistreatment; and (3) unfavorably affected lawful, eligible workers. Commenter applauds the decision to delete this subsection.	Nicole Marquez, Esq. Worksafe July 18, 2013	No response necessary.	No change.

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10133.34(b)(4)	Commenter would like to commend the Department of Industrial relations for allowing the public comment process to play out in real time (and not just in theory), thereby resulting in positive changes to the initial versions of these Regulations. Commenter opines that with this [presumably] final version of the Proposed SJDB/"voucher" regulations the DIR has addressed the concerns made in the previous comment periods both by those within and outside of the workers' compensation community, specifically in relation to Regulation 10133.34(b)4). Commenter states that the deletion of this needless, and potentially hurtful, proposed Regulation will benefit everyone and will help to implement the both the letter and the spirit of the statute, as well as the intent of the Legislature, by ensuring the continued availability of the SJDB benefits for ALL qualified injured workers irrespective of immigration status.	Bret Graham President LatinoComp July 18, 2013 Written Comment	No response necessary.	No change.