



## California Workers' Compensation Institute

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June 28, 2019

VIA E-MAIL – [rbrill@dir.ca.gov](mailto:rbrill@dir.ca.gov)

VIA E-MAIL – [WCABRules@dir.ca.gov](mailto:WCABRules@dir.ca.gov)

Workers' Compensation Appeals Board (WCAB)  
Attn: WCAB Forums / Staff Attorney Rachel E. Brill  
P.O. Box 429459  
San Francisco, CA 94142- 9459

### **Re: Tentative Proposed Amendments to WCAB Rules of Practice and Procedure**

Dear Ms. Brill:

These comments on the tentative proposed amendments to the WCAB Rules of Practice and Procedure are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 81% of California's workers' compensation premium, and self-insured employers with \$72.0B of annual payroll (31.6% of the state's total annual self-insured payroll).

Insurer members of the Institute include AIG, Alaska National Insurance Company, Allianz Global Corporate and Specialty, AmTrust North America, Berkshire Hathaway, CHUBB, CNA, CompWest Insurance Company, Crum & Forster, EMPLOYERS, Everest National Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, Pacific Compensation Insurance Company, Preferred Employers Insurance, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, Travelers, XL America, Zenith Insurance Company, and Zurich North America.

Self-insured employer members include Adventist Health, Albertsons/Safeway, BETA Healthcare Group, California Joint Powers Insurance Authority, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Los Angeles, City of Pasadena, City of Torrance, Contra Costa County Risk Management, Costco Wholesale, County of Los Angeles, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, Foster Farms, East Bay Municipal Utility District, Grimmway Farms, Kaiser Permanente, Marriott International, Inc., North Bay Schools Insurance Authority, Pacific Gas & Electric Company, Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group, Southern California Edison, Special District Risk Management Authority, Sutter Health, United Airlines, University of California, and The Walt Disney Company.

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

## General Consideration

*The Institute urges the Workers' Compensation Appeals Board to reconsider its adoption of a style change that excludes use of the serial comma (also known as "Oxford comma"). The risk of ambiguity that is created by the mandatory exclusion of punctuation is particularly acute in regulatory drafting and interpretation. The Board's attention is directed to the recent court decision in a class action lawsuit about overtime pay for truck drivers ("[Lack of Oxford Comma Could Cost Maine Company Millions in Overtime Dispute](#)").*

### §10305(a)

#### Recommendation:

(a) "Administrative Director" means the Administrative Director of the Division of Workers' Compensation or ~~their~~ the Administrative Director's designee.

#### Discussion:

*The Institute applauds the WCAB's efforts to use gender-neutral pronouns throughout these Rules. Unfortunately, the use of a third-person plural pronoun does damage to ordinary rules of grammar, syntax, and comprehension, and may result in unintended legal consequences. The better solution is to avoid the use of pronouns altogether.*

### §10305(o) - Defining "Party"

#### Recommendation:

(3) A lien claimant where either:

(A) The underlying case of the injured employee or the dependent(s) of a deceased employee has been resolved or

(B) The injured employee or the dependent(s) of a deceased employee choose(s) not to proceed with his, her, or their case.

#### Discussion:

*Practitioners at the WCAB are accustomed to the existing, sensible rules defining a lien claimant as distinct from a party to the case-in-chief. Rebranding lien claimants as parties is likely to result in unintended legal consequences.*

*In light of new §10752(d) (relieving a lien claimant from obligation to appear at MSC or trial of the case-in-chief), and with the repeal of former §§10563.1(c) and (d) (requiring certain lien claimants to appear at MSC or trial of the case-in-chief), the concerns raised in the Author's Comment explaining this proposed rule have been rendered moot. The definition of lien claimant as a "party" only in limited circumstances should be restored in full.*

### §10305(q) – "Significant panel decision" defined

and

### §10325(b) – En Banc and Significant Panel Decisions

#### Recommendations:

Delete these proposed regulations.

#### Discussion:

*An expression of the need for a rule, no matter how compelling, cannot fill a gap in legal authority. State Compensation Insurance Fund v. WCAB (Sandhagen) (2009), 73 CCC 981.*

*None of the cited authority (Labor Code §§115, 133, and 5307) actually contemplates the creation of a new level of decisional authority. The Institute is unaware of a pressing need to highlight non-binding panel decisions of general interest. Indeed, the proposal to require a majority vote of the Commissioners prior to application of the designation of a case as “significant” begs the question of why the decision is not simply rendered en banc.*

*Despite the effort to emphasize the non-binding nature of these panel decisions, the few existing cases that have already received the “significant” designation are in practice treated as binding by both practitioners and judges alike. The Institute recommends that the confusion here is best avoided by the elimination of the designation, rather than its confirmation.*

#### **§10488 – Objection to Venue Based on an Attorney’s Principal Place of Business**

##### **Discussion:**

*The Institute supports this rule providing for an automatic change in venue under certain circumstances.*

#### **10540 – Petition to Terminate Liability for Continuing Temporary Disability**

##### **Recommendation:**

(a) A petition to terminate liability for temporary total disability indemnity under a findings and award, decision or order of the Workers’ Compensation Appeals Board shall be filed at least one week prior to termination of temporary disability within 10 days of the termination of payments or other compensation and shall conform substantially to the form provided by the Appeals Board and shall include: [...]

##### **Discussion:**

*The proposed regulatory language results in a conflict with the enabling statute, Labor Code §4651.1. The statute provides that there is a rebuttable presumption that temporary disability continues for at least one week following the filing of a petition alleging that disability has decreased or terminated. By this language, the statute contemplates that the presumption can be rebutted and that the week following the filing of a petition may be noncompensable. In contrast, the proposed rule requires payment of indemnity for the week following the filing of a petition and thus defeats the rebuttable nature of the statutory presumption.*

*The Institute recommends that the existing language be preserved. Under the statute, when a claims administrator receives evidence supporting termination of temporary disability status, payments may be appropriately discontinued at that time (inasmuch as the injured employee is no longer entitled to continuing temporary disability indemnity), subject only to the rebuttable presumption. The claims administrator’s conduct is tempered by the existing requirement to file its petition within 10 days of termination of payments -- as well as other requirements of this section.*

#### **§10545 – Petition for Costs**

##### **Recommendation:**

(g) (1) A petition for costs may be placed on calendar:

(A) On the filing of a declaration of readiness by an employee, a dependent, or a defendant, or a petitioning interpreter that lists the petition as an issue; or

(B) On the Workers’ Compensation Appeals Board’s own motion.

and

## **§10789 – Walk-Through Documents**

### **(5) Petitions for Costs.**

#### **Discussion:**

*The proposed rules delete provisions requiring that a Petition for Costs be accompanied by a Declaration of Readiness, and instead allow these petitions to be dealt with on a walk-through basis. While the WCAB acknowledges that this is a “substantive” change, the Board fails to recognize the very serious dangers presented by the change.*

*Petitions for Costs, typically filed for interpreting services, have become a tremendous source of system abuse. The potential for abuse was supposed to be addressed by the implementation of a Fee Schedule, designed to eliminate manipulation and misapplication of the rules and leaving any payment disputes up to the IBR process. Some service providers have taken advantage of the absence of regulation to overcharge for multiple hearings, depositions, and other non-medical events, or even duplication of services. (See, e.g., DWC NEWSLINE, April 2, 2018, identifying a “reduction in double billing fees for multiple interpretations during the same time slot” as a primary basis for the proposed Fee Schedule.) Unfortunately, despite going through Forum Comments in 2015 and again in 2018, the Interpreter Fee Schedule has never been finalized for implementation.*

*WCAB walkthrough procedures are by definition ex parte, and are ordinarily reserved for non-controversial and undisputed pleadings. But by their very nature, Petitions for Costs are disputed and are entirely unsuitable for resolution on a walkthrough basis. Removing the due process protections provided by the requirement to file a DOR with an opportunity to be heard is misguided, and the requirement should be reinstated.*

## **§ 10547. Petition for Labor Code Section 5710 Attorney’s Fees**

#### **Recommendation:**

(d) A petition for attorney’s fees ~~pursuant to Labor Code section 5710~~ shall not be filed or served until at least 30 days after a written demand ~~for the fees~~ has been served on the defendant(s), stating with specificity the benefits sought under Labor Code section 5710. The petition shall append:[...]

#### **(4) A verification.**

(e) Failure to comply with subdivisions (c) and (d)(1)-(3)(4) of this rule shall constitute a valid ground for dismissing the petition with prejudice.

#### **Discussion:**

*Because of the varied nature of benefits in addition to attorney’s fees available under Labor Code 5710 (e.g., expenses, wages, copy of transcript, interpreting services) and in light of the proposed availability of monetary sanctions, fees, and costs, it is appropriate to require a written request precisely specifying the benefits being sought. Subdivision (c) and (d)(4) appear to be duplicative, so a deletion of the latter is suggested. Adding consequences for the failure to abide by the rules will help to stem misuse of the proposed procedures.*

*The Institute applauds efforts to regulate procedures for obtaining fees under Labor Code §5710. Under Labor Code §5710(b)(4), a formal fee schedule for deposition fees was required by July 1, 2018. The Institute continues to await implementation of the formal rulemaking process on this issue,*

*which will provide further context to the proposed procedures under §10547 (e.g., whether and under what circumstances reimbursement is required for attorney travel time).*

### **§10555 – Petition for Credit**

#### **Recommendation:**

(a) An employer shall not take a credit for any payments or overpayments of benefits pursuant to Labor Code section 4909 unless ~~ordered or awarded~~ approved by the Workers' Compensation Appeals Board. **A If filed, a** petition for credit shall include: [...]

(b) An employer shall not take a credit for an employee's third party recovery pursuant to Labor Code section 3861 unless ~~ordered or awarded~~ approved by the Workers' Compensation Appeals Board. **A If filed, a** petition for credit shall include: [...]

#### **Discussion:**

*As a practical point, the Institute does not dispute the need for WCAB approval of a claimed credit, nor of the invalidity of a credit asserted unilaterally. However, the mandating of a formal Petition and corresponding formal adjudication is completely unnecessary and frankly unworkable.*

- *It is not unusual for the employer and/or injured worker to initially provide the claims administrator with an incorrect wage statement, resulting in TD overpayments for a period of time.*
- *Frequently, MMI examinations are conducted while TD is being paid and the permanent and stationary reports are received weeks later, resulting in TD overpayments for a period of time and/or support an adjustment to the PD benefit rate.*

*The vast majority of claimed credits arise from incidents like these. The routine and informal adjustment of benefit overpayments has not historically required routine judicial intervention, but it is readily available when it is needed. Informal resolution of these credits should be encouraged, requiring only WCAB approval of a negotiated settlement but without a requirement for a formal Petition and adjudication. The regulation as proposed will unnecessarily burden both claims administrators and District Offices.*

*However, the Institute has concerns that any proposal here is invalid ab initio:*

*[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute. Therefore, it has been said that when a statute confers upon a state agency the authority to adopt regulations, the agency's regulations must be consistent, not in conflict with the statute and that a regulation that is inconsistent with the statute it seeks to implement is invalid. No matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes. Mendoza v. WCAB (2010) 75 CCC 634, 640 (WCAB en banc) (internal citations and quotations omitted).*

*There is nothing in Labor Code §4909 that supports the proposition that all claimed benefit overpayments must be formally adjudicated by the WCAB. The Board has no authority to implement proposed rule 10498 and the proposed rule should be deleted accordingly.*



## **10600 –Time for Actions**

### **Discussion:**

*The new provision regarding computation time (and excluding Saturdays and Sundays) applies only to Filing and Service of Documents pursuant to Article 9. The Institute's primary concern over computation of time relates to Labor Code §4610(i)(1) ("five working days"), the conflict with 8 CCR §9792.9.1(c)(3) ("five business days"), and the incongruous interpretation outlined in Calif. Dept. of Corrections v. WCAB (Gomez) (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 514 (writ denied) (holding that the day after Thanksgiving is a "working day" for purposes of calculating timeliness of UR determination, utilizing analysis equally applicable to all Saturdays).*

*The Institute believes that the WCAB should take this opportunity to affirmatively define (in all contexts) both "business day" and "working day" as any day other than a Saturday, a Sunday, a day declared by the Governor to be an official State holiday, or a day listed at Calhr.ca.gov.*

## **§10620 – Filing Proposed Exhibits**

### **Recommendation:**

Delete this proposed regulation.

### **Discussion:**

*Current rules require that all trial exhibits must be listed on the pre-trial conference statement, but only certain relevant medical reports need to be filed in advance of trial. "No other...documents shall be filed" prior to trial, unless ordered by the WCJ. 8 CCR §10393(b)(1). Instead, all other documents "shall be filed at the time of trial." 8 CCR §10393(c)(3).*

*In stark contrast to existing rules, the proposed rule requires the advance filing of all documents to be offered at trial. Even in a case of ordinary complexity, this would likely encompass numerous documents including a claim form, wage statement, denial letter, benefit notice(s), benefit printout, QME waiver, notice of offer of regular/modified work, job description, ergonomic reports, treatment reports, correspondence, and excerpts from subpoenaed records. More complicated cases such as those involving death claims or affirmative defenses -- i.e., cases even more likely to proceed to trial -- would include an exponentially greater number of submitted trial exhibits.*

*The burden on the parties and the District Offices far outweighs the suggestion in the Author's Comment of a benefit in enabling WCJs to review proposed exhibits prior to trial; indeed, as laudable as that goal might be, the workload of most WCJs simply precludes this level of advance preparation. Under the circumstances, it is actually the proposed rule that is "impractical and wasteful of existing resources" as suggested by the Author's Comment. The Institute suggests that the process contemplated by proposed rule 10787(b) is adequate and appropriate to address trial exhibits.*

## **§10629 – Designated Service**

### **Recommendations:**

*(e) Within 10 days from the date on which designated service is ordered, the person designated to make service shall serve the document and shall file the proof of service.*

### **Discussion:**

*A requirement for the Appeals Board's designee to not only serve the document but also file the proof of service with the Workers' Compensation Appeals Board doubles the administrative burden; the*

*additional 10-day deadline not only for service but also for filing renders this rule practically unworkable. A better solution, while still accomplishing the desired result, would be to require service within 10 days, with the party ordered to maintain the original proof of service until and unless ordered to file it at the Workers' Compensation Appeals Board -- if and when a dispute arises.*

### **§10670 – Documentary Evidence**

#### **Recommendation:**

(a)(2) Any document not served prior to **or at the time of** the mandatory settlement conference, unless good cause is shown.

#### **Discussion:**

*Labor Code §5502(d)(3) provides that discovery shall close on the date of the mandatory settlement conference, and that evidence not disclosed or obtained “thereafter” is inadmissible. There is no requirement in the statute that evidentiary documentation must be served “prior to” the mandatory settlement conference. The recommended language allows parties to exchange documentation up to and including the time of the MSC, in accordance with both the statutory language and standard practice.*

### **§10700 – Approval of Settlements**

#### **Recommendation:**

(c) Agreements that provide for the payment of less than the full amount of compensation due or to become due and undertake to release the employer from all future liability will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval is in the best interest of the parties. **No agreement shall relieve an employer of liability for provision of supplemental job displacement benefits unless the Workers' Compensation Appeals Board makes a finding that there is a good faith issue which, if resolved against the injured employee, would defeat the employee's right to all workers' compensation benefits.**

#### **Discussion:**

*The Institute supports regulatory sanction of the rule announced in Beltran v. Structural Steel Fabricators, 2016 Cal. Wrk. Comp. P.D. LEXIS 366, wherein it was held that the prohibition on settlement of Supplemental Job Displacement Benefit voucher in Labor Code §4658.7(g) is analogous to settlement of vocational rehabilitation benefits, and that where parties establish that there is good faith dispute which, if resolved against injured worker, would defeat injured worker's entitlement to all workers' compensation benefits, the injured worker may settle potential right to Supplemental Job Displacement Benefit voucher by way of Compromise and Release.*

### **§10752 – Appearances Required**

#### **Recommendation:**

(c) **An ~~un-represented~~ injured employee or dependent shall personally appear at any mandatory settlement conference. Upon failure of the injured employee or dependent to appear at a mandatory settlement conference, the Workers' Compensation Appeals Board may, on its own motion or upon the filing of a petition pursuant to Rule 10510, order payment of reasonable expenses, including attorney's fees and costs and, in addition, sanctions as provided in Labor Code section 5813. Before such an order is issued, the alleged offending party or attorney must**

be given notice and an opportunity to be heard. Failure to appear shall not alone be a basis for dismissal of the application.

**Discussion:**

*The Institute believes that the purpose of the mandatory settlement conference is best fulfilled by having all signatories to a settlement present at the time of the hearing. A requirement that all parties have settlement authority is valid, but a settlement does not actually occur without parties being physically present and ready to sign a settlement document. Accordingly, attendance must be mandatory regardless of representation status, and absence strongly disincentivized.*

**§10786 – Determination of Medical-Legal Expense Dispute**

**Recommendation:**

(a) ~~Within 60 days of service of a medical legal provider objection to a denial of a portion of the medical legal provider's billing pursuant to Labor Code section 4622(c), the defendant shall file a Declaration of Readiness to Proceed to a status conference. Upon filing of a Declaration of Readiness to Proceed, the medical legal provider shall be added to the official address record.~~

(b) ~~A medical legal provider may file a petition for reimbursement of medical legal expenses where a defendant has failed to timely object to a medical legal expense pursuant to Labor Code section 4622 or 60 days have elapsed from a provider objection pursuant to Labor Code section 4622(c) and the defendant has not filed a Declaration of Readiness to Proceed to a status conference. Upon the filing of a petition for reimbursement of medical-legal expenses pursuant to Labor Code section 4622(c),:~~

(1) ~~The~~ the medical-legal provider shall be added to the official address record.

(2) ~~The defendant shall either pay the expenses and file proof of payment or file a Declaration of Readiness to Proceed to a status conference.~~

(e) ~~Notwithstanding the filing of a Declaration of Readiness to Proceed in accordance with the provisions of subdivisions (a) and (b) of this rule, the~~ The Workers' Compensation Appeals Board may defer hearing and determining this issue until the underlying claim of the employee or dependent has been resolved or has been abandoned.

(d) ~~c~~ The employer and the medical-legal provider are required to appear at the status conference. If the matter is not resolved at the status conference, the matter may be set for a mandatory settlement conference on the medical-legal expense dispute.

**Discussion:**

*The Author's Comment accompanying this proposal is confusing. The Author's Comment suggests that the proposed revisions are simply a reorganization of existing Rule 10451.1, with additional language to require an employer to file a DOR in the event of a dispute. But existing Rule 10451.1(c)(2) does require an employer to file a DOR in the event of a dispute. More importantly, however, much of the proposed rule is already covered by Labor Code section 4622(c) and should be deleted here.*



*The proposed rule is not entirely consistent with the Labor Code §4622(c), which requires the defendant to file both a Petition and a DOR within 60 days of the objection but does not require the defendant to pay the expense. If the intent of the proposed rule is to allow the defendant to issue payment instead of filing the DOR, it would appear that the proposed rule may not be authorized by the statute.*

### **§10788 – Petition for Automatic Reassignment**

#### **Recommendation:**

(a) An injured worker shall be entitled to one reassignment of a judge for trial or expedited hearing. If the injured worker has not exercised the right to automatic reassignment and one or more lien claimants have become parties and no testimony has been taken, the lien claimants shall be entitled to one reassignment of judge for a trial, which may be exercised by any of them. The defendants shall be entitled to one reassignment of judge for a trial or expedited hearing, which may be exercised by any of them. The lien claimants shall be entitled to one reassignment of judge for a lien trial, which may be exercised by any of them. This rule is not applicable to conference hearings. In no event shall any motion or petition for reassignment be entertained after the swearing of the first witness at a trial or expedited hearing.

#### **Discussion:**

*Current rule 8 CCR §10453 allows a lien claimant to petition only if the injured worker has not petitioned. The proposed rule expands the ability of a lien claimant to petition for automatic reassignment. No clear explanation has been provided why a lien claimant should be able to independently disrupt a trial assignment, particularly where the trial judge has already adjudicated the underlying injury and/or approved a settlement of the case-in-chief. The lien claimant's rights are still derivative of the injured workers. [See: Barri v. Workers' Compensation Appeals Board (2018), 28 Cal.App.5th 428] The Institute recommends that the original practice be preserved.*

### **§10790 – Interpreters**

#### **Discussion:**

*In the continuing absence of an Interpreter Fee Schedule, the Institute fears that deletion of the only regulatory guideline for payment of interpreter services is dangerous. We suggest that, at a minimum, language be retained providing that only those fees that are reasonably, actually, and necessarily incurred are reimbursable, with the burden on the provider to demonstrate those facts. A sunset provision could be included to account for the Fee Schedule when it is finalized.*

### **§10832 – Notices of Intention and Orders after Notices of Intention**

#### **Recommendations:**

- (c) If an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may:
- (1) Sustain the objection;
  - (2) Issue an order consistent with the notice of intention together with an opinion on decision; or
  - ~~(3)~~ Set the matter for hearing.

**Discussion:**

*The dual purposes of the due process requirements for notice and opportunity to be heard would be effectively thwarted if an order were permitted to be issued without a hearing. Additionally, requiring that a hearing be held before an objection is overruled helps to ensure that a properly filed objection is actually seen and considered by the judge prior to rendering a decision.*

**§10940(a) – Filing and Service of Petitions for Reconsideration, Removal, Disqualification and Answers****Recommendations:**

Petitions for reconsideration, removal, or disqualification and answers shall be filed in EAMS, with any district office of the Workers' Compensation Appeals Board, or with the district office having venue in accordance with Labor Code section 5501.5 unless otherwise provided. Petitions for reconsideration of decisions after reconsideration of the Appeals Board shall be filed with the office of the Appeals Board. Petitions filed in EAMS pursuant to this rule must comply with rules 10205.10-10205.14.

**Discussion:**

*One of the promised benefits of the Electronic Adjudication Management System was that it would streamline and simplify filing requirements. While much of EAMS has delivered less than promised, the provision permitting appeals to be filed at any District Office has actually proven useful and convenient to parties who are already constrained by strict time deadlines. The provision should be restored.*

**§10995(b) – Reconsideration of Arbitrator's Decisions or Awards****Recommendations:**

(b) A petition for reconsideration from any final order, decision or award filed by an arbitrator under the mandatory or voluntary arbitration provisions of Labor Code sections 5270 through 5275, and any answer, shall be filed in EAMS or with the any district office having venue in accordance with Labor Code section 5501.5. No duplicate copies of petitions shall be filed with any other district office or with the Appeals Board.

**Discussion:**

*One of the promised benefits of the Electronic Adjudication Management System was that it would streamline and simplify filing requirements. While much of EAMS has delivered less than promised, the provision permitting appeals to be filed at any District Office has actually proven useful and convenient to parties who are already constrained by strict time deadlines. The provision should be restored.*

Thank you for the opportunity to comment, and please contact us if additional information would be helpful.

Sincerely,

Ellen Sims Langille, General Counsel

ESL/pm

cc: Victoria Hassid, Chief Deputy Director, Department of Industrial Relations  
CWCI Claims Committee  
CWCI Medical Care Committee  
CWCI Legal Committee  
CWCI Regular Members  
CWCI Associate Members