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# 15% PERMANENT DISABILITY WEEKLY INCREASE / DECREASE

The 15% permanent disability weekly increase or decrease is applicable for this population of files pursuant to LC §4658 (d) (2) and LC § 4658 (d) (3) (A):

- Dates of injury: 1/1/05 and continuing
- Condition must be P&S/MMI with some level of permanent disability
- Employers with 50 or more employees at the time of the most recent policy inception or renewal in effect on the DOI; Self-insured employers who employ 50 or more employees at the time of the most recent filing of the self-insured's annual report; Legally uninsured employers who employ 50 or more employees at the time of injury.

Increase is applicable:

If the employer does not offer an injured worker regular, modified or alternative work within 60 days of P&S status, each "**remaining"** disability payment **"from the date of the end of the 60-day period"** shall be increased by 15%. Start the 15% weekly increase on the 61st date after the P&S/MMI date.

Decrease is applicable:

If the employer offers the injured worker regular, modified or alternative work for a period of at least 12 months, and regardless of whether or not the injured worker accepts, each PD payment "**remaining"** to be paid to the injured employee "**from the date the offer was made"** shall be decreased by 15%. Start the 15% weekly PD decrease as soon as the offer of return to work has been made by the employer for regular, modified or alternative work via the DWC AD 10003 form / Offer of Regular Work or DWC AD 10133.53 form / Offer of Modified or Alternative Work.

Retroactive or accrued PD payments that are due prior to the P&S/MMI date are not subject to the 15% decrease or increase.

If regular, modified or alternative work is terminated by the employer before the end of the twelve-month period, the amount of **"each of the remaining**" PD payments shall be increased by 15% (PD rate). An injured worker who voluntarily terminates employment is not eligible for 15% increase. An injured worker who is terminated for cause may not be eligible for the 15% increase. It all depends on the termination for cause issue as well as how well the termination was documented by the employer.

The 15% increase/decrease in the PD rate is made during weekly payments for each remaining PD benefit once the determination has been made as to whether or not the employer can or cannot provide the employee with a return to work. Do not add the 15% PD increase or decrease to the final PD rating. Example: If the final PD rating is 25% and you have a 15% PD increase, do not make the total PD rating 40%.

<u>15% Increase / Decrease PD rate Examples</u>

- Increase – If the standard weekly PD payment is $185.00 per week, a 15% increase would result in a rate change to $212.75 for the remaining PD payments owed. In a case where 10 weeks of PD payments remain with payments being made at the new rate of $212.75, after all 10 weeks are paid out, the net result of the 15% increase would equate to an increase in overall PD payments of $277.50.

- Decrease – If the standard weekly PD payment is $185.00 per week, a 15% decrease would result in a rate change to $157.25 for the remaining PD payments owed. In a case where 10 weeks of PD payments remain with payments being made at the new rate of $157.25, after all 10 weeks are paid out, the net result of the 15% decrease would equate to an overall savings of $277.50.

**These question and answer examples have been provided by Allan Leno via his monthly VR and Voucher news letters during the past 2 years. These examples are being provided to assist Claims Administrators in complying with the Labor Code to determine whether or not a 15% increase or decrease is applicable. Claims Administrator's needs to establish their own policy on how to handle each individual claim / situation.**

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***An employee returns to work at regular duties but no offer of regular work (DWC AD Form 10003) is sent. Do you increase weekly PD payments after 60 days?***

The statute (*L.C. §4658(d)(3)(A)*) says weekly PD payments are increased unless the employer offers regular, modified, or alternative work within 60 days of P&S. *CCR §§ 10001-10003* specifies that the offer of regular work is via the 10003 form so the answer to this question would be "Yes." Some argue that the actual return to work constitutes a de facto offer of work by the employer and an acceptance by the employee so the 10003 form should be irrelevant and requiring the form constitutes "form over substance." That is a very logical argument but the history of workers' compensation in California is replete with examples of cases where a failure to meet technical requirements (such as sending mandatory notices) has proven expensive to defendants. I therefore expect that a failure to send a 10003 form to offer regular work will result in a finding that the 15% PD increase is due after the 60th day.

***If the offer of regular/mod/alt work comes through the employer via an interactive process, is the offer valid if not served by the claims administrator?***

Presumably the claims administrator does not serve a DWC AD Form 10003 so the answer would be the same as above. This question points out the absurdity of relying on "form over substance" and we can hope the courts will recognize that an employer that has utilized an interactive process resulting in a return to work has meet the intent of *L.C. § 4658(d)*. Until that happens, send the 10003 (or 10133.53 for mod/alt jobs) before taking your 15% PD credit.

***L.C. §4658(d)(2)(3) indicates that you have 60 days to send an offer of regular work – do you than have to wait an additional 60 days to take the 15% credit?***

You have 60 days to send the offer; the credit can be taken immediately after the offer is made.

***We did not send the Notice of Rights within 10 days but an offer of regular work was***

***sent within 30 days of P&S. Are we entitled to take the 15% PD credit?***

Yes. The PD credit is not dependant on the timeliness of a Notice of Potential Rights (DWC AD From 10133.52). 4658(d)(3)(A) only requires that the offer of regular (10003) or mod/alt work (10133.53) be made within 60 days of P&S.

***We just received the P&S report today but the doctor indicates the applicant was P&S three months ago. Do we now owe a 15% increase in PD even though we can send an offer or regular/modified/alternative work within 60 days of knowledge?***

The statute specifies the P&S date, not the date of knowledge so the injured worker would presumably be due a 15% increase for 30 days and then a 15% decrease when you send the 10003 or 10133.53. This is clearly not an equitable situation for defendants but, historically, the workers' compensation system has not made the applicant suffer for the errors or delays of others (see *Gallagher Bassett v. WCAB (Lewis) (2001) 66 CCC 520 (writ denied)*).

***If we previously sent an offer of regular work (10003) based on the treating physician's P&S report but subsequently receive an AME report (or Panel QME report), do we have to send another 10003 form? What if the number of weeks of PD changes?***

There should be no need to send a second 10003 form, even if the number of weeks of PD changes. As long as the applicant is still released to regular duties, the original 10003 will suffice. Note, however, that you would need to send a DWC AD Form 10133.53 Offer of Mod/Alt Work if the AME imposes work restrictions that would re3sult in a need for job modification or reassignment.

***An employee is released to regular, modified, or alternative work but is not yet P&S. Can we take the 15% PD credit if we send the 10003 or 10133.53 forms?***

No. The claims administrator cannot claim the 15% PD credit until AFTER P&S. The statute says that the credit can be taken "….within 60 days of becoming P&S…" and most attorneys are of the opinion this means after P&S only and not 60 days before or after. This may mean that all the PD has been paid out by the time the applicant becomes P&S and this certainly seems unfair to the employer. However, as we know, the law is always fair – it's just the law.

***Our employee is P&S on 9/15/06 and returns to regular duty the following day. Unfortunately, we don't send the DWC AD Form 10003 until 12/15/06. Do we pay PD at the regular rate until 12/15/06 and then take the 15% credit?***

Good question. You would certainly owe PD payments at the regular rate for the first 60 days and (I would argue) you can take the 15% reduction effective 12/15/06. I believe you would owe a 15% increase for the period 11/15/06 to 12/15/06 because there had been no offer of regular work within 60 days as required by *L.C. § 4658(d)(2)*. Note that an applicant's attorney might argue that you cannot take the 15% reduction at all because there was no offer of regular work within 60 days. I believe these fine points will eventually be resolved at the Board.

***If we do not get the 10003 or 10133.53 out by the 60th day, is it pointless to do so***

***thereafter?***

This is a variation of the preceding question. I would go ahead and send the form and take the credit until/unless the courts tell us that the 60th day is an absolute deadline. I view the 15% credit as a return to work incentive for the employer so the employer should be able to take the credit once a job offer is finally made. The Board may eventually disagree but I see no reason why we should assume an outcome before they actually make a decision.

***The employee is released to return to regular work and does so but the employer fails to send the 10003 offer notice. Does the employer owe the employee a 15% increase? What about the 10% self imposed penalty (SIP) if the employer doesn't pay the additional 15%? I don't think it is fair for the employer to be penalized twice (especially when the employee is working!).***

As above, I believe the statute requires the employer to increase weekly PD payments by 15% starting on the 61st day after P&S if there has been no offer of work via a 10003 or 10133.53, at least until the offer is made. And, if the employer fails to pay benefits properly, the SIP would be due. I agree this seems unfair when the employee has actually returned to work but, as noted previously, our system has numerous examples where technical requirements do not properly reflect real world situations.

***An injured worker loses no time from work and becomes P&S on 11/15/06 but we do not find out until 12/15/06 at which time we immediately send out the 10003 regular work offer. The employee has PD and we owe 30 days of retro PD benefits. Can we take the 15% decrease since the payment is being made after the 12/15/06 offer? Of do we owe the 30 days at the regular rate?***

I suspect you all know the answer to this one. The retro PD amount needs to be paid at the regular rate; only the future weeks will be subject to the 15% credit. The system never holds the employee responsible for a reporting delay and the credit can only be taken subsequent to the actual offer of regular/modified/alternative work. Sorry.

***An employee has retired from the employer and the work force but has PD at the time he is determined P&S. Is the employer required to increase PD by 15%?***

I would say no – a retirement is the same thing as a voluntary termination so the employee should not be entitled to a weekly PD increase (see L.C. §*4658(d)(3(B)& CCR §10002(d)*). Note that the Board may have a different view on this issue so stay tuned for case law.

***An injured worker is released to temporary modified duty but is not yet P&S but we send the 10133.53 anyway. Later the employee is released to permanent modified duty; the employer is able to make the temporary position permanent. Do we need to send the 10133.53 again?***

Yes – for two reasons. When you offered the job on a temporary basis, you probably indicated on the 10133.53 that this was a temporary modified position (you should have). You now need to indicate that the job is being offered on a permanent basis. The second reason is that you need to send the 10133.53 '…..within 60 days of the applicant becoming P&S….' in order to take the 15% PD credit. Seems like unnecessary work but the RTW regulations do not contain a "you only have to do it once" clause as we have with the

10133.52 Notice of Rights.

**We were hoping you could clarify whether or not the 15%+/- PD adjustment would apply to employees' who have retired from the County.**

Unfortunately, LC 4658(d) does not address situations that should be exempt - such as cases where an employee is terminated for cause or where the employee chooses to voluntarily end the employment relationship (such as those who choose to retire). In my opinion, you have two options. (1) Offer the job and take the 15% credit when the employee fails to respond or responds that s/he has retired (could be a problem with unions though). (2) Pay PD at the regular 4650 rate. My preference would be for the latter since it is likely to create the least backlash from employees. I do not think you owe the 15% increase because the Legislature did not intend to reward employees who took the return to work option out of the employer's hands.

***If an employee is terminated after their industrial injury for cause (unknown) do we not owe the SJDB or the increase if he/she is not able to return to her usual job?***

The statutes do not address issues such as these so it is essentially a policy issue. Some carriers have adopted a policy that there will be no voucher and PD will be paid at the standard 4650 rate. Al I can suggest is that your company set its own policy and mandate that is followed in all cases where there is a termination for cause or a voluntary termination before P&S.

I would be worried about an "unknown" termination for cause. If the termination isn't clean (i.e., readily understandable as in termination for acts or threats of violence, drug use, etc.), I would err on the side of caution and provide the voucher and 15% increase (my opinion – not a policy recommendation).

***An adjuster just came to me to ask if we would owe an additional 15% on a previously denied case that went to an AME not too long ago, and the AME declared the injured worker P&S as of Oct 2006. The adjuster only received the AME report today--I told the adjuster it doesn't matter if we only received it today. We would still owe the additional 15% because the labor code "doesn't really care" about date of knowledge, but rather if and when a 10133.53 or 10003 was sent within 60 days of P&S. So I told her to pay IW the additional 15%. She came away thinking that wasn't reasonable but I told her bottom line is we owe the additional 15% because we didn't send an offer letter timely. Was I being unreasonable and too "by the book"?***

One of the problems with a case denied AOE/COE (if you lose) is that everything that would have come due during the denial period instantly becomes due when you lose. That includes offers of modified or alternative work. In your example, the adjustor would owe the 15% PD increase beginning with any payments due after the 61st day from the date the applicant was P&S by the AME report (assuming a DOI on/after 1/1/2005). It doesn't matter when you got the report. Steer your adjustor to L.C. § 4658(d)(2) which measures the adjustment date from P&S, not receipt of the medical report.

***If an injured worker is losing time from work and then returns to full duty and I send the offer of full duty at that time, would I be able to retroactively take a 15%***

***reduction on the PD rate back to the date the original offer of full duty was sent out, or, am I only able to take the credit on the date the offer of full duty is sent at post MMI?***

The 15% "bump down" adjustment cannot be deducted retroactively in this example. This is the language from L.C § 4658(d)(3)(A) and AD Reg § 10002(b)(2):

4658(d)(3)(A) If, within 60 days of a disability becoming

permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent.

10002(b)(2) If an employer serves the employee with a notice of offer of regular work, modified work or alternative work for a period of at least 12 months, and in accordance with the requirements set forth in paragraphs (3) and (4), each payment of permanent partial disability remaining to be paid from the date the offer was served on the employee shall be paid in accordance with Labor Code section 4658(d)(1) and decreased by 15 percent, regardless of whether the employee accepts or rejects the offer.

Any PD paid prior to the P&S date is not subject to the PD adjustment. That may not seem fair where the employer has complied with Legislative intent but – the law is the law

***I have received the AME report which states Claimant has 7% permanent disability and is able to go back to regular duties WITHOUT WORK RESTRICTIONS or MODIFICATIONS . However, the Claimant has been laid off – would he be entitled to the voucher?***

As in the question above, the employee is not entitled to an SJDB voucher if s/he is released to regular duty, even if there is no job to return to. The employee is entitled to a weekly 15% PD increase beginning on Day 61 after P&S.

***If the employer fails to make the job offer within 60 days after the injured worker's condition becomes P&S, is the employer then precluded from asserting the 15% reduction in the P.D. rate or can the employer still begin to pay at the 15% reduced P.D. rate from the date of the letter?***

This is one of those questions that will have to be clarified by the courts. I would argue that the Legislature intended to "reward" those employers who retained their injured employees and those employers should be able to take the 15% PD credit when they make the job offer, even if it is after 60 days. Of course, the employer would have to pay the 15% increase from day 61 until the offer is made. I would expect an applicant's attorney to take the position that the 15% increase is due from day 61 until the PD is paid out or the case is settled via C&R. Your employer should consult with an attorney, make a policy decision, and handle the issue consistently until there is either case law or further regulation to clarify the matter.

***If the employer fails to make the job offer within 60 days after the injured worker's condition becomes P&S, is the employer then precluded from asserting the 15% reduction in the P.D. rate or can the employer still begin to pay at the 15% reduced P.D. rate from the date of the letter?***

This is one of those questions that will have to be clarified by the courts. I would argue that the Legislature intended to "reward" those employers who retained their injured employees and those employers should be able to take the 15% PD credit when they make the job offer, even if it is after 60 days. Of course, the employer would have to pay the 15% increase from day 61 until the offer is made. I would expect an applicant's attorney to take the position that the 15% increase is due from day 61 until the PD is paid out or the case is settled via C&R. Your employer should consult with an attorney, make a policy decision, and handle the issue consistently until there is either case law or further regulation to clarify the matter.

***I have a scenario that I'm not sure how to handle.... I have a claim where the Employee was offered, and accepted, a permanent/modified position back in March. We reduced the PD by 15% (and actually finished paying that out a few weeks ago in its entirety). We have not yet formally settled her claim, however. I just got a call from the employer indicating that they may not, in fact, be able to meet the commitment to 12 months of the perm/mod position and may have to let the Employee go earlier than that. I know that this would entitle her to the voucher, but since the PD was previously paid out in its entirety, we don't have to send a supplemental PD payment increasing it by 15%, do we?***

Pursuant to L.C. § 4658(d)(3)(B), you would owe the 15% increase on any PD remaining to be paid after the employee is laid off. You do not have to go back and modify payments already made. However, if the employee is due additional PD at the time of stipulation or award, she would be entitled to the 15% increase on the additional PD amount. As you noted, the employee is now entitled to a voucher as well.

***I received an MMI report indicating EE has 11% WPI, can return to regular duty, but the doctor on the PR-4 does a functional capacity assessment and indicates some restrictions: limited lift/carry no more than 30 lbs, frequently lift/carry no more than 20 lbs, occasionally lift/carry 20 lbs, stand/walk less than 4 hrs per 8 hr day, sit less than 8 hrs per 8 hr day and push/pull no more than 30-40 lbs. The employer has more than 50 employees. I have not yet contacted the employer because I want to clarify the 15% decrease. Basically, I can send the offer of regular work and decrease the PD by 15% correct? EE is not entitled to a voucher because he was released to full duty, but what has confused me is the doctor's permanent work restrictions, so would the offer of regular work be applicable? If I call ER asking if they can provide the permanent work restrictions and they say no, would EE be entitled to the 15% increase?***

Your assumptions are correct. The work restrictions are not an issue as long as they do not conflict with the duties the employee must perform. The physician released this employee to regular duty so you would send him/her a DWC AD 10003 and you would start taking the 15% decrease in the PDAs as soon as the offer is sent. If the employer does not take the employee back, you would owe the employee a 15% increase in PDAs starting the 61st day after P&S. In your example, the work restrictions are a sort of "red herring" because the doctor released the employee to regular duties.

***We have an admitted 2006 case with 27% PD; the employer is accommodating the employee's restrictions. Unfortunately, we did not get the AD Form 10003 out within 60 days. What rate do we owe the applicant on the 61st day from P&S – his regular rate of $230/week, plus 15% at $264.50, or can we take a 15% credit and pay $195.50 because the employer has actually provided modified work? Can we still send the 10003?***

First, you would the 10133.53 Offer of modified/Alternative work form if the employer is providing permanent modified work: the 10003 goes only to those employees who return to regular duties.

There is no question that you will owe PD benefits at the $264.50 rate until the formal offer of modified work is sent to the applicant; the statute states quite clearly that the upward PD adjustment is do if there is no offer within 60 days of a P&S determination. What is less clear is whether the $264.50 rate must be pad until PD payments end – or, can the insurer/employer reduce payments (in your case to $195.50) once a 10133.53/10003 is sent to the employee. In my view, the Legislature intended to encourage employers to retain their injured employees so I believe you can take the 15% reduction as soon as the 10133.53/10003 is sent. Other may interpret the statute to mean that the offer must be made within the 60 day window or the opportunity to take the reduction is lost. Ultimately this issue will be decided by the WCAB.

***We have an insured employer with hundreds of employees nationwide but only 30 or so are employed within the state of California. Does this employer meet the 50 employee requirement in L.C. § 4658(d) for PD adjustments?***

The DWC has jurisdiction only over your employer's California location (i.e., the employees for whom the employer pays a workers' comp premium). The employer in this example would NOT meet the 50 employee requirement specified in the statute and therefore would not owe the PD increase OR be entitled to take the 15% decrease. The employer would be able to take advantage of the reimbursement provisions of *L. C. §139.48* and *CCR §§10004-10005*.

***My insured account regularly completes a "temporary" 10133.53 Mod/Alt Work offer form when an injured employee returns to regular modified work. If any of these employees are released to full duty before P&S, do I need to send the DWC AD 10003 Offer of Regular Work immediately?***

The 10003 form must be sent AFTER P&S in order to take the 15% PD reduction for DOIs on/after 1/1/05. The statute (*L. C. § 4658(d)(3)(A)*) and the regulations (*CCR §§ 10001-10003*) would appear to require you to send the 10003 a second time if the form was initially sent to the applicant prior to a P&S determination.

***I read your posting on workcompcentral with the title "BPPVE vouchers Set to Sunset". The third comment in there discussed employers that employ fewer than 50 employees and not owing the 15% increase "OR be entitled to take the 15% decrease". Unless there has been an amendment I missed, if you look closely at LC4658, the paragraph in (3) (A) discusses the 15% decrease but does NOT indicate any limitation of application of this section regarding size of employer. The other sections (2) no offer of reg/mod/alt = +15% and (3) (B) reg/mod/alt work terminates before PD does – both clearly state "this paragraph shall not apply to an employer that***

***employs fewer than 50 employees". Therefore, any employer, and especially an employer with fewer than 50 employees, is entitled to take the 15% decrease.***

The ability of small employers (fewer than 50 employees) to take the 15% reduction in PD is the subject of much debate. Many defense attorneys have taken the position outlined above, namely that small employers can take the 15% PD reduction when modified/alternative work is offered but are not subject to the 15% increase when no modified or alternative work is offered. A Workers' Compensation PJ responded to the same item indicating his conviction that small employers are not subject to the increase or the decrease. Clearly this is an issue that begs for resolution at the Board. Until then, all insurers/employers can do is obtain a legal opinion from a trusted source and then make a policy decision on how they wish to manage the issue until such time as there is definitive guidance from the courts.

My interpretation of *L.C. § 4658(d)* is the same as the reader above, namely that the language appears to say that small employers get the benefit when modified/alternative work is offered (a 15% reduction in PD) but do not suffer the penalty (an increase of 15% in PD) when they cannot offer modified/alternative work. But I am not an attorney – and such an interpretation makes no sense. Why should small employers get the 15% benefit but not be subject to the 15% penalty? Especially when only small employers can be reimbursed for the costs of job modification under *L. C. § 139.48*? Since attorneys and WCJs cannot agree on this issue, claims administrators need to establish a good faith policy and apply that policy in all cases until there is case law on the subject.

***In the Return To Work Regulations, I only see reference to the Notice of Offer of Regular Work Form DWC-AD 10003 and the Notice of Offer of Modified or Alternative Work Form DWC-AD 10133.53 under section 10002 - Adjustment of Permanent Disability Payments. If the claims adjuster misses the 60 calendar day window from permanent and stationary status and therefore, their ability to qualify for a 15% reduction of permanent partial disability, is there any need to issue either of those forms when the employee returns to work? Are those forms only to document the timely offers and therefore, the 15% reduction?***

As above, I think we need to send the forms out irrespective of the timeliness issue, although there would be an exception for the 10003 if all PD has been paid out by the time the timeliness error is discovered. The courts may well find that the defendant cannot take the 15% credit if the time requirement (i.e., 60 days from P&S) is missed but the issue has yet to be litigated. And there is an argument that the claims administrator should be able to take the credit once it corrects its error – the purpose of the section is to encourage employers to retain injured employees. If the employer has complied with the intent of the law, it should be able to claim the credit once the notice error is rectified. Until we have guidance in the form of case law, the message to claims administrators must be that the form is due – period.

It should be noted that the claims administrator is obligated the 15% increase from the 61st day after P&S until the proper form is sent. Even if the WCAB eventually finds that the employer can take the 15% credit after an untimely 10003/10133.53, there is no doubt that the increase is due where the claims administrator has failed to send the 10003/10133.53 timely.

***The injured worker has a 2006 injury but there was no lost time. The claimant is now P&S and the report states the injured worker can return to her U&C occupation even though she does have PD and some work restrictions. However, the employer did not***

***renew the employee's contract so there is no job for her to return to. I'm assuming I owe the SJDB voucher because the insured did not renew the contract?***

There is no liability for a voucher because the applicant was released to her regular duties. You would, however, have to increase the applicant's weekly PD payments by 15% beginning on day 61 after P&S, assuming the employer has 50 or more employees.

***We had a public safety officer who returned to work post wrist surgery in a light duty capacity. Upon his return, we sent him the Notice of Potential Rights and the Offer of Alt/Mod duty. He has now been released back to full duty. Do I now have to send him the offer of regular work?***

If the employee has PD, you would want to send the Offer of Regular Work (10003) so you can reduce PD by 15%. The 10003 form is meaningless if there is no PD but it may be a good idea to send one anyway as injured workers sometimes choose to go to a Panel QME who does find PD.

***You may have addressed this in a prior Newsletter. I wanted to know if the employer can assert the 15% reduction in PD if the injured worker is declared P&S by an AME/QME retroactive 60 days, but the report is not received until after the 60th day. Can the employer argue that we have 60 days from receipt of the report finding P&S? I was unable to find case law on the point.***

You can't find any case law on the subject because there isn't any. I have yet to see any cases go up on either the 15% PD adjustment or the voucher.

You cannot take the 15% credit retroactively because the statute requires an offer of work to be made BEFORE you can assert the credit. The Administrative Director has determined that an offer of work must be made via DWC forms AD-10003 (regular work) or AD-10133.53 (mod/alt work). This doesn't seem fair when it is the doctor who is responsible for the delay - but this is just a case where the law is the law.

***I thought one of your newsletters covered this but, if an employee resigns, before we have a P&S report with permanent work restrictions, is the employer obligated to increase the PD by the 15% since they can't offer a modified job since the employee resigned?***

The statute (*4658(d)*) and the Regs (*10133.56/57*) do not address this situation and we have no case law to provide guidance. Applicant attorneys, of course, would argue that you owe both the 15% increase as well as the voucher. As an employer/insurer, I would argue that the applicant has voluntarily resigned and is not entitled to either a PD increase or a voucher. Eventually the courts will decide this issue but I would not be inclined to provide these "rewards" where the employee has made a voluntary decision that takes the incentives out of the employer's hands. Ultimately though this is a policy decision you must make - all I can do is give you my opinion - and it may only be worth what you paid for it.

***If an injured worker has been declared P&S with no work restrictions for the work comp injury, but has restrictions for a non-industrial condition, does the claims examiner send an offer of modified/alternative work or can the employer disregard the non-industrial work restrictions for the purposes of the RTW offer? It doesn't make***

***sense to send an offer of regular work when there are restrictions, but it also doesn't make sense that the employer looses the 15% reduction if they cannot accommodate non-industrial work restrictions.***

The employer should have no obligation to offer modified/alternative work with respect to its workers compensation requirements BUT it does have an obligation to engage in an "interactive process" with the employee and to conduct a reasonable accommodation assessment under the Fair Employment and Housing Act (FEHA).

This is one of the situations that simply make no sense under the new workers comp requirements. Technically, you would be required to send the applicant a DWC Form 10003 Offer of Regular Work so you could take the 15% PD credit. That offer will not make much sense to the employee who is precluded from returning to his/her usual duties by the non-industrial condition and that confusion might well lead to an FEHA complaint. Your employer needs to consult a labor attorney regarding its FEHA exposure; the 15% PD adjustment is pocket change compared to the potential FEHA costs.

A question (or two) does come to mind here. I would assume the non-industrial condition existed prior to injury. Did the industrial injury exacerbate the condition to the point where it now prevents the employee from performing his/her regular duties? If so, the situation is much more complicated and the employer may need to offer modified/alternative work under its workers' compensation obligation.

***I have an IW who quit with our ER and had SX putting him on TD, and RTW with another ER. The IW is now RTW full duty with PD. How do I handle the Voucher and RTW offer to take the 15% credit.***

If the injured worker was released to full duty, I would argue that s/he is not entitled to a voucher. The purpose of the voucher is to assist injured workers who are displaced from the occupations due to their industrial injury. This person was released to full duty and has proved his/her ability to compete for similar work by finding another job. The individual also voluntarily terminated the employment relationship; by doing so, I would argue that the employee acted to end the employer's options in terms of offering re-employment.

The 15% PD credit is another matter. *L. C. § 4658(d)* indicates the employer can take a credit where it offers re-employment within 60 days of P&S. Here the employee has quit so it isn't reasonable to expect the employer to offer the employee his/her job back. But, because the employer isn't offering a job, it probably cannot take the 15% credit against PD. My suggestion would be for the employer to pay PD at the regular *4650* rate.

***A primary treating physician's report indicates P&S and no ratable disability; a Notice of Offer of Regular Work was not issued based on the current facts. The IW requests a panel QME evaluation and 6 months later the QME finds ratable disability. Would this be a new trigger to send the DWC AD Form 10003? Would we owe the 15% increase or are we able to reduce by 15%?***

You should send the 10003 Regular Work offer ASAP and can start taking the 15% reduction going forward. It is unclear if you can take the 15% reduction for any PD owed prior to sending the 10003. The statute (*4658(d)(3)(A)*) says you can only take the reduction after an offer is made (and the offer is likely to be defined as the 10003). Until there is case law

however, you can argue that an offer was in fact made (the applicant is working) and you had no knowledge of disability until the QME report. Absent case law, this is a policy decision. Discuss with your attorney and decide on your policy (all cases of this nature would have to be handled the same).

***I have one claimant who filed one claim for several body parts, including hearing loss. He is P&S from hearing loss (w/no ratable impairment) but is not P&S from the other body parts. Would I send him an offer of regular work now or wait till he's P&S from all his body parts? We are utilizing AMEs so he should eventually by P&S from all his body parts.***

The claimant is not P&S and due a DWC 10003 until he is P&S on all body parts. *L.C. § 4658(d)* indicates that the PD adjustments are not due until the applicant is P&S so you cannot take a credit nor are you obligated for an increase until the applicant is P&S on all body parts.

***I have a situation where the injured worker is participating in the Sheriff Work Alternative Program. This program allows individuals to work for the Sheriff's department a certain number of hours or days in lieu of jail time. When one of the SWAP workers sustains an injury and suffers permanent disability and work restrictions would they be entitled to a voucher? Technically the department can have them do anything so the restrictions are not a problem - it's the ability to offer it for a year. This situation also comes into play for the eligibility of the 15% increase/ decrease.***

This question is similar to the one above it in that it is a fact pattern never anticipated by the Legislature; we thus have no real guidance in the statute or AD Regulations. Here, the employer (i.e., the Sheriff's Dept.) is receiving a benefit (the inmate's work) which is the same as in the preceding example (the Fire Dept. receives the benefit of the volunteer's work). However, the inmate is being compensated – in a manner of speaking – by having his sentence reduced where the volunteer firefighter receives no compensation. On that basis, I believe the Board would find that the inmate was "working" and s/he would be potentially entitled to a voucher if the "employer" Sheriff cannot provide medically appropriate modified or alternative work. Your problem is that the Sheriff can provide modified/alternative work but probably not for one year. It therefore appears you would be able to take the 15% PD reduction while the inmate is in the modified/alternative position but then would have to increase weekly PD payments once the inmate was released.

I would suggest you get a legal opinion in this matter. This "employment" is not a job as contemplated by the Legislature and being released from jail really is not the same as having your employment terminated by an employer. Your attorney may be able to come up with a different theory that results in a different – and admittedly more rational – outcome. I doubt that the Legislature intended for prisoners who happened to be injured while in jail should be rewarded by receiving a voucher.

***The injured employee chose to retire prior to the point he was determined to be P&S by his treating physician. Our insured employer always has modified work and would have had appropriate work for this employee but for his decision to retire. Is the employee due a voucher because he didn't return to work? Do we have to pay the 15% increase in PD because he isn't returning to work?***

Unfortunately, the statute and AD Regulations do not address this situation. The safest option would be to develop a DWC AD 10133.53 Offer of Modified or Alternative Work for the position the employer has available. Once the offer is sent to the employee, you can take the 15% PD reduction allowable under *L.C. § 4658(d)* and you would not owe the employee a voucher.

Many employers do not want to make such offers to employees who have terminated the employment relationship or they may be prohibited from doing so by union agreements or personnel rules. Without an offer, the claims administrator cannot take the 15% PD credit. I would argue that the employee is not due a voucher or the 15% PD increase because s/he has made a decision to leave the labor market.

***The employee was entitled to a 15% PD increase because the employer was unable to offer modified or alternative work. We started to pay the increase but then reverted, without notice, to the statutory rate several weeks later. When we issue a check for the missing amount, is it subject to penalty?***

The 15% PD increase is still a disability payment and would therefore be subject to the same penalties applicable to permanent disability under *L.C. §§ 4650 & 5814*. Arguably the applicant would be due a 10% self imposed penalty (SIP) on the entire amount of PD due for those payments paid without the 15% increase since each of those payments was made at an incorrect rate.

***I have a claim that has PD, via the P&S report just received. We do not have mod/alt duty available, the claim was rated at 3%, or 9 weeks, and he has an atty. I have several charts that reflect PD levels (in the lower PD levels) of the 15% that do NOT add up to 15%. Example, PD of 2% of $1,380.00. Reduction is 15% or $1,173.00, but the column for increase of the 15% is the same or $1,380.00. Same for 3% PD, reduction is fine but the increase is NOT 15%, it adds up to about less than 1%. This doesn't make sense to me.***

The 15% PD adjustment is applied to the weekly payments, not to the PD rate or to the total PD paid to the claimant. The reason the amount doesn't change on your chart for 2% is that the 15% increase would not apply until the 61st day of PDAs. The 15% decrease in PD applies immediately when you send the DWC AD 10003 or DWC AD 10133.53 offer of work. I suspect it would make more sense to just remember when the weekly adjustment is due rather than relying on the chart.

***The applicant was RTW modified duty after receiving TTD and a Notice of Rights to the voucher was sent. The Applicant then became P&S in 2006, but continues to work the modified duty which will be permanent. I understand that the notice of perm/mod/alt work is supposed to issue within the 60 days of P&S status to take the discount if the employer can accommodate. Here, the Applicant is still working the perm/mod job but no offer was sent to the employee within 60 days of P&S determination. Does the employer have to pay the 15% increase to the applicant until they send the official offer of perm/mod even if it is the same job they are working now? Can they send offer now even though after the 60 days and pay the decrease of 15% now, and can they take credit retroactively? What do they do for the period after P&S, decrease or increase, if no mod/alt perm offer was made?***

Since the employee has not been sent an offer of modified/alternative work (form DWC AD 10133.53), PD should be increased 15% from the 61st day from the P&S date and continuing until the employer makes the formal offer of modified work on form 10133.53. The statute (*§4658(d)*) indicates that the offer must be made within 60 days of P&S so it is unclear at the present time if the employer can, in fact, correct its error. At its February 2007 seminar, the DWC advised employers that the increase would be due from day 61 until the error is corrected so there is a basis for this action. However, the WCAB may view the matter differently if the issue is ever litigated.

***The employee has an injury on 4/21/05 resulting in surgery on 7/1/05 and an eventual PD rating of 6%. He is TTD until 8/21/05 and returns to modified duty on 8/22/05. The employee is released to full duty on 11/10/05 and is P&S on 1/5/06***. ***My counterparts and I have had a discussion regarding this scenario and whether a voucher is due when somebody is released to and returns to regular work for the employer and what notices are issued.***

This applicant was due a Notice of Potential Rights letter (DWC AD 10133.52) by 8/31/05. According to the DWC, he should also have been sent a DWC AD 10133.53 Notice of Offer of Mod/Alt Work by September 19, 2005 (I think that requirement is debatable because the form is misleading and inappropriate for temporary modified duty). If you were still paying PDAs after 9/2006, you would have owed the applicant a DWC AD 10003 Offer of Regular Work so that you could take the 15% PD reduction allowed by *LC 4658(d)(3)(A)*. I expect you paid out the PD before *CCR Sect. 10003* became effective (the 10003 form was not yet available) so you would have been able to take the reduction based on the fact that the applicant did return to full duty.