

The Elements of An Audit



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Standards of Measurement

- 2023 Audit Standard for Passing PAR (Profile Audit Review)
- PAR 1.76323
- FCA 2.00574



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Standards of Measurement

- 2022 Audit Standard for Passing PAR
- PAR 1.68032
- FCA 1.95657



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The Industry Has Improved

- In the 4 years we have gotten better as an industry in our application of the Regulations.
- Making it even more critical to do well in the 5 categories of PAR.



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2025 Standards are Based on Years 2022 through 2024

1. Rating based on the frequency and severity of violations with weighted factor that emphasize the gravity of violations involving failure to pay compensation due.



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2025 Standards are Based on Years 2022 through 2024

2. The higher the rating an audit subject receives—the worse the performance score.
3. Compensation due can be a driving factor of failure to pass PAR.



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Audit Units Authority

LC 129 and 129.5

Require Audit & Enforcement Unit of the DWC to conduct “Routine” “Profile Audit Review” on all adjusting agency, once every 5 years or sooner.



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Administrative Director

- Administrative Director Establishes annually the Profile Audit Review and Full Compliance Audit standards.
- AD uses the compilation of data from previous audits.
- Are there areas that the industry needs to improve?



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Elements of a PAR Audit

#1. Frequency of claims with unpaid compensation and the amount of unpaid compensation.

Factors affecting this determination are:

1. Wage Statement Calculations



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Wage Statement Calculation

LC 4453(c) Between the limits specified in subdivisions (a) and (b), the average weekly earnings, except as provided in Sections 4456 to 4459, shall be arrived at as follows:

(1) Where the employment is for **30 or more hours a week and for five or more working days a week**, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury. **(Considered Full Time Regular)**



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Two or More Employers

(2) Where the employee is working for **two or more employers at or about the time of the injury**, the average weekly earnings shall be taken as the **aggregate of these earnings** from **all employments** computed in terms of one week; **but the earnings from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury.** (Use all hours, times our employer's rate)



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Irregular, Piecework, Commission

(3) If the earnings are at an **irregular rate, such as piecework, or on a commission basis, or are specified to be by week, month, or other period**, then the average weekly earnings mentioned in subdivision (a) **shall be taken as the actual weekly earnings averaged for this period of time, not exceeding one year**, as may conveniently be taken to determine an average weekly rate of pay.



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The 4th Method (The Loop Hole)

(4) Where the employment is for **less than 30 hours per week, or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied**, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments



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Pandora's Box Is Open

What's old is new in Grossmont Hospital 1997

In this opinion the court addressed whether a wage increase that occurs after an injury can be considered in calculating temporary total disability benefits due.



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History

Discussion

[1a] Grossmont contends that section 4453, subdivision (d) has replaced the "Thrifty Drug rule" and that under subdivision (d), wages on the date of injury control indemnity benefit calculations for all injuries sustained on or after January 1, 1990. Kyllonen on the other hand contends Thrifty Drug remains good law and that if "earning capacity" changes subsequent to a worker's injury, the worker should be entitled to a subsequent increase or decrease in benefits as appropriate. As discussed below, we reject both parties' positions.



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Thrifty Drug

Thrifty Drug Stores, Inc. v. Workers' Comp. Appeals Bd. (1979) 95 Cal. App. 3d 937 [157 Cal. Rptr. 459] (Thrifty Drug) holds that upon a proper showing such increases can be considered. The question presented here is whether subdivision (d), added to Labor Code fn. 1 section 4453 in 1989, mandates a different result for workers sustaining injury on or after January 1, 1990



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Thrifty Drug

The court concluded wage increases that were scheduled or reasonably anticipated at the time of injury and that would occur during the anticipated duration of the disability may be considered in determining the injured worker's "earning capacity" and ultimately the benefits due.



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Thrifty Drug

However, where the subsequent change in wages is not scheduled or reasonably anticipated at the time of injury or where it would not occur during the anticipated duration of the disability, it may not be considered. [59 Cal. App. 4th 1352]



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Application in Audits

- Grossmont Hospital Application
- Thrifty Drug Application



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LC 4454 Remunerations

LC 4454. In determining average weekly earnings within the limits fixed in Section 4453, **there shall be included overtime and the market value of board, lodging, fuel, and other advantages received by the injured employee as part of his remuneration**, which can be estimated in money, but such average weekly earnings shall not include any sum which the employer pays to or for the injured employee to cover any special expenses entailed on the employee by the nature of his employment, nor shall there be included either the cost or the market value of any savings, wage continuation, wage replacement, or stock acquisition program or of any employee benefit programs for which the employer pays or contributes to persons other than the employee or his family.



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Disputed Medical TD

2. Medical disputes and failure to take steps to resolve the disputes. (Evidence Based)

Failure to secure Proof for employer paid Salary Continuation Plan or Modified Duty and Return to work date.



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Disputes Between QME & PTP

Example:

- PTP says return to work no restrictions
- The applicant objects and goes to a QME



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Disputes Between QME & PTP



The QME says Not MMI and needs treatment (The door is open for potential compensation due)

Can you rely on the PTP initial findings?



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Here is where you need to develop your evidence:

- Do you have a legal/factual basis for the dispute?
- Is the dispute a medical issue only?
- Raise the dispute and seek evidence to solve the question of TTD.



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Developing Evidence

- If there is a dispute raised on TD and you are actively seeking the resolution you have a viable dispute.
- What you should not do, is just hold your position and stand on the treating doctors medical.



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Developing Evidence

- Each medical needs to be considered on its own merits and addressed accordingly.
- There is a difference between legal strategy and a dispute with evidence to support it.
- Work with your counsel to support your position.



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Here are some cases to help reason through the statement

Leinon v. Fishermen's Grotto (2004) 69 Cal. Comp. Cas 1449 (Appeals Board en banc decision)]

Penalties—Delay in Payment of Disability Benefits—Appeals Board en banc held that, when injury, disability, or indemnity rate is disputed, no Labor Code § 4650(d) penalty arises if disputed disability indemnity payments are made within 14 days of final order, decision, or award imposing liability for those benefits or within 14 days of defendant's acceptance of liability for injury and disability benefits, and that order, decision, or award becomes final for purposes of Labor Code § 4650(d) when defendant has exhausted all of its appellate rights or has not pursued them. [See generally *Hanna*, Cal. Law of Emp. Inj. And Workers' Comp. 2d § § 7.03[1], 8.08[1], 10.40[3][a], 25.20[4], 32.04[2].]



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More about Rivera

Commutations no 4650(d) vs Accrued Benefits 4650 (d) due

In *Rivera v. Workers' Comp. Appeals Bd.* (2003) 112 Cal. App. 4th 1124 [6 Cal. Rptr. 3d 16] [68 Cal. Comp. Cas 1460], liability for injury and disability benefits was not in dispute, and the injured worker claimed penalties under sections 4650(d) and 5814 for late payment of an approved Stipulations and Award. The Award included accrued and continuing periodic indemnity payments, and was accompanied by a simultaneous order of commutation of the future indemnity payments into a lump sum. The Court affirmed the Appeals Board's en banc decision in [****10**] ***Rivera v. Tower Staffing Solutions* (2002) 67 Cal. Comp. Cas 1473 [Appeals Board en banc decision], holding that section 4650 does not apply to lump sums that are commuted future periodic indemnity payments. (See 112 Cal. App. 4th at 1136 [68 Cal. Comp. Cas at 1468]. The court also found and clarified that LC 4650(d) penalties do apply to accrued benefits that are not being commuted.**



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More about Rivera and its implications

important legal issues raised by the Court of Appeal in *Rivera v. Workers' Comp. Appeals Bd.* (2003) 112 Cal. App. 4th 1124 [6 Cal. Rptr. 3d 16] [68 Cal. Comp. Cas 1460], the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.) 2 [**4**]** Based on our review of the relevant statutory and case law, we hold that where injury, disability or indemnity rate is disputed, no section 4650(d) penalty arises if the **disputed disability indemnity payments are made within 14 days of a final order, decision or award imposing liability for those benefits or within 14 days of a defendant's acceptance of liability for the injury and disability benefits. We also hold that an order, decision or award becomes final for purposes of section 4650(d) when a defendant has exhausted all of its appellate rights or has not pursued them.**



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What Proof Should You Seek from Employer

- The audit unit has been enforcing Regulation 9814 Salary Continuation Plan.
- Does the employer have a plan (policy) that they apply to all employees for Salary Continuation for work related injuries?



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Employers Plan

The employer needs to send to you written confirmation of how they **apply to ALL** Salary Continuation upon injury.



What is the duration, and is the salary the same or have they reduced the rate or hours?



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Reg 9814 Application Issues

- What do you do if an employer is not paying the full salary?
- How do you determine if full salary is being paid?



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Reg 9814 Application Issues

Ask your employer for wage information for the period in question on a document usually printed out by the payroll company or program used to determine payment of earnings.



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Reg 9814 Application Issues

If you determine the employer is not paying the employee the normal salary, rate, hours, then you **MUST** consider wage loss.

This has been a big issue, leading to unsuspecting comp due, and auditors will ask for the proof to show the employer paid full wages.



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Violations of 1st Late TD Payment First Notice of Salary Continuation

1. ARTICLE 3. Disability Payments [4650 - 4664] (Article 3 enacted by Stats. 1937, Ch. 90.)

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



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Reg 9812 Payment and Notice TD

- **§ 9812. Benefit Payment and Notice.**
- **(a) Temporary Disability Notices. When an injury causes or is claimed to cause temporary disability:**

(1) Notice of First Temporary Disability Indemnity Payment. The first time the claims administrator pays temporary disability indemnity, the claims administrator **shall advise the employee of the amount of temporary disability indemnity due, how it was calculated, and the duration and schedule of indemnity payments.** The notice shall be sent no **later than the 14th day after the employer's date of knowledge of injury and disability.**



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Notice of Delay TD

(2) Notice of Delay in Any Temporary Disability Indemnity Payment. If the employee's entitlement to any period of temporary disability indemnity cannot be determined within 14 days after the date of knowledge of injury and disability, the claims administrator shall advise the employee within the 14-day period of the delay, the reasons for it, the need, if any, for additional information required to make a determination, and when a determination is likely to be made.



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Subsequent TD Delay Notice

- If claims **cannot make a determination** by the date specified in a notice, a **subsequent delay notice is due**.
- Due no later than the **determination date specified in the previous delay notice**, and giving a revised date.
- A subsequent delay notice shall comply with all requirements for the contents of an original delay notice.



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Notice and Payment of PD

(b) (1) If the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity, except as provided in paragraph (2). When the last payment of temporary disability indemnity has been made pursuant to subdivision.



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Notice of Delay of TD

If the claims administrator cannot make a determination by the date specified in a notice to the employee, the claims administrator shall send a subsequent delay notice to the employee, not later than the determination date specified in the previous delay notice, notifying the employee of the revised date by which the claims administrator now expects the determination to be made. A subsequent delay notice shall comply with all requirements for the contents of an original delay notice.



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PD

(c) of Section 4656, and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless shall commence the timely payment required by this subdivision and shall continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid



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(2) Prior to an award of permanent disability indemnity, a permanent disability indemnity payment shall not be required if the employer has offered the employee a position that pays at least 85 percent of the wages and compensation paid to the employee at the time of



PD

injury or if the employee is employed in a position that pays at least 100 percent of the wages and compensation paid to the employee at the time of injury, provided that when an award of permanent disability indemnity is made, the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, whichever is earlier.



LC 4650 (c)

- LC 4650 (c) Payment of temporary or permanent disability indemnity subsequent to the first payment shall be made as due every two weeks on the **day designated** with the **first payment**.
- (Amended by Stats. 2012, Ch. 363, Sec. 54. (SB 863) Effective January 1, 2013.)



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8CCR 10100.2 Definitions

8CCR 10100.2

(jj) Payment Schedule. Either:

(1) The two-week cycle of indemnity payments due on the day designated with the first payment as required by Labor Code sections 4650(c) or 4702(b), including any lawfully changed payment schedule;



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8CCR 10100.2 Definitions

(y) Indemnity Payment. Compensation for any of the following benefits: temporary disability indemnity, including temporary partial disability indemnity, or salary continuation in lieu of temporary disability indemnity, permanent disability indemnity, death benefits, or vocational rehabilitation maintenance allowance. An indemnity payment includes any increase made pursuant to Labor Code section 4650(d), and any interest pursuant to Labor Code section 5800.



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Pay Cycles

- Discussion on application for LC 4650 (c) subsequent checks.
- Latest trends in audits possible solution.



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Possible Solution

§ 9815. Corrected Notice.



If information in any notice, or the action taken as reflected in the notice, was incorrect or incomplete, the claims administrator shall provide the employee with a corrected notice within 14 days after knowledge of the error or omission.



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CORRECTED

The notice shall be identified as a “Corrected Notice” and explain the nature and reason for the correction. Any additional benefits due as a result of the error or omission shall be paid or provided with the notice, if not previously provided.



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Note:

Authority cited: Sections 59, 133, 138.4, 4637 and 5307.3, Labor Code.
 Reference: Sections 138.4, 4061(a), 4061(b), 4061(d), 4637, 4641, 4643, 4644, 4650(a) through (d), 4661.5, 4700, 4701, 4702, 4703, 4703.5, 4903(a) and 5402, Labor Code; Sections 11651 and 11652, Insurance Code; Section 19871, Government Code; and Section 89529.03, Education Code.

HISTORY

1. Amendment of section and Note filed 1-7-94; operative 1-7-94. Submitted to OAL for printing only pursuant to Government Code section 11351 (Register 94, No. 1).
2. Amendment of section and Note filed 8-24-2015; operative 1-1-2016 (Register 2015, No. 35).



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Good Source for Benefit Notice Info

Section 9810 – 9815 DWC Benefit Notice Manual

This is a great resource to check what you believe you know on the requirements of language and time frames for notices.

<https://www.dir.ca.gov/dwc/BenefitNoticeManual/BenefitNoticeManual.pdf>



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#5.AME/QME Notices

- a) To request a QME you must either contact (insert “me, the ADJUSTER’S NAME” or a specific claims department name and telephone number) to request the form to submit to the state Division of Workers’ Compensation (DWC) to request a panel of three Qualified Medical Evaluators (QMEs), or you may download the form from the DWC website:

<http://www.dir.ca.gov/dwc/FORMS/QMEForms/QMEForm105.pdf>. Instructions for completion of the form are found here:



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QME Information

- <http://www.dir.ca.gov/dwc/FORMS/QMEForms/QMEForm105-Instructions.pdf>. You
- must notify me in writing of your objection to the determination of the treating physician
- within thirty (30) days of the date you received the treating physician’s report.
- (b) Please contact (insert “me, the ADJUSTER’S NAME” or a specific claims department
- name and telephone number) to arrange for a new evaluation with QME (insert name)



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LC 4650 (d)

(d) If any indemnity payment is not made timely as required by this section, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee, unless the employer continues the employee's wages under a salary continuation plan, as defined in subdivision



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LC 4650 (d)

(g). No increase shall apply to any payment due prior to or within 14 days after the date the claim form was submitted to the employer under Section 5401. No increase shall apply when, within the 14-day period specified under subdivision (a), the employer is unable to determine whether temporary disability indemnity payments are owed and advises the employee, in the manner prescribed in rules



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LC 4650 (d)

and regulations adopted pursuant to Section 138.4, why payments cannot be made within the 14-day period, what additional information is required to make the decision whether temporary disability indemnity payments are owed, and when the employer expects to have the information required to make the decision.



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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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Irregular/Seasonal Workers



Signature Fruit Company v. WCAB(Ochoa) 71 CCC 1044 (2006) and Jimenez v. San Joaquin 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 Joaquin Valley Labor)



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EDD Disputes in Audits

Compensation Due from Rate Difference

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) We can only take credit for the amount actually paid to EDD, so this is the only time negotiating with EDD does not benefit you. (count the weeks paid by the weeks reimbursed to EDD, not the total sum requested)**

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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Use a Calendar for the Year benefits are paid

- I use a printed calendar for an easy way to visualize 14 day pay cycles. I know several auditors who do the same.
- Pay cycles need to consistently 14 days, with some exceptions for broken periods, but always guided by medical evidence. When TD benefits have ended. PD benefits need to be addressed.



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Better to Catch Your Own Mistakes

- Better to catch your own mistakes and correct them.
- You will have an administrative penalty but avoid compensation due.
- From an audit perspective, if there is a good flow to a case, apparent good documentation to explain what is going on and why, and benefits appear timely, most files will do well in an audit.



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Regular Self Audits

Refreshers on:

- Key Factors for audits
- What to look out for
- Understanding Benefit Calculations (Case Law and Interpretations)



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Questions????

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