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### Division of Workers' Compensation Announces Temporary Disability Rate Increase Based Upon New State Average Weekly Wage Information

In an announcement issued on October 31, 2008, the Division of Workers' Compensation (DWC) announced the new maximum and minimum temporary total disability (TTD) rates effective January 1, 2009, based upon the increase in the state average weekly wage (SAWW) as required under *Labor Code Section 4453(a)(10)*.

Effective January 1, 2009, the maximum TTD rate will increase to \$958.01, from \$916.33, based upon an increase in the SAWW of approximately 4.5%.

Also effective January 1, 2009, the minimum TTD rate will increase from \$137.45 to \$143.70, based upon the same increase in the SAWW.

The full bulletin of the DWC is presented below:

#### Temporary total disability rate for 2009 will increase to \$958.01 per week

The maximum temporary total disability (TTD) rate will increase to \$958.01 on Jan. 1, 2009. This increase to the maximum TTD rate marks the third year in a row that the TTD rate will be affected by a change in the state average weekly wage (SAWW).

Beginning in 2006, Labor Code section 4453(a)(10) required the rate for TTD be increased by an amount equal to the percentage increase in the SAWW as compared to the prior year. The SAWW is defined as the average weekly wage paid to employees covered by unemployment insurance as reported by the U.S. Department of Labor for California for the 12 months ending March 31 in the year preceding the injury.

The California SAWW for the 12 months ending Mar. 31, 2008 was \$956.20. For the period ending March 31, 2007 this figure was \$914.60. So the 2008 TD rate of 916.33 is multiplied by  $956.20/914.60$  or  $1.045484365$ , which equals \$958.01 for 2009.

The minimum TTD rate is also subject to annual adjustment based on increases in the SAWW, so the minimum rate of \$137.45 will increase to \$143.70.

Under Labor Code section 4659(c), workers with dates of injury on or after Jan. 1, 2003 who are receiving life pensions (LP) or permanent total disability (PTD) benefits

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pensions (LP) or permanent total disability (PTD) benefits are also entitled to have their weekly LP or PTD rate adjusted based on changes in the SAWW. Claims administrators should be aware that many LP and PTD awards are reduced (by uniform reduction) in order to produce a lump sum for paying attorney's fees. To adjust for the SAWW in cases where there's been a prior commutation of attorney's fees, the new rate should be based on the previous year's rate before deduction for attorney's fees, multiplied by the percentage change in the SAWW.

SAWW rates may be verified at the US Department of Labor Web site.

For the 12 months preceding Mar. 31, 2008:

[LINK](#)

## **Division of Workers' Compensation Issues Reminder to the Workers' Compensation Community about the Sunset of the Vocational Rehabilitation Program.**

In a bulletin released on October 27, 2008, the Division of Workers' Compensation (DWC) reminded the workers' compensation community that the vocational rehabilitation program would no longer be authorized effective January 1, 2009. In the Notice, the DWC advised that the vocational rehabilitation unit will no longer exist, in its current form, effective January 1, 2009 and that no orders will issue from the vocational rehabilitation unit relating to rehabilitation services after January 1, 2009. The DWC does note that rehabilitation issues that have been appealed before January 1, 2009 may be pursued before the WCAB.

The full text of the WCAB notice is set forth below and all readers are encouraged to read this in detail:

### **Division of Workers' Compensation reminds community about sunset of the vocational rehabilitation program**

The Division of Workers' Compensation (DWC) is reminding the workers' compensation community that the vocational rehabilitation program established under Labor Code section 139.5 will sunset on Jan. 1, 2009. Because the program will no longer be authorized, injured workers will not be entitled to vocational rehabilitation benefits or services after the program's sunset date. Any eligible injured employee who is interested in pursuing vocational rehabilitation benefits and services is encouraged to do so before the end of calendar year 2008.

The DWC has received a number of questions regarding whether its Rehabilitation Unit will oversee the conclusion of vocational rehabilitation cases and issues beyond the sunset date of Jan. 1, 2009. The DWC has informed the community at various times over the past year that the Rehabilitation Unit does not have statutory authority to order vocational rehabilitation services or benefits for an injured employee beyond Jan. 1, 2009.

While it is conceivable that a claims administrator could agree to provide vocational rehabilitation services and benefits beyond the program's sunset date, the Rehabilitation Unit will not issue determinations directing them to do so. Vocational rehabilitation issues which have been appealed prior to Jan. 1, 2009 can be brought before the Workers' Compensation Appeals Board (WCAB).

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As of Jan. 1, 2009 the Rehabilitation Unit staff will be transitioned into the Retraining and Return to Work (RRTW) Unit. This unit will work with employees injured on or after Jan. 1, 2004 who may be entitled to supplemental job displacement benefits (SJDB). They will also educate employers on the benefits of early and effective return to work, and will specifically assist small employers in seeking reimbursement for temporary and permanent modifications made to worksites to bring injured workers back to the job.

More information on the RRTW Unit can be found at:

<http://www.dir.ca.gov/DWC/rehab.html>.

### **In a General-Special Employment Case Involving CIGA for the General Employer, Second District Holds that the Insurer of the Special Employer, SCIF, is Liable.**

In *CIGA v. WCAB (Zachary) (10/31/08)[cite pending]*, the Second District Court of Appeal, in an unpublished opinion, held that the insurer of a special employer was liable for the industrial injuries of the applicant when the general employer's insurance company, Reliance Insurance Co., had entered into liquidation and was under the auspices of CIGA.

In *Zachary*, the applicant sustained admitted injuries to several body parts while working for Labor Pool from March 1999 through June 1999 as a general laborer. Labor Pool operated as a staffing company and would assign employees to other employment locations performing work under the direction of Labor Pool supervisors. The applicant testified that he was told which locations to go to by Labor Pool, and was supervised and paid by Labor Pool. The applicant further testified that he had no knowledge of who Carri Construction was, the location that he had been assigned to by Labor Pool.

At trial, the parties stipulated that Carri Construction was the special employer and that they were insured by SCIF during the time in question. Notably, the insurance Policy of SCIF was not entered into evidence and SCIF advised that the actual policy could not be found. CIGA raised the issue of whether SCIF, insuring the special employer, constituted other coverage under *Insurance Code Section 1063.1(c)(9)*.

After the matter was submitted, the trial judge awarded the applicant benefits and held that CIGA was liable to provide these benefits. CIGA filed a petition for reconsideration with the WCAB arguing that the failure to provide the policy by SCIF created a presumption under *Insurance Code Section 11650* that the policy provided for unlimited coverage and, as such, it must be presumed that there was no language within the policy excluding coverage to special employees. The WCAB denied CIGA's petition for reconsideration, holding that absent the policy, with no form endorsement excluding special employee's, CIGA had not met its burden of proof regarding the extent of SCIF's coverage. The WCAB declined to rely on the presumptions set forth in the insurance code.

CIGA thereafter filed a petition for writ of review with the Second District Court of Appeals. The District Court denied CIGA's writ. CIGA filed a writ of review with the California Supreme Court. The Supreme Court granted CIGA's request and remanded the matter back to the Second District to author an opinion.

The Second District Court of Appeal then reversed the WCAB. In reversing the WCAB, the Court held that because there was no dispute of SCIF's coverage for Carri Construction, and the inability of SCIF to provide a policy, as well as the stipulations entered into by the parties, the SCIF

policy was presumed to be a comprehensive compensation policy, without exclusions, applying to the location the applicant was assigned to.

Further, the Court found that because of the general-special employment situation, the parties were jointly and severally liable for the applicant's injuries, thus establishing "other insurance" and relieving CIGA of liability.

Again, we thank you for your interest in FS&K Work Comp News and look forward to keeping you informed on the Workers' Compensation issues that most affect you.

Sincerely,

**The FSK Newsletter Team**

Jason C. Hilfrink  
(Chief Legal Editor)

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