

Benefit Provision and Notices from an Audit Perspective

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2021 Audit Program Description

California Division of Workers Compensation (DWC)

- Guiding **LC 129 and 129.5**
- The **Audit & Enforcement Unit** is Required to:
- Conduct **routine Profile Audit Review (PAR Audit)**
- **Applies to all adjusting locations** of California Workers' Compensation claims **at least once every five years**



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2021 Audit Program Description

California Division of Workers Compensation (DWC)

- Subjects of **audits are rated on set measurement standards** set by **prior audit results in the industry**
- The **Administrative Director annually establishes the profile audit review and full compliance audit standards**



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2021 Audit Program Description California Division of Workers Compensation (DWC)

- The **2021 standards** were to be based on results from **Calendar years of 2017 through 2019**
- The audit notifications I have seen have **dropped 2017 and added 2020.**
- The **current audits** are reviewing **2018 through 2020**



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2021 Under 8CCR10107.1(C) (1)

- What's the goal in Profile Audit Review (PAR)
- Scheduled selection of files and alternates
- The percentage you must be **at or under:**
 - **Pass PAR is 1.46656**



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What Happens if you PASS PAR?

- You will be required to pay all compensation due, but **no administrative penalties will be assessed.**
- **THIS IS THE GOAL!**
- **AUDIT UNIT GOES AWAY FOR 5 YEARS!**



2021 Under 8CCR10107.1 (d) (1)

- What's the goal in Full Compliance Audit (FCA)
- Expanded review additional files
- Based on audit results from the full sample of indemnity claims
- The percentage you must be **at or under:**
 - **Pass FCA is 1.85379**



What Happens if you PASS FCA?

- You will be required to **pay any unpaid compensation and penalties will be assessed**, but only for violations involving the **failure to pay indemnity or late paid indemnity**
- **AND... The AUDIT & ENFORCEMENT COMES TO VISIT YOU AGAIN IN 2 YEARS!**



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2021 Under 8CCR10107.1 (e)

- If FCA is failed, then you go onto (FCA-2)
- This includes a review of all issues including but not limited to Denied Claims
- “An ounce of prevention is worth a pound of cure”
 - Who said this?



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Answer

- Benjamin Franklin famously advised fire-threatened Philadelphians in 1736 that:
- “An ounce of prevention is worth a pound of cure”
- Clearly preventing fires on your files before an audit is better than having to fighting them during an audit!



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What Happens if you PASS FCA-2?

- You will be required to pay unpaid compensation, and penalties assessed for all violations.
- The penalty scale escalates depending on the frequency and severity of the infraction.



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What Happens if you PASS FCA-2?

- There are a wide variety of considerations at this stage of an audit which includes but is not limited to business practices.
- Business practices penalty is extremely serious and can be up to \$400,000, plus the individual penalties for each violation.



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We think we know what's in our files... But Do We?

- Consider pre-audit or Mock PAR Audits of your files if you know your number is coming up in the next year
- Claims can be complex, and disputes do arise, but your main role as an administrator is to provide benefits that are due.
- That is the dilemma!



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Disputes

- Food for thought... If you do not have in your possession documentation to support a dispute, pay what you owe until you can obtain the documentation that supports your dispute.
- Your arguments are always more persuasive when you have the proof!



What Categories are Included in PAR

- Frequency of claims with unpaid compensation and the amount
- Frequency of claims with violations involving late first Temporary Disability payments or first notices of salary continuation



What Categories are Included in PAR

- Frequency of claims with violations involving late first payment of Permanent Disability and Death Benefits
- Frequency of claims with violations involving late subsequent (scheduled) indemnity payments



What Categories are Included in PAR

- The percentage of claims with violations involving failure to comply with the requirements for notices advising injured worker of the process for selecting an Agreed Medical Evaluator/or Qualified Medical Evaluator
- Make sure your enclosures say what you sent and maintain a copy of all documents in your claim file



Let's talk about practicing the process

- Thought we were getting over COVID-19, but your practices during COVID-19 are in the year 2020 and subject to Audit Review!
- So, what could go wrong?



COVID-19 Modified Duty

Do we owe TD when an employer who was offering modified duty is closed or lays off due to a "Mandatory Order" or loss of business?

Answer:

Bethlehem Steel Co. v. Industrial Acci. Com., 7 Cal. Comp. Cases 250, 1942 Cal. Wrk. Comp. LEXIS 363, 54 Cal. App. 2d 585, 129 P.2d 737 (Cal. App. September 29, 1942)

The WCAB has cited it for the purpose of "**once an IW has RTW unrestricted duties, they are no longer TD.**"



COVID-19 Modified Duty

Young v. Johns-Manville Products Co. (1946) 11 CCC 217

When an employee is offered modified work within their work restrictions and they **refuse, then TD is NOT due.**



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COVID-19 Modified Duty

The questions I ask myself:

- Are the employee's released to full duty as in Bethlehem Steel?
- Answer: NO -If on modified duty they have not been released to full duty.



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COVID-19 Modified Duty

Is modified duty being offered as in Young v. Manville Products?

Answer: In Young the employee must receive an offer and then refuse.

In the current circumstances modified duty is not being offered because of COVID-19; the employee is not refusing to accept modified.



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COVID-19 Modified Duty

- Audit unit insight, if there is medical evidence indicating TD on a positive COVID-19 case, send a TD start notice and explain employer paid sick pay, then pick up TD if continued.
- The vast majority of COVID cases do not have any more than the positive test result and no other medicals. In those cases, its okay to send a TD Denial.
- If you use a Salary Continuation Notice, you must have documentation in your file of the employer Salary Continuation Program.



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Audit Notes



1. At this time, the DWC has no authority to suspend our statutory or regulatory provisions. Our authority is based on Labor Code section 129.5 and the California Code of Regulations.
2. DWC will certainly consider all relevant and mitigating facts.



Audit Notes



1. when considering a deadline that may have been missed due to compliance with either a COVID-19 mandate (i.e., a stay in shelter order) or a COVID-19 guideline issued by a state or federal agency; or
2. prior to assessing an administrative penalty for a violation that can be attributed to COVID-19. The affected party should be sure to document any shut-downs, office closures, or public mandate/guideline as evidence of an actual impact.



Audit Notes



3. DWC has no authority to advise a workers' compensation judge on a course of action should a COVID-19 issue be brought before them.

If a benefit is due, the benefit would still have to be paid and the proper notices would have to be sent out. If the regular employees are being paid full salary, then TTD is not due. If TTD is denied, delayed or disputed, then your Company would need to document the file with the reason for denying or delaying TTD.



Benefit Notice Regulation Overview

9812 – Benefit Payments and Notices- This is your guide for when payments are due and what notices are required.

Temporary Disability is due 14 days from date of employer knowledge. Consider medical evidence as notice. (Any Source) A notice is due to advise the injured worker of delay of payment, payment, or denial of payment.

Example: You received an applicant medical indicating TD due; you must address this medical, even with a delay notice; or if you have contrary medical evidence and an MPN applies, then a denial notice.

There are many different fact patterns, and you must work through each one individually to assure correctness.



9812(d)

9812 (d)- Notice that Benefits Are Ending (TD, PD). At the same time as the last payment of temporary disability indemnity or permanent disability indemnity, the claims administrator shall advise the employee of the ending of indemnity payments and the reason and shall make an accounting of all compensation paid to or on behalf of the employee in the species of benefit to which the notice refers, including the dates and amounts paid and any related penalties.

If the decision to end payment of indemnity was made after the last payment, the claims administrator shall send the notice and accounting within 14 days after the last payment. If the claims administrator's determination is based on a medical report, a copy of the medical report(s) shall be provided with the notice, except for psychiatric reports that the psychiatrist has recommended not be provided to the employee.



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Make Sense

If the claims administrator's determination is based on a medical report, a copy of the medical report(s) shall be provided with the notice, except for psychiatric reports that the psychiatrist has recommended not be provided to the employee.

9811- Does not give a clear definition of what constitutes a medical



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Haven't Seen This Being An Issue

- What if an auditor finds a violation of 9812 (d) because you failed to send a copy of the return to work medical or slip?
- I asked our appellate wizard Louis Larres what his interpretation was for sending a return-to-work slip?
- Louis says, the direct interpretation as he reads it is when a medical reason is used to end benefits, a medical or in this case medical slip needs to be sent to the injured worker and if represented his attorney



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What Did We Learn...

The moral of this story...

- If you are ending a benefit due to a medical reason, such as IW is no longer TD, then obtain the medical, even if only a slip of paper saying they can return-to-work, and send it out with the notice.
- Not something I've seen focused on in prior audits



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Benefit Notice Regulation Overview

9814 –Salary Continuation

- (Employer should have an established program) Notice due 14 days from the employers date of knowledge of injury and evidence from any source of losing time due to the injury)
- This is another area that has caught our attention as being a focus on current audits.
- I've heard there is an expectation for the Carrier/TPA to maintain a copy of the employer's written Salary Continuation Program.



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9814 Salary Continuation

- In relation to periods of temporary disability, where an employer provides salary or other payments in lieu of or in excess of temporary disability indemnity, the claims administrator or employer shall comply with the notice requirements of this article which apply to temporary disability.
- In addition, the claims administrator or employer shall include a full explanation of the salary continuation plan with the initial notice.



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9815 - Correction Notices

Applies to subsequent notices (due 14 days from knowledge of an error or change such as wage statement receipt)



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Benefits Payments - Notices Due

- Employer Date of Knowledge (DOK) - 14 days from your employer's DOK you must; Delay, Issue payment, Deny species of benefits or partial benefits being requested
- TD Delay- 14 days from employer knowledge- Must include all remedies- Must give date for decision.
- TD Decision date- On or before date given in delay notice.
- TD re-delay notice due on or before date given in delay notice.
- TD Start Notice- 14 days from lost time any source



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Benefits Payments - Notices Due

- TD End or Stop Notice- 14 days from knowledge that TD has ended based on medical evidence and a confirmation that the employee has returned to work or it has been addressed and the employee refuses.
- TD End or Stop Notice issued – PD needs to be addressed.
- PD Delay – Due within 14 days of TD ending and dated and sent on the same date as TD End/Stop Notice.
- PD Re-Delay – Due on or before the date given on the original PD notice.
- PD Re-Delay's are often missed and cause an administrative penalty during PAR.



Benefits Payments - Notices Due

- PD Deferred – Due 14 days from knowledge employer providing permanent modified, alternate or regular work. This notice can follow a PD Delay notice or can be issued instead of the PD Delay if RTW is known.
- PD Commence/Start- Either 14 days from the medical evidence any source or on or before a date given on a PD delay notice.
- PD End/Stop – Due 14 days from your knowledge of existence of PD.
- Represented cases are paid to 85% of rated estimate
- Non-represented cases are advanced to 100% of rated estimates.
- Include your string rating in notice.



Benefits Payments - Notices Due

- PD Denial- Due 14 days from the date of medical evidence any source. I would recommend you document when the medical was received.
- PD denials should include the appropriate remedies to address the QME process on the non-represented and represented track.
- Does your system electronically date stamp receipt of mail? If not, a timely note will help you document when you received the medical so that the date of the report is not used to calculate the date due for benefits and notices.
- Make sure you send the medical report to the injured worker unless it says not to on a psychiatric medical report.



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Benefits Payments - Notices Due

- There will be times when you must stop and start benefits.
- Benefit Notices are due with all starts and stops and changes of type of benefits. The same time frames apply, within 14 days of knowledge.
- W.S. change of benefit rate notice due within 14 days from the date of knowledge of rate increase or decrease due.
- If it is a rate decrease, please review the employer 5020 and determine what the employer said the earning capacity for this employee is, recommend selecting the higher of the two.



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Benefits Payments - Notices Due

- SJDB- 2013 DOI forward- Injuries resulting in PPD whose employers cannot offer regular, modified or alternative work, within 60 days after receipt by the claims administrators Physicians Return-to-Work & Voucher report (Form DWC-AD 10133.36) Amount \$6,000.
- Voucher- Due within 20 Calendar days from the expiration of time for making an offer of regular modified or alternative work.
- Job must pay no less than 85% of earnings prior to injury and must be expected to last for at least 12 months.
- Must be a bonafide job.



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Waiting Period (WP) Payments

- If a W.P. was taken, then it will be due with the second payment or during the next 14day period but never later than the 28th day.
- There is never a W.P. if the IW is hospitalized.
- If you know that an IW will be off work for more than 14 days, you do not need to hold back on issuing the W.P. This is not EDD (They take 7 days, and that money is not paid at a later date)!
- W.P. in workers compensation is fluid, not absolute.



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Wage Loss or Temporary Partial Disability

- LC 4654 – Temporary partial disability or what we call wage loss, is two thirds of the weekly loss in wages.
- This usually happens when a doctor returns an IW to reduced hours at the employer, an off-site program, salary continuation, hourly pay rate reduction due to different job duties.
- You will need to know the IW AWW (Capped at maximum and minimum) at DOI and the current rate and hours worked. Using two times and divided by three of the difference is your wage loss benefit.
- Sounds Simple Right??



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Wage Loss or Temporary Partial Disability

Four Questions:

- First Question: What is the IW AWW?
- Second Question: How many hours can IW work per PTP, or did your employer reduce hours or rate of pay per the PTP or QME work restrictions?
- Third Question: What commitment can your employer make regarding weekly hours and rate? (Get a number and have them stick to it)
- Fourth Question: What benefit notice do I send?



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Wage Loss or Temporary Partial Disability Example

- IW AWW \$750 per week, 40 hours per week at DOI- Prove it through W.S. calculations or Employer 5020, last resort IW stubs
- PTP says, IW can RTW but only for 20 hours per week or \$375.
- Let's do the Math:
- \$750 AWW – Per Wage Statement or Employer 5020
- \$375 Reduced Hours per PTP
- \$375 Wage Loss after subtracting AWW-Reduced Hours sum
- **Formula applied**
- **$\$375 \times 2/3 = \250 for Wage Loss Per Week**



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Benefit Notice Due for Wage Loss-Audit Unit Considerations

- If you have calculated Wage Loss, you owe a Temporary Partial Disability Notice or TPD.
- The audit unit wants to see timely payment cycles for wage loss and your employer's lack of cooperation doesn't alleviate your responsibility.
- That means every 14 days that your IW hours or rate is reduced based on your understanding of the IW AWW, you must consider what you owe.
- A notice must always accompany benefits paid and an SIP where your payment is beyond 14 days, even if it's the employer's fault.



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Capped TD Payments

- LC 4656, it depends on the date of injury:
- DOI on or after 4-19-04 and before 1-1-08 up to 104 weeks in a period of 2 years from the first payment of temporary disability.



Capped TD Payments

Important to note for payments before 1-1-08:

If temporary disability did not start until a year after the date of disability, and payments are made retroactive to the date, applicant is still entitled to 104 compensable weeks from the first date of temporary disability payment.

(Hawkins v. SCIF 72 CCC 807 (W/D 2007))



Capped TD Payments

If EDD paid benefits for a year, and then we picked up benefits, we cannot automatically include the first date of EDD benefits in calculating the 104 weeks. (EDD must be resolved to take credit)

DOI on or after 1-1-08 up to 104 weeks in a period of 5 years from the date of injury.



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State Average Weekly Wage (SAWW)

- DOI on or after 1-1-07 and each January thereafter.
- To be increased by an amount equal to the percentage increase of the State Average Weekly Wage (Also known as SAWW).
- SAWW applies to PTD, PPD, LP cases of 70% and above.



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Two Years Are We Paying the Correct Rate?

Hofmeister v. WCAB 49 CCC 438 W/D 1984

LC 4661.5 Two Year Rule provides any compensation paid two years from the date of injury must be given consideration for the rates at the time the benefit is paid unless this results in a decrease.



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What does the audit unit want to see in the file regarding earnings?

- Insurance Code 1010.1(j) Documentation Requirement for Earnings
 - 5020
 - Wage Statement with a tape attached
 - Explanation of any remunerations such as room, board, meals, overtime
 - Good faith attempts to gather this information
 - This applies to Seasonal workers too!
 - Don't forget the two or more employers!



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Full Time Regular Calculations LC 4453(c)

- **Full time regular employee- 30 hours and 5 or more days per week.** AWW is determined by use of **hourly rate** times **hours worked** for a **base rate**.
- Then consideration for any additional compensation such as over time, bonus, remunerations.
- **When reviewing your wage statement you count base rate earnings and above and only divide by the number of weeks being considered.**



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Base Rate Calculation



What is a base rate?

Its simply the hourly rate times the hours that the employer either on the 5020 or in your initial contact says the employee works.

Example:

Employer says \$12.10 per hour and they work 40 hours.
The base rate is a simple math calculation and the answer is \$484.00.



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Base Rate Calculation



- The key now in comparing your base rate to the wage statement while only considering earnings at or above the base rate.
- Why would we do it that way?
- This method allows a real picture of earning capacity; it considers remunerations; it considers overtime earnings; bonus.



Base Rate Calculation



- What weeks do we include or exclude and why? I thought we were not supposed to skip weeks or have gaps?
- We include the weeks that are at the employer promised (5020) or verbal information on the initial contact earnings and above only.
- If there is a bonus, we include the earnings but do not take it as a separate week.



Base Rate Calculation



What do you document:

- Employer hours x hourly rate = \$

Used the employer earnings, bonus, remunerations, and overtime, in consideration for earning capacity and divided by the weeks considered. (document specifics to your case)

It will simplify your decisions and make your outcomes more consistent.



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What about exceptions



What about a wage statement that doesn't look anything like what the employer 5020 or verbal verification indicated.

Example:

- Employer said \$12.10 per hour and 40 hours or a base rate of \$484 one week or \$968 two weeks.
- The wage statement shows very few earnings at the base rate. Perhaps the employee is working less hours on a regular basis?



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What about exceptions



- **We are looking for real earning capacity.** If you can prove that the earnings are consistently lower than what the 5020 indicates, then with careful documentation, you can pay less.
- **Note:** The audit unit will consider the 5020 earnings and some clients select to pay the 5020 rate unless the employer gives an informal statement of less hours and the 5020 is inaccurate.
- **Documentation is always the key!**



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Two or More Employer Calculations

Two or more employers uses the aggregate from all employment but taken at **the rate from the employer where the injury occurred.**

Note: A wage statement from the concurrent employer helps document hours worked and will allow a more accurate consideration of those earnings.



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Two or More Employer Calculations

Your injury is the hourly rate used

Example:

- Employee works 40 hours time \$11.50 per hour for your employer and he is injured on the job.
- Second employer he works 20 hours a week at the rate of \$13.00 per hour.



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Two or More Employer Calculations

- This example would cause you to add up the second job hours and multiply them times your injury employer's hourly rate.
- This would be at a straight rate even though the total hours are more than 40 per week.
- The calculation would be 60 hours times \$11.50 per hour or \$690 per week.



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Part-Time Employee's

- Part-time employees are calculated based on the earnings divided by the period of time worked for the employer.
- Consideration must be given to earnings from all sources during that same period.



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Irregular/Seasonal Workers



Signature Fruit Company v. WCAB(Ochoa)
71 CCC 1044 (2006) and Jimenez v. San Juaquin Valley Labor 67 CCC 74 (WCAB en banc 2002)

Irregular work or seasonal work should be calculated as an average over the **promised period of work**, not to exceed one year. (Signature Fruit Company v. WCAB and Jimenez v. San Juaquin Valley Labor)

It is important to **consider the history** of the injured worker regarding their work on **prior seasons** and their ability to **produce evidence** that supports income.

Seasons can last 6 months; for example the strawberry season is from February to July. Does your employer have the next seasonal crop and keep the same workers?



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Argonaut Ins. Co. v. IAC (Montana) 27 CCC 130 (1962)

- California Supreme Court case on Earning Capacity.
- Consideration must be given to the entire work history.
- What is the earning capacity during the time of injury.
- Reflective of why we use the season promised when considering wage calculations.
- If all of these factors have been considered and the seasons ends without any further earning capacity, then consideration for ending benefits can be given.



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