Jackie Secia April 7, 2021

Claims and Medical Director

California Workers’ Compensation Institute (CWCI)

Recommended revisions to the proposed regulations are indicated by underscore and ~~strikeout~~. Comments and discussion by the Institute are identified by *italicized text*.

**Recommended Division Considerations:**

* The proposal includes substitutions of the word “shall” with the words “must” or “will.” The use of the words “shall” and “may” has long been part of the statutory workers’ compensation nomenclature and understood as being directive or permissive, respectively. It is not clear what the Division intends in its replacement of these words, often in conflict with statutory enabling sections, in the absence of some definition or clarification of their intended meaning.
* The proposed Disability Evaluation Unit (DEU) regulations contain three renumbered sections (*i.e.,* §10145, §10146, and §10147) that have largely become obsolete, and consideration should be given to striking them altogether. These sections were intended to implement §4660(d) (also obsolete but not yet revised by legislative enactment), which was enacted when the revision to the *Schedule for Rating Permanent Disabilities* (PDRS) took effect in 2005 and accounted for a transition period to the new rating schedule as affecting injury dates prior to January 1, 2005. As such, we ask that the Division consider the obsolete nature of these sections as it moves forward with these revisions and updates.
* CWCI understands the Division’s need to group all related regulations in the proposal by renumbering them in sequential order. However, renumbering §9725 through §9727 into §10145 through §10147, creates a conflict with existing regulation §11.5(i)(3), which has not been modified. The latter section makes specific reference to the DEU sections prior to their renumbering.

CWCI is aware that the Division is updating the QME regulations as these proposed DEU regulations are proceeding through the public comment process. We anticipate that changes in these regulations will be done in concert, to avoid potential conflict. In the meantime, CWCI wishes to provide assistance in the drafting of the proposed regulations, as outlined below.

**Recommendation:**

**§10158. Time Period for Issuing a Summary Rating Determination Pursuant to Labor Code §4061(e).**

Following the receipt of a comprehensive medical-legal evaluation of unrepresented employees from a Qualified Medical Evaluator that is eligible for rating under section 10159, the DEU must issue a summary rating determination pursuant to Labor Code section 4061(e) within 20 days of either the date the time has passed for the filing of a request for factual correction under Labor Code section 4061(d)(1), or the date of receipt of a supplemental report submitted to the DEU in response to a request for factual correction under section 37, whichever is later.

**Discussion:**

*Although Labor Code §4061(e) solely applies to Summary Rating procedures when the employee is unrepresented, we believe that the addition of clarifying language to the regulatory section will avoid any confusion about its application, particularly since the Division has proposed to strike a corollary section, §10160.5, pertaining to Summary Rating Determinations for represented employees.*

**Recommendation:**

**§10159. Summary Rating Determinations for Comprehensive Medical Evaluation of Unrepresented Employee~~s~~.**

(b) The insurance carrier, ~~or~~ self-insured employer, or claims administrator acting on behalf of the insurance carrier or self-insured employer, must provide the employee with an Employee's Disability Questionnaire DWC AD Form 100 (DEU) prior to the appointment scheduled with the Qualified Medical Evaluator. The employee will complete the questionnaire and provide it to the Qualified Medical Evaluator at the time of the examination.

(c) The insurance carrier, self-insured employer, claims administrator acting on behalf of the insurance carrier or self-insured employer, or injured worker must complete a Request for Summary Rating Determination of Qualified Medical Evaluator's Report DWC AD Form 101 (DEU), a copy of which must be served on the opposing party. The requesting party must send the request, including proof of service of the request on the opposing party, to the Qualified Medical Evaluator, together with all medical reports and medical records relating to the case, prior to the scheduled examination with the Qualified Medical Evaluator. The request must include the appropriate DEU address of the Disability Evaluation Unit. A listing of all of the offices of the DEU, with each office's area of jurisdiction, will be provided, upon request, by any DEU office or any Information and Assistance Office.

(d) When a summary rating determination has been requested, the Qualified Medical Evaluator must submit all of the following documents to the ~~Disability Evaluation Unit~~ DEU at the location indicated on the DWC AD Form 101 (DEU) and must concurrently serve copies on the employee and claims administrator:

**Discussion:**

*There are no definitions included at the outset of these regulations to provide clarification on the meaning of terms. It cannot be assumed that the claims administrator’s role is interchangeable with the insurance carrier or self-insured employer. We have added language in (b) and (c) to clarify the claims administrator’s role in compliance with these requirements.*

*We suggest deletion of the full reference to the Disability Evaluation Unit to be consistent with other proposed sections that the Division proposes to strike and replace with “DEU.”*

**Recommendation:**

**§10164. Service of Summary Rating Determination and Notice of Options Following Permanent Disability Rating.**

~~Within the time specified in Labor Code section 4061(e),~~ Within the time specified in Labor Code section 4061(e), t~~T~~he DEU will serve the permanent disability rating determination on the employee, ~~and~~the employer, or the claims administrator if acting on behalf of the employer and the Notice of Options Following Permanent Disability Rating (DEU Form 110) on the employee by the method of service described in section ~~of~~ 10205.6.

**Discussion:**

*The opening phrase in this section should be maintained. Labor Code section §4061(e) requires that within 20 days of receipt of the comprehensive evaluation, the permanent disability rating “shall” be calculated and served on the employee and employer. We believe this statutory section takes precedence, and that the timeframe to complete and serve the rating applies to the DEU as well. As this section pertains to unrepresented employees, we also believe there is a compelling reason for the regulatory section to be consistent with the statutory 20-day timeframe as it ensures accountability of everyone involved in the Summary Rating process and may serve to avoid unnecessary delays in the resolution of the employee’s claim.*

*There are no definitions included at the outset of these regulations to provide clarification on the meaning of terms. It cannot be assumed that the claims administrator’s role is interchangeable with the insurance carrier or self-insured employer. We have added language to clarify the claims administrator’s role in compliance with these requirements.

We have also added minor punctuation and syntax corrections.*

**Recommendation:**

**§10165. Reconsideration of Summary Rating Determinations if Employee is Unrepresented.**

(a) Requests for reconsideration of the summary rating determination may~~must~~ be filed with the administrative director. If either the employee, employer, or claims administrator on behalf of the employer requests reconsideration, the request shall be filed in writing within 30 days of receipt of the summary rating determination. DWC-AD Form 103 (DEU) can be used to file for reconsideration. The request and must clearly specify the reasons the summary rating determination should be reconsidered and must include a proof of service on the other party and any other information necessary to support the request. Reconsideration of a summary rating may be granted by the administrative director for one or more of the following reasons:

**Discussion:**

*The request for reconsideration of a summary rating is not mandatory so we have replaced the word “must” with the word “may.”*

*There are no definitions included at the outset of these regulations to provide clarification on the meaning of terms. It cannot be assumed that the claims administrator’s role is interchangeable with the insurance carrier or self-insured employer. We have added language to clarify the claims administrator’s role in compliance with these requirements if a request for summary rating determination is made.*

 **Recommendation:**

**§10167. Request for Consultative Rating. – ~~(~~DWC AD Form 104 (DEU).**

[DWC AD Form 104 (DEU)](http://www.dir.ca.gov/dwc/FORMS/EAMS%20Forms/DEU/DEU104.pdf)

 **Discussion:**

*A technical correction is suggested.*

**Recommendation:**

**§10168. Notice of Options Following Disability Rating (DEU Form 110).**

**Discussion:**

*The Institute recognizes the challenges presented in attempting to describe complex legal documents in a limited space. We also understand that the Division’s intention has always been to provide information to unrepresented injured employees that is understandable and helps to improve communication.*

*We suggest that clarity can be added with a slight reorganization to the section. For example, inserting a paragraph break before the last sentence of the opening paragraph would help draw attention to the two options available. Simple edits to the order of the bullet points outlining the Differences Between Stipulated Award and C&R would provide better focus on the differences being discussed (e.g., grouping the two items about protecting rights or risking litigation, grouping the two items about giving up or keeping medical care, and grouping the two items referencing biweekly or lump sum payments).*

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Andrea Guzman, Claims Regulator Director April 7, 2021

State Compensation Insurance Fund

State Compensation Insurance Fund appreciates the opportunity to provide input regarding the Division of Workers’ Compensation’s (DWC) proposed amendments to the Disability Evaluation Unit (DEU) regulations. State Fund respectfully submits the following comments for your consideration.

Recommended revisions to the DWC’s proposed updates are indicated in the body of this letter under **Recommendation(s)** as follows: by underscore for additional language and ~~strikeout~~ for deleted language.

# § ~~10161.1. Reproduction of Forms.~~

**Discussion:**

It is apparent that the DWC’s proposed changes to the DEU’s regulations included deleting §10161.1 in its entirety and moving specific text to §10161 Forms. This is evident by the DWC’s strikeout of the section number, section title, the authorities cited, and reference sections. However, the DWC inadvertently did not strike out language that it proposes be moved to § 10161. This language is:

*The Request for Summary Rating Determination of Qualified Medical Evaluator's Report, the Employee's Disability Questionnaire, and the Request for Summary Rating Determination of the Primary Treating Physician's Report may be reproduced by automated office equipment or other means as long as the printed content and layout of the form are identical to the specified form.*

# Recommendation:

If it is DWC’s intent to delete this section in its entirety and move the remaining text to another section, State Fund recommends deleting the remaining text via strikeout under §10161.1 to provide clarity and make certain that this language is meant to be located under §10161.

Proposed revision:

*~~The Request for Summary Rating Determination of Qualified Medical Evaluator's Report, the~~ ~~Employee's Disability Questionnaire, and the Request for Summary Rating Determination of the~~ ~~Primary Treating Physician's Report may be reproduced by automated office equipment or other means~~ ~~as long as the printed content and layout of the form are identical to the specified form.~~*

1. §~~10164~~ 10165. Reconsideration of Summary Rating Determinations, ~~Reconsideration~~ if Employee is Unrepresented.

**Discussion:**

Subsection (c) states:

*(c) The administrative director will not review any request for reconsideration of a summary rating in a case that is pending before a workers’ compensation administrative law judge.*

Here, there can be different interpretations of the term “pending”. This term can either mean the case is assigned to a workers’ compensation administrative law judge or that the case is assigned to a workers’ compensation administrative law judge for trial. Obtaining a summary rating before trial, even when there has been an assignment of a workers’ compensation administrative law judge would be helpful to the parties to resolve potential disputes.

# Recommendations:

State Fund request clarification as to what the DWC means by “*pending”*. In addition, State Fund recommends revision of this section to avoid being read and interpreted differently.

State Fund recommends the following revision:

*(c) The administrative director will not review any request for reconsideration of a summary rating in a case that is pending ~~before a workers’ compensation administrative law judge~~ for trial.*

# §~~10165.5.~~ 10168. Notice of Options Following Disability Rating (DEU Form 110).

**Discussion:**

Here, the DWC’s description of a Compromise and Release (C&R) agreement in stating that this type of settlement *“cannot be set aside except in very rare circumstances”* may not be clear to injured workers who may equate the circumstances of their injury with being rare circumstances that warrant the setting aside of a C&R. Emphasizing the finality of a C&R would be most important when comparing this type of settlement option to a Stipulated Findings and Award, rather than providing a vague expression of the possibility of setting aside a C&R without any detail.

# Recommendation:

For the reasons stated above, State Fund recommends deleting language referencing “…*cannot be set aside except in very rare circumstances” a*nd suggests the following revision:

*A Compromise and Release Agreement is a settlement which generally closes all aspects of a workers' compensation claim including future medical care. It is paid in one lump sum to you. Once a Workers' Compensation Judge has approved this settlement it is final. ~~and cannot be set aside~~ ~~except in very~~ ~~rare circumstances.~~*

# § 10169. Commutation Tables and Instructions.

**Discussion:**

The DWC’s revision to this section should include consistency in describing Tables 1, 2 and 3. Additional language is needed.

# Recommendation:

For the purpose of providing consistency in the naming of the tables referenced under this section, State Fund recommends the following revisions (**bolded**):

*Table 1 (“Present Value of Permanent Disability at 3% Interest”) ~~as issued in January 2001~~, Table 2 ~~(“Present Value of Life Pension at 3% Interest for a Male”)~~(“Present Value for a Life Pension* ***at 3% Interest*** *for a Male”) ~~as issued in July 2001~~, Table 3 ~~(“Present Value of Life~~ ~~Pension at 3% Interest for a Female”)~~(“Present Value for a Life Pension* ***at 3% Interest*** *for a*

*Female”), ~~as issued in July 2001,~~ and ~~“Commutation Instructions”, as issued in January 2001,~~* ***and*** *Table 4 “Commutation Instructions with Examples” are hereby incorporated by reference in their entirety as though they were set forth below.*

# § ~~10169.1~~10170. Commutation of Life Pension and Permanent Disability Benefits

**Discussion:**

The revisions made to this section make it clear that the commutations must now be done using *Table 4 “Commutation Instructions with Examples”*. However, a commutation of all life pension benefits with State Average Weekly Wage (SAWW) increase is not accounted for in these examples. With the lack of instruction on how to perform a calculation of all life pension benefits that includes future cost of living adjustment (COLA) increases, clarity is needed on how a commutation would be done under this scenario.

# Recommendation:

State Fund request clarification on how to perform a commutation of all life pension benefits that takes into consideration SAWW increases. In addition, State Fund recommends that the DWC provide an example of this scenario under *Table 4, Commutation Instructions with Examples*.

# Commutation Instructions

#  Discussion:

Revisions were made to *Example E - COMMUTATION OF ALL LIFE PENSION INDEMNITY PRIOR TO COMMENCEMENT OF LIFE PENSION* that are not consistent throughout the steps outlined to perform a calculation under this scenario.

Under the facts portion of Example E, it appears the DWC intended to replace the birth year with 65 instead of 45, but inadvertently struck through the number 65. Revision is needed.

The DWC proposes deleting the fact giving the person’s exact age on the date of commutation. However, this information is necessary to know what the person’s age is and what rows to use in Table 3. Keeping this fact here is easier for one to follow in performing this calculation.

# Recommendations:

For the reasons indicated above, State Fund recommends the following:

* + Revision to the DWC’s strike through of 65 for the birth year to reflect the DWC’s intent to replace 45 with 65.

Recommended revision: *Date of birth: 8/25/~~45~~ 65*

* + Keep the fact giving the person’s exact age on the date of commutation within this example for ease of use for one performing this type of calculation.

Recommended revision: *Exact age on DOC (from 1c of Example D): 53.718*

Lastly, State Fund reiterates the need for the Commutation Instructions to contain an example showing a commutation of all life pension benefits with SAWW increases accounted for.

# VII: Commutation Tables - Life Pension Tables (Table 2 and Table 3) Discussion:

The DWC indicated that the Life Pension tables are based on the [U.S. Decennial Life Tables](https://www.cdc.gov/nchs/products/life_tables.htm) for 2010. However, an official release of the U.S. Decennial Life Tables for 2010 has not occurred. Claims administrators only have access to the 2001 U.S. Decennial Life Tables. Clarification is needed as to whether the DWC erred in referencing 2010 instead of 2001 U.S. Decennial Life Tables. If not, the DWC should provide the location of where these tables are published.

# Recommendation:

For the reasons stated above, State Fund requests clarification as to which Decennial Life Tables the DWC intended to reference. If the DWC intended to reference 2010 U.S. Decennial Life Tables, then State Fund requests that the DWC provide where these tables are published and confirm that they are used to create the Life Pension tables for Table 2 and Table 3.