

WCAB Forum 1

Rules of Practice and Procedure

Executive Committee
State Bar of California

Received May 26, 2015



WORKERS' COMPENSATION SECTION

THE STATE BAR OF CALIFORNIA

To: Workers' Compensation Appeals Board (WCAB)

From: The Executive Committee of the Workers' Compensation Section of the State Bar of California

RE: Rules of Practice and Procedure (Forum April 21, 2015 – May 21, 2015)

The Executive Committee of the Workers' Compensation Section of the State Bar of California ("Committee"), consisting of a balanced group of attorneys for Applicants, attorneys for Defendants, and Workers' Compensation Judges, respectfully submits the following comments.

1. With regard to - § ~~10346~~10325. ~~Assignment or Transfer of Cases.~~ Authority of Presiding Workers' Compensation Judge to Assign or Transfer Cases.

(b) We believe that **RETIREMENT** should be added to the list of reasons for a PJ to reassign a case.

2. With regard to - § ~~10380, 10364~~ 10352. Joinder of Parties.

The Committee recommends the parties who are to be joined receive NOTICE and OPPORTUNITY TO BE HEARD BEFORE THE JOINDER. Perhaps an addition of a TIME FRAME before JOINDER CAN OCCUR or service of an Notice of Intent to Order the Joinder thereby allowing for DUE PROCESS.

3. With regard to - ~~(10550)~~§ 10355. Proper Identification of the Parties and Lien Claimants.

The Committee has GREAT concern about the use of the term TPA as it is not defined in 10301 so we recommend the WCAB define the term TPA as used in the Regulations as presented and in conjunction with the Coldiron case.

Furthermore, there are fundamental differences in the types of defendants - 1/ insurance carriers (first dollar programs/ full insurance), 2/ employers who have large deductibles with insurance/ excess and 3/ employers who are partially self-funded both of these defendants can have their claims administered by the underlying/ excess insurance carrier or they can have their claims administered by a Third Party Administrator, 4/ there are fully self-insured employers who are self-administered and then there are fully self-insured employers who are administered by Third Party Administrators.

Perhaps the term should be defined in the same manner it is defined in the insurance code.

As to the next section the Committee recommends the change in language from may to SHALL as to third party administrators based on the probability that a lack of listing on the OAR will cause receipt of notices, orders and other items pertinent to due process from being actually received by the administrator causing delays in provision of benefits and lack to appearance/ participation at hearings.

(c)(2) shall identify the insurer and/or employer as a party or parties and not identify a third party administrator as a party. The third party administrator SHALL be identified and included on the official address record and case caption if identified as such.

4. § ~~10561~~10410. Sanctions.

~~(e)~~ (c) Notwithstanding any other provision of these rules, for purposes of this rule and Labor Code section 5813:

(1) a lien claimant may be deemed a "party" at any stage of the proceedings before the Workers' Compensation Appeals Board; and

The Committee acknowledges that third party administrators may be guilty of sanctionable activity. Section 10355(c) specifically states that a third party administrator may not be identified as a "party." The Committee recommends similar language to the language herein for lien claimants.

We would suggest 10410(c)(2) be added: "a third party administrator may be deemed a "party" at any stage of the proceedings before the Workers' Compensation Appeals Board" for purposes of this rule regarding sanctions. And current 10410(c)(2) becomes 10410(c)(3).

5. § ~~10403, 10400.~~ 10450. Invoking the Jurisdiction of the Workers' Compensation Appeals Board.

As to 10450(c) Labor Code section 4064(c) was amended and the fee shifting provision does not reference or depend on the filing of an application. The Committee recommends that this subsection can and probably should be deleted in its entirety.

6. With regard to -§ ~~10400, 10401, 10402, 10455.~~ **Applications.**

(f) The Committee recommends that this section should document that service should be Notice of Application rather than “conformed” copy.

7. With regard to – § ~~10450, 10482.~~ **Petitions and Answers to Petitions.**

The Committee is not certain how (h)(1) and (i) are made superfluous by amending (a) to state after jurisdiction has been invoked. Would not the petition still have to be filed at the office that has venue? And would not the petitioner who is not already a party still have to be added to the OAR?

8. With regard to – § **10498. Petition for Credit**

As to (a) we believe that it should read “employer shall not take a UNILATERAL credit...” and this section should end after the Order of the WCAB. The Committee recommends that there be **NO** requirement or language related to a mandatory Petition. NO PETITION LANGUAGE and sections 1-3 are unnecessary. SEE CCR 9812(c) as the claims administrator will have already given NOTICE to the IW of claimed credits. This section will overburden the Defendant’s and the WCAB District Offices related to filings and hearings and cause a NEED for a TRIAL on this issue in the middle of the case in chief. The Committee finds this section over broad as written. Everything after (a) should be deleted.

The Committee recommends that the new language be as follows eliminating all reference to a mandatory Petition:

(a) An employer shall not take a unilateral credit for any payments or overpayments of benefits pursuant to Labor Code section 4909 unless ordered or awarded by the Workers’ Compensation Appeals Board.

The Committee does not recommend any changes to (b)

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May 21, 2015

TheZenith[®]

May 21, 2015

Workers' Compensation Appeals Board
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Re: Commentary of Zenith Insurance Company Regarding Proposed WCAB Rules of Practice and Procedure §10498, Petitions for Credit.

To the Honorable Commissioners of the Workers' Compensation Appeals Board:

Zenith would first like to commend the WCAB Commissioners for the thoughtful and detailed work that has gone into drafting and revising the WCAB regulations since the enactment of SB 863. The changes have helped to provide clarity to an increasingly complex system.

The current proposed revisions to the WCAB Rules contain a new regulation, 8 CCR 10498 entitled Petitions for Credit. Zenith has some concerns about the practical application of this regulation and wishes to offer the following commentary:

The statute that authorizes the WCAB to allow a credit for benefit overpayments is Labor Code §4909 which provides as follows:

“Any payment, allowance or benefit received by the injured employee during the period of his incapacity, or by his dependents in the event of his death, which by the terms of this division was not then due and payable or when there is any dispute or question concerning the right to compensation, shall not, in the absence of any agreement, be an admission of liability for compensation on the part of the employer, but any such payment, allowance, or benefit may be taken into account by the appeals board in fixing the amount of the compensation to be paid. The acceptance of any such payment, allowance, or benefit shall not operate as a waiver of any right or claim which the employee or his dependents has against the employer.”

The purpose of §4909 is to encourage employers to provide benefits to injured workers in situations where there may be some doubt concerning liability. Allowance of the credit is discretionary with the WCAB and subject to equitable principles. [Genlyte Group v. WCAB (Zavala) (2008) 73 CCC 6; Gamble v. WCAB (2006) 71 CCC 1015]

Credit for third party recovery is based on Labor Code §3861 which, in contrast to §4909, grants the employer the right to take a credit provided the conditions of the statute are met:

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