

Labor Code 4658.7 - SJDB Voucher Post SB863

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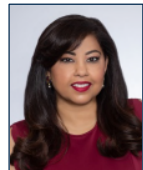
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Supplemental Job Displacement Benefits (SJDB)

Labor Code Section 4658.7 – This section shall apply to injuries occurring on or after January 1, 2013.

- If the injury causes permanent partial disability, the injured employee shall be entitled to a supplemental job displacement benefit as provided in this section **unless the employer makes an offer of regular, modified, or alternative work,**
- The offer must be made **no later than 60 days after receipt of a permanent and stationary report** from the PTP, AME, or QME finding that the injury has caused permanent partial disability
- The offer must be for regular work, modified work, or alternative work **lasting at least 12 months**



SJDB Then and Now

- DOI 1/1/04 to 12/31/12 – less than 15% PD \$4000 – 15% to 25% PD \$6000 – 26% to 49% PD \$8000 – 50% to 99% PD \$10,000
- DOI on or after 1/1/13 – maximum aggregate value of \$6000 (payment for education-related retraining and/or skill enhancement at certified locations listed at <http://etpl.edd.ca.gov>, including tuition, fees, books, and other expenses required by the school)



SJDB Then and Now (cont.)



- Make sure Voucher is offered within 20 days after the expiration of the time for making a RTW offer as per 4658.7(c)
- **NOTE: NEW SJDB VOUCHER EXPIRES 2 YEARS FROM ISSUANCE OR 5 YEARS FROM DOI, WHICHEVER IS LATER; SETTLEMENT OF SJDB CLAIM SHALL NOT BE PERMITTED PER LC 4658.7(g)**



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New SJDB Also Pays For

- occupational licensing or professional certification fees, related examination fees, and examination preparation course fees;
- licensed placement agencies, vocational or return to work counseling, and resume preparation (up to \$600);
- tools required by a training or educational program;
- computer equipment (up to \$1000);
- miscellaneous expense (up to \$500) – payable upon request without need for itemized documentation or accounting. The employee shall not be entitled to any other voucher payment for transportation, travel expenses, telephone or internet access, clothing or uniforms, or incidental expenses.

See Form 10133.32



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Description of Employee's Job Duties

- New Form 10133.33 – for DOI on or after 1/1/13
- Old Form 10133.11 (Form RU-91) – for DOI 1/1/04 to 12/31/12



NOTE: FAIR EMPLOYMENT AND HOUSING ACT (FEHA) REQUIRES THAT EMPLOYERS CONDUCT AN INTERACTIVE PROCESS BEFORE INDUSTRIALLY INJURED WORKERS MAY BE TERMINATED



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Physician's Return to Work and Voucher Report

Rule 10133.33(b)(1) – The offer of regular, modified, or alternative work must be made **within 60 days after receipt by the claims administrator of the Physician's Return-to-Work & Voucher Report** (Form DWC-AD 10133.36) **and** (2) The offer must be for work lasting **at least 12 months**

- Offer made with Form 10133.35
- Different from LC 4658.7 – P&S report from PTP, AME, or QME



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Sending the Voucher

Rule 10133.33(c) – If no offer for regular, modified, or alternative work is made, pursuant to subdivision (b), the claims administrator shall furnish a “Supplemental Job Displacement Nontransferable Voucher For Injuries Occurring on or After 1/1/13” (Form DWC-AD 10133.32) **within 20 calendar days from expiration of time for making an offer of regular, modified, or alternative work pursuant to paragraph (1) of subdivision (b)**

- Within 20 days after 60 day period or within 10 days of knowledge from the Employer that no offer of work will be made, Form 10133.32 (Supplemental Job Displacement Non-Transferable Voucher) due

NOTE: MUST SEND VOUCHER VIA CERTIFIED MAIL



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EXCEPTIONS TO PROVISION OF VOUCHER

LC 4658.7 does not provide any exceptions to provision of the voucher when the employer does not timely make an offer of work. But, per CCR 10133.31(c), "An employee who has lost no time from work or has returned to the same job for the same employer, is deemed to have been offered and accepted regular work in accordance with the criteria set forth in Labor Code section 4658.7(b)." This provision was added to clarify that if an applicant loses no time from work or returns to his or her regular job, no return-to-work offer is required.

Final Statement of Reasons (supplemental job displacement regulations, p. 4), available at http://www.dir.ca.gov/DWC/DWCPropRegs/SJDB_Regs/SJDB_FSOR.pdf.

That is, an employer is not required to provide a voucher if the applicant has lost no time from work or has returned to work for the same employer just because it fails to make an offer on the appropriate form of regular, modified or alternative work.



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OFFER OF WORK TO EMPLOYEE WHO MAY NOT WORK LAWFULLY

Whether an employer must offer regular, modified or alternative work to an employee who may not lawfully work for the purposes of avoiding the voucher is at issue.

In *Del Taco v. WCAB (Gutierrez)*, the Court of Appeal has held that an illegal immigrant is not entitled to vocational rehabilitation benefits when the individual is unable to return to work solely because of immigration status, rather than because of an industrial injury.

Furthermore, the California Supreme Court has held that SB 1818, which extends state law employee protections and remedies to all workers regardless of immigration status, is pre-empted by federal immigration law to the extent it authorizes an award of lost pay damages for any period after the employer's discovery of an employee's ineligibility to work in the United States.



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Salas v. Sierra Chemical Co. (2014) 79 CCC 782

If an employer discovers that the employee is an illegal immigrant, the employee might not be entitled to the voucher if he or she is unable to return to work solely because of immigration status. This will need to be further clarified.



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OFFER OF WORK TO EMPLOYEE WHO CANNOT RETURN TO WORK

Sometimes an employer is unable to offer an applicant work following an industrial injury for reasons unrelated to that injury. This is most common when an employee is terminated for cause following an injury.

Employer may have had work that meets the requirements of LC 4658.7(b), but it cannot offer it due to the termination.

Would such an employee be entitled to the voucher?



OFFER OF WORK TO EMPLOYEE WHO CANNOT RETURN TO WORK

In one case, the board held that an applicant was not entitled to a voucher when he was terminated for cause (threatening violence to a co-worker) while on modified duty.

The board found no case law indicating that an employer must rehire an employee who was terminated for cause, or in the alternative, provide supplemental job displacement benefits to such an employee.



OFFER OF WORK TO EMPLOYEE WHO CANNOT RETURN TO WORK

In contrast, the WCAB held that a former state prison inmate was entitled to the voucher when the State of California could not make a bona fide offer of work.

The applicant suffered admitted injuries while performing construction work as an inmate. The defendant sent her a notice of offer of regular, modified or alternative work, but at the same time sent a letter indicating that she was not eligible for employment because she was released from prison. The applicant inquired about the job offer but was informed that no position was available because she was no longer an inmate.

The board determined that the defendant made an illusion of a job offer rather than a bona fide job offer.



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OFFER OF WORK TO EMPLOYEE WHO CANNOT RETURN TO WORK

This issue probably will require further legal development.



The employer generally has the burden of offering modified or alternate work within the employee's work restrictions to avoid liability for benefits.



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OFFER OF WORK TO SEASONAL EMPLOYEE

CCR 10133.34(b)(4) establishes requirements for an offer of regular, modified or alternative work for a seasonal worker. Seasonal work means employment as a daily hire, a project hire or an annual season hire (CCR 10116.9(q)). The offer must reflect that:

- A. Employee was hired for seasonal work prior to injury.
- B. Offer of regular, modified or alternative seasonal work is of reasonably comparable hours and working conditions to the employee's previous employment, and the one-year requirement may be satisfied by cumulative periods of seasonal work.
- C. Work must commence within 12 months of the date of the offer. And
- D. Offer meets the other conditions required for regular, modified or alternative work.



Beltran v. Structural Steel Fabricators, 2016 Cal.Wrk.Comp. P.D. LEXIS

The WCAB panel found that the prohibition on the settlement of a SJDB voucher in LC § 4658.7(g) is analogous to a settlement of vocational rehabilitation benefits, which *Thomas v. Sports Chalet, Inc.* (1977) 42 Cal.Comp.Cases 625 [42 CCC 625] (Appeals Board en banc opinion) held could be settled in a Compromise and Release only when a serious and good faith issue exists which, if resolved against the injured worker, would defeat all of his or her rights to compensation benefits.



Fndkyan v. Opus One Labs, 2019 Cal. Wrk. Comp. LEXIS 51 (writ denied)

What happens if there is a report but no form? In one case, the appeals board held that an applicant was entitled to a voucher even though there was no evidence that a physician's return-to-work & voucher report (physician's RTW form) was sent to or received by the defendant. It was undisputed that the defendant received a permanent and stationary report from the QME outlining work restrictions, but the QME did not issue the physician's RTW form. The board explained that the defendant had the burden to obtain a physician's RTW form when it was apprised of the applicant's permanent disability status and work preclusions in the QME report, and that to conclude otherwise would place form over substance.



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Dispute Resolution

Form 10133.55 – Request for Dispute Resolution Before Administrative Director

- Employee's entitlement to a voucher
- Parties dispute the amount of the voucher
- Insurer has failed to pay the training provider
- Employee objects to the job offer provided by the employer
- Other - ?

Procedural Considerations

- Need to include summary of informal efforts to resolve the dispute
- 20 days to respond from date of proof of service of Request
- Administrative Director to issue determination within 30 days
- If no decision issued within 60 days, considered to be denied
- Either party may appeal within 20 days by filing a Petition and DOR



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SJDB Audit Penalties

Rule 10111.2(a)(27):

The penalty for each failure to comply with the supplemental job displacement benefit notice requirements of California Code of Regulations, title 8, section 10133.51 is:

- \$100 for each materially incomplete or inaccurate notice or for each failure to send the notice of supplemental job displacement benefits by certified mail
- up to \$500 for each failure to issue the notice of supplemental job displacement benefits within 10 days of the last payment of temporary disability
- up to **\$1000** for each failure to issue the voucher for education-related retraining/skill enhancement
- up to **\$1000** for failure to pay any properly documented supplemental job displacement benefit voucher billing within the time frames required



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SJDB (DOI on or after 1/1/13) in summary



- Labor Code 4658.7 and Rule 10133.33
- Job Duties – New Form 10133.33
- Maximum value of \$6000 (\$500 for miscellaneous expense)
- Physician's Return to Work and Voucher Report (Form 10133.36) – upon receipt, 60 days to make offer of work using Form 10133.35
- SJDB Voucher (Form 10133.32) due 20 days after 60 day period or within 10 days of knowledge from the Employer that no offer of work will be made
- Still send Notice of Potential Rights to SJDB? Recommend new notice, copy and paste LC 4658.7 or Rule 10133.33



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Voucher Documentation

Confirm Eligibility:



Confirm the school, course, and program are approved in the subject language:

- https://www.edd.ca.gov/Jobs_and_Training/Eligible_Training_Provider_List.htm
- https://www.bppe.ca.gov/schools/approved_schools.shtml

Documents the Counselor Must Submit:

- Financial interest waiver signed by the counselor and the school (PC§550(b)(3) Financial Interest must be disclosed) (LC§3215 Kickback Violations)
- Identity of and financial interest waiver signed by the referring party, if applicable.
- Itemization of Counselors Services to document/substantiate the work the counselor did to support the fee requested (up to \$600) under LC 4658.7(e)(3):
 - Paperwork completed by the counselor for the claimant
 - Claimant's complete file with their office
- Did the counselor help the claimant obtain the \$5,000 from the Return-to-Work Supplement Program?



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Voucher Documentation (Cont'd)

Documents the School Must Submit:

- If the claimant does not have a High School Diploma or GED, documentation they passed an Ability-to-Benefit Test in their primary language.
- Enrollment agreement between the school and the claimant detailing tuition charges. Compare to invoice submitted to the carrier.
- Purchase invoice for computer/misc. equipment and associated details, e.g. make/model, serial number, purchase date, type of software.
- Proof that equipment was delivered to the claimant, e.g. signed acknowledgement, certified mail slip.
- Timeline for course completion.
- Request program course catalogue.



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Voucher Documentation



If Claimant Purchases Equipment:

- Receipt for equipment purchased.
- The \$500 misc. expense may be used for educational expense, but be sure it does not overlap the items being paid for under the enrollment.

Information & Documents to Consider:

- Recorded Statement, Deposition Transcript: education level, read/write English questions, employment history, etc.
- C&R language – expressly state that the SJDB voucher is or is not due?
- Did we pay for interpreting services for the C&R, medical appointments, hearings?
- Claimant's signature on other claim documents; verify against SJDB documents if there is suspicion.



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Voucher Documentation

Important Reminders:

There is no authorization under the Labor Code or CCRs for the school to use voucher funds for computer expenses. If the school is selling the computer to the student, they must provide all the documentation that the student is required to present to the carrier. Full receipts for hardware, software, etc. must accompany the request for payment.

Control over voucher disbursements is strictly regulated by 8 CCR §10133.1 (j): The claims administrator shall issue the voucher payments to the employee or direct payments to the VRTWC, training providers, and/or computer retailer within 45 calendar days from receipt of the complete voucher, receipts, and documentation.



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Voucher Fraud Red Flags

Most represented injured workers do not get much in the way of assistance from their attorneys once the case is settled, leaving the Vocational schools and counselors to control & misrepresent the use of the funds. Also, it seems to be a known fact in Northern Cal the misuse of the RTW fund (wanting a voucher for the sole purpose of accessing the fund). We would never support sending out a voucher where the applicant was not entitled, and should not use it to negotiate settlement knowing the A/A was just trying to access the RTW fund.

Common issues that are not in the best interest of the claimant include:

1. Being told they are enrolling in a program for which the school is not approved to provide.
2. Being told they will receive \$500, a free computer and the \$5,000 RTW supplement from the State for signing the documents
3. The claimant does not have the ability to benefit from re-training



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Voucher Fraud Red Flags

Types:

Worker's Compensation (WC)- Injured employees are offered retraining benefits. The victims are the students and the insurance carriers. Workforce Innovation and Opportunity Act (WIOA)- Displaced employees are offered retraining benefits. The victims are the students and EDD

Schools that are 100% funded from WIOA or WC vouchers

Note that the FINANCIAL RELATIONSHIP between the RTW counselor and the school MUST BE DISCLOSED or this will violate PC§550(b)(3). Disclosure does not avoid kickback violations per LC §3215. Furthermore, the RTW counselor's fees must be supported by documentation submitted to the claims rep. Each carrier needs to determine what justifies \$600 worth of work. LC §4658.7(e)(3): Payment for services of licensed placement agencies, vocational or return-to-work counseling, resume preparation, all up to a combined limit of 10 percent of the amount of the voucher.



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Voucher Fraud Red Flags (Cont)

Verify School's approval information

- Approval dates
- School's physical address is the owner's residence.
- Suspect created a school with the same name as an approved BPPE school & utilized a post office box for voucher payments.
- Branches using multiple EIN/SOS/DBA for payments.



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Voucher Fraud Red Flags (cont'd)

Student Recruiting

- School receives the student names' from attorneys, doctor offices, copier services, translators, and vocational counseling centers.
- The schools will send staff to the students' homes to enroll the students and provide the student a computer/printer during the initial visit.
- Students are enrolled while in the attorneys and doctors offices.
- Students have reported they have never heard of the school or attended the school.
- Insurance carrier received multiple voucher invoices/EA for the same student but different schools.
- WC counselors assist students receive an additional \$5,000 from Dept of Industrial Relations (possible incentive for students' cooperation in the scheme).



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Voucher Fraud Red Flags (cont'd)

Student file reviews

Incomplete, blank and/or multiple EA in the student files.

EA with inflated prices.

Inconsistent EA provided to carriers, students, and in the student files.

Missing student signatures and initials.

No high school diplomas or Ability to Benefit (ATB).

ATB is in English; however student only speaks Spanish.

Falsified ABT reports/certificates.

No financial records/documents in the student files.

No attendance records.

No grades or transcripts.

Copy and pasted signatures.

No SPFS.



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Voucher Fraud Red Flags (cont'd)

Programs & Quality of Education

Not approved for distance education.

Not approved for instruction in a student's home. Verify in BPPE (Bureau for Private Postsecondary Education) licensing file.

In-home instructor/faculty have a criminal record.

No attendance records.

Students do not speak English (school not approved for Spanish programs).

Instruction can be on campus, in the student's home, and online (distance education).

Approved for unrelated programs- Cake decorating to mechanics, and the campus does not support that type of programs.

Students may not be truthful in fear that they are the ones being investigated.



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Voucher Fraud Red Flags (cont'd)

Student Equipment, Expenses

- Schools are allowed to issue students computers and printers (not a BPPE violation). **There is no authorization under the Labor Code or CCRs for the school to use voucher funds for computer expenses. If the school is selling the computer to the student, they must provide all the documentation that the student is required to present to the claims rep. Full receipts for hardware, software, etc. must accompany the request for payment.**
- Schools are allowed to issue students the \$500 for educational expenses (not a BPPE violation). **This is a Labor Code and CCR violation. If the school is dispersing voucher funds to ANY third party, it is a kickback per LC §3215.**
- Falsified computer purchase receipts.
- Computer does not support the operating system provided to the student. Student enrolled in iOS; however received HP computer.
- **All school-related expenses must be listed on the invoice and supported by documentation.**
- **Internet service IS NOT a school-related expense allowed under the voucher, although the student may use the \$500 misc. allowance to cover their ISP bill.**



Voucher Fraud Red Flags (Cont'd)

COMPLIANCE WITH VOUCHER DISBURSEMENT RULES

Control over voucher disbursements is strictly regulated by 8 CCR §10133.1 (j): The claims administrator shall issue the voucher payments to the employee or direct payments to the VRTWC, training providers, and/or computer retailer within 45 calendar days from receipt of the completed voucher, receipts, and documentation. [. . .]

The completed voucher form alone DOES NOT trigger the 45 day period. The provider must support their request for payment with sufficient documentation to satisfy the claims administrator that the requested service and/or supply/equipment is allowed under the CCRs and LC.



Voucher Fraud Checklist

The following items trigger a request for documentation and/or a Request for Dispute Resolution to be filed with the Administrative Director

1.VOUCHER 10133.32

- Multiple schools submitting voucher requests for the same claimant
- Electronic signature on the voucher is not valid
- Claimant signature does not match other signed documents
- Request for computer related expenses is being invoiced by the school
- Request for Tuition, fee's, books, and/or tools lacks the supporting documentation(invoice and Student enrollment agreement do not match)
- The school is requesting reimbursement for items they should not have provided(software, wifi, computer)
- Credit hours and Clock hours are missing from the Student Enrollment Agreement
- The Student Enrollment Agreement is missing
- The Student Enrollment Agreement does not list the location where classes will be held
- The Student Enrollment Agreement does not list the credit hours or the clock hours2.



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Voucher Fraud Checklist (cont'd)

SCHOOL ELIGIBILITY

The school is ineligible: Injuries January 1, 2013 or after, private schools must be either a California Public School or State -Certified provider and on the Eligible Training Provider List: <http://etpl.edd.ca.gov>. Eligible Training Provider List (ETPL) – www.caljobs.ca.gov

- o The school is listed as a Denied institution per the BPPE- https://www.bppe.ca.gov/schools/approved_schools.shtml
- o We request the name and phone number of the party referring the claimant for counseling services. Additionally, we request disclosure of any financial interest between counselor, counseling facility and the school.2.PREREQUISITES
- o The claimant has reported not having a GED or HS Diploma and there is no documentation to support that an Ability to Benefit (aka CELSA) exam, was either provided or confirmed.
- o Claimant is enrolled in a course outside of native language
- o Claimant contact revealed they did not enroll in the course noted on the voucher. (by SIU and with A/A approval in represented claims)
- o Claimant contact revealed no knowledge of either the counselor or school listed on the voucher. (by SIU and with A/A approval in represented claims).



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Voucher Fraud Checklist (cont'd)

COUNSELOR FEES

- The counselor is not approved - https://www.dir.ca.gov/dwc/SJDB/VRTWC_list.pdf
- The Invoice from the Counselor lacks detail regarding services performed.



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LC 4615 Stay of Liens

- As of 08/30/2024 Laura Wilson and Hazel Ortega (Ortega Counseling) are now on the LC 4615 stay list.
- Please Also See press release <https://www.insurance.ca.gov/0400-news/0100-press-releases/2024/release038-2024.cfm>
- “The investigation determined Caledonian was not only depriving students of their education, they were also receiving money from insurance companies for the services not rendered. Further, vocational counselors received illegal kickbacks payments from Caledonian for student referrals. The vocational counselors allegedly involved in the scheme are Jenny Villegas, Friends for Injured Workers CEO, Laura Wilson, CEO of Laura Wilsons and Associates, Jesus (Jessie) Garibay, Gordy’s Legal Service Director, and Hazel Ortega, CEO of Ortega Counseling Center. All six defendants have been charged with violating Penal Code 550(a)(1), Labor Code 3215, and Insurance Code 750.5. As Insurance Code 705.5 stipulates it is unlawful to receive or accept money for referrals, the chargeable fraud amount is \$985,677”



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4615 Stay of Liens (cont'd)

- Check closely for whether any of the listed above parties are connected to your voucher and investigate further if they are listed here. The Charged Schools have been removed from the ETPL (Eligible Training Prover List) as well.



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LC 4658.7(e): Fee payments to Counsel

- See also 8 CCR 10133.31(f)(3)
- “Payment for services of licensed placement agencies, vocational or return-to-work counseling, and resume preparation, all up to a combined limit of six hundred dollars (\$600)”.
- The up to \$600 for fees should come out of the \$6,000 total: The voucher may be applied to any of the following expenses at the choice of the injured worker: 8 CCR 10133.31(f)
- No guidance in case law as to fee amounts. Argue services must be performed and billing must be appropriate for services performed



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Attachments

- Form DWC-AD 10133.33 – Description of Employee’s Job Duties
- Form DWC-AD 10133.36 – Physician’s Return to Work & Voucher Report
- Form DWC-AD 10133.35 – Notice of Offer of Regular Modified or Alternative Work
- Form DWC-AD 10133.32 – Supplemental Job Displacement Non-Transferrable Voucher
- Form DWC-AD 10133.55 – Request for Dispute Resolution Before Administrative Director



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