



California Workers' Compensation Institute

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September 24, 2019

VIA E-MAIL – WCABRules@dir.ca.gov

Workers' Compensation Appeals Board (WCAB)
Attn: Rachel E. Brill, Industrial Relations Counsel
P.O. Box 429459
San Francisco, CA 94142- 9459

Re: Proposed Amendments to WCAB Rules of Practice and Procedure

Dear Ms. Brill:

These comments on the 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 \$72.1B of annual payroll (31.7% 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 ("[Gender Neutral Language](#)"). Indeed, the proposed revisions to Rules 10398, 10470, and 10785 are great examples of this solution.

§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 the case.

Discussion:

The Institute has serious concerns about the proposal to redefine "party" to include lien claimants. Historically, and in every other court system in California, "parties" are strictly defined as the plaintiff and the defendant. In workers' compensation, the grand bargain is between injured workers and their employers; the parties are easily identified as the applicant and the employer/claims administrator. Ancillary participants to the case such as medical providers, copy services, interpreters, etc., are vendors.

Vendors have no valid interest in the case-in-chief, merely in the reimbursement for the goods and services provided during the pendency of the case. While issues of AOE/COE and employment may have a bearing on the rights of such vendors, these service providers do not participate in the adjudication of such disputes. Indeed, the proposed amendments herein even allow for lien claimants to be excused from attending the MSC and trial. Other proposed amendments provide a confusing labyrinth of rules for whether and when medical information may be shared with these "parties."

Since the reforms of SB 863, the WCAB has made tremendous strides in curtailing the out-of-control lien environment that clogged the system and prevented resources from being utilized for the case-in-chief. This proposed amendment would have the effect of nullifying many of these successful efforts by unnecessarily expanding the rights of ancillary participants in the case.

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. Placing the mantle of “party” upon service providers will create havoc in the orderly proceeding of legal disputes because “parties” have rights of notice and service, as well as participation in discovery, deposition, pre-trial proceedings, trial, and appeal. There is no need to expand the definition of “party” to include vendor service providers, only to then excuse those vendors from major aspects of the case-in-chief.

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 Initial Statement of Reasons explaining this proposed rule have been rendered moot. The proposed amendment is a solution in search of a problem that does not exist. 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

Recommendation:

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.

The Institute is aware of the informal practice of the WCAB in issuing “significant panel decisions.” But 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. The recent case of Pa’u v. Dept. of Forestry is a perfect example of a case identified by the WCAB as significant that should have been issued en banc. With only a “significant” designation attached to it, future litigants and even WCJs are free to ignore this ruling and the Institute questions the point of the designation.

At the same time, and despite the effort to emphasize the non-binding nature of these panel decisions, the 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 significant panel designation rather than its confirmation, and the increased utilization of the en banc designation in order to achieve uniformity of decision.

§10465 – Answers

Recommendation:

An Answer to each Application for Adjudication of Claim ~~shall~~ may be filed and served ~~no later than the shorter of either: within~~ 10 days after service of a Declaration of Readiness to Proceed, ~~or 90 days after service of~~ the Application for Adjudication of Claim.

Discussion:

The Institute agrees that 10 days is seldom long enough for a meaningful assessment of a claim and the filing of a useful response. Nevertheless, the Institute recommends that the proposed language correctly reflects the relevant statutory authority. Labor Code §5500 does not require the filing of an Answer, and states only that no pleadings other than an Application or Answer shall be required. Labor Code §5505 does not permit the WCAB to “alter the response timeline” for the filing of an Answer.

§10470 – Labor Code Section 4906(h) Statement.**Recommendation:**

(c) If any of the above parties **are is** not available, cannot be located or **are is** unwilling to sign **the statement required by Labor Code section 4906(h)**, a declaration under penalty of perjury setting forth in specific detail the reasons that the party is not available, cannot be located or is unwilling to sign, as well as good faith efforts to locate the party, may be filed with the **aApplication for Adjudication of Claim** or **aAnswer**. If the presiding workers’ compensation judge or designee determines from the facts set forth in the declaration that good cause has been established, the presiding workers’ compensation judge or designee may accept the **aApplication for Adjudication of Claim** or **aAnswer** for filing. For the purpose of this rule, a Compromise and Release agreement or Stipulations with Request for Award shall not be treated as an Application for Adjudication of Claim.

Discussion:

Grammatical correction of subject-verb agreement is suggested for the opening clause of the subdivision, which will then also match the subsequent clause. Additional language is recommended for the opening sentence, in order to clarify the distinction between the Labor Code §4906(h) statement and the declaration authorized by this subdivision. Certain capitalizations and expanded titles are recommended for consistency.

§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.

§10500 – Form Pleadings

(c) Any form prescribed and approved by the Appeals Board may be printed **(i.e., hard copy)** by the Division of Workers’ Compensation for distribution at district offices of the Workers’ Compensation Appeals Board. In addition, the Division may create:

- (1) Electronic versions of the prescribed and approved forms (i.e., e-forms); and/or
- (2) Optical character recognition versions of those forms (i.e., OCR forms), either in fillable format or otherwise, for posting on the Division’s Forms webpage.

(d) Any hard copy, e-form, or OCR form for proceedings before the Workers’ Compensation Appeals Board created by the Division shall be presumed to have been prescribed and approved by the Appeals Board unless the Appeals Board issues an order or a formal written statement to the contrary.

Discussion:

The proposed deletion of the example in subdivision (c) leaves the subsequent mention of “hard copy” without any frame of reference. Additionally, the Institute suggests splitting the final sentence into its

own subdivision, in order to avoid any question that the language applies to all forms created by the Division, and not just those under subdivision (c)(2).

§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 one week of the termination of temporary disability payments and shall conform substantially to the form provided by the Appeals Board and shall include: [...]

Discussion:

The proposed regulatory language results in a clear 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.

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 to the rebuttable presumption.

It should be noted that Labor Code §4651.1 permits the termination of benefits immediately (no one week, no rebuttable presumption) where the injured worker has returned to work. The statute permits the immediate cessation of benefits, and the proposed rule is invalid to the extent that it conflicts with this statutory provision.

§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.

Discussion:

Please see detailed discussion related to proposed rule 10789.

§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:—

(1) A copy of the settlement or judgment; and

(2) An itemization of any credit applied to expenses and attorneys' fees pursuant to Labor Code sections 3856, 3858 and 3860.

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. Parties should be permitted to informally agree upon a credit without the need for a formal Petition and WCJ order.

- *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.

The Initial Statement of Reasons is partly correct: There is settled case law preventing an employer from unilaterally taking a credit for an alleged overpayment of benefits. But there is no requirement in the code or in case law that the employer “must file a petition for credit with the WCAB to have the issue adjudicated.” Informal resolution of these disputes should be permitted and encouraged.

*Regarding third-party credit rights, the proposed rule is in conflict with the relevant statutes. Labor Code Section 3858 provides that in civil subrogation “the employer **shall** be relieved from the obligation to pay further compensation to or on behalf of the employee under this division up to the entire amount of the balance of the judgment, if satisfied, without any deduction.” And Labor Code Section 3861 mandates that the WCAB “**shall** allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment....” Subrogation credit is mandatory in most instances and applies to nearly all species of benefits. Put simply, the employer is entitled to a credit from applicant’s net recovery in a third party lawsuit. But the proposed rule requires a Petition and Order in all cases as a prerequisite to the employer’s assertion of the credit against ongoing benefits. In practice, the delay of the credit defeats the rights of the employer. In light of the reluctance of most WCJs to set priority trials on credit matters, the result is that the applicant enjoys a double recovery while the mandatory credit rights of the employer are left to wither to dust.*

As a practical matter, compliance with the requirement that a Petition in a third-party credit situation include a copy of the settlement is nearly impossible. The employer simply has no right nor even opportunity to obtain a copy of the (often confidential) settlement agreement to which it is not a party. Until a viable avenue is provided to obtain this information, a requirement to include it here is pointless and would prevent rightful credit.

As currently drafted the proposed rule 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 10555 as written, and the proposed rule should be altered accordingly.

§10570 – Petition to Enforce an Administrative Director Determination

Recommendation:

(a) An aggrieved party may file a “Petition to Enforce an Administrative Director Determination” after the Workers’ Compensation Appeals Board has issued a final order affirming an IBR, IMR, or other determination issued by the administrative director or after the time to appeal the determination to the Workers’ Compensation Appeals Board has expired.

Discussion:

A party wishing to enforce a determination from the Administrative Director, after the WCAB has issued its affirmance of the determination, will not be “aggrieved”; rather, that party will have been successful in achieving a desired result and seek only to enforce the ruling.

§10600 –Time for Actions**Discussion:**

The new provision regarding computation of time (and excluding Saturdays and Sundays) apparently applies only to Filing and Service of Documents pursuant to Article 9. The Institute’s primary concern over computation of time relates to the conflict between Labor Code §4610(i)(1) (“five working days”), and 8 CCR §9792.9.1(c)(3) (“five business days”). The Institute respectfully suggests that the WCAB 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, which has the added benefit of comporting with the language of recently passed legislation (SB 537), currently pending the Governor’s signature with an anticipated effective date of January 1, 2020.

§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)].

The proposed regulation stands in stark contrast to existing rules, and 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.

According to the ISOR, practitioners are reminded that the WCJ can always reduce the 20-day requirement. In this regard the Institute notes that Labor Code section 5500.3 requires uniformity among all District Offices and WCJs: “No district office of the appeals board or workers’ compensation administrative law judge shall require forms or procedures other than as established by the appeals board.” The Institute suggests that the process contemplated by proposed rule 10787(b) (“Unless already filed in EAMS, the parties shall have all proposed exhibits available at trial for review by and filing with the trial workers’ compensation judge”) is adequate and appropriate to address trial exhibits.

§10625 – Service

Recommendation:

(a) Except as otherwise provided by these rules at 10300 et seq., service shall be made on the attorney or agent of record of each **affected** party unless that party is unrepresented, in which event service shall be made directly on the party.

Discussion:

The Initial Statement of Reasons suggests that the use of “affected party” provide sufficient clarity for a determination of which documents must be served on what parties (particularly, lien claimants now designated as “parties”). The Institute suggests that the use of “affected party” is inadequate for the case participant to determine whether a particular service is required to be made upon a lien claimant. This confusion clearly demonstrates one of the many dangers engendered by the inclusion of lien claimants in the definition of “party.” Other serious concerns include the likelihood of service of private or confidential information, including medical information, upon those having no business receiving it, notwithstanding proposed rule 10637.

§10629 – Designated Service

Recommendation:

(c) 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 WCAB 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 WCAB -- if and when a dispute arises. The Initial Statement of Reasons suggests that this proposed solution is unreliable. However, if it is coupled with a negative inference rule (i.e., failure to produce a Proof of Service permits an inference that the document was not served as alleged), such solution would serve to encourage reliable record-keeping.

The numbers contemplated here are staggering. Assuming that the District Offices hold 350,000 hearings annually (not to mention any walk-through hearings), each set of Minutes of Hearing, Orders Approving, interim rulings, and even orders taking off calendar would result in a necessary filing at the WCAB. Sufficient WCAB personnel are simply not available to absorb this increased workload, nor is there a valid basis for parties (almost always defendants) to incur costs associated with such a requirement.

It should be noted that the California Applicants’ Attorneys Association has also submitted forum comments objecting to this proposed requirement.

§10670 – Documentary Evidence

Discussion:

The Institute appreciates the updated language clarifying that a WCJ may decline to admit into evidence documents not served either prior to or at the mandatory settlement conference, in compliance with Labor Code §5502(d)(3).

§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.

§10742 – Declaration of Readiness to Proceed

Discussion:

The Institute applauds the additional language in subdivision (c) requiring a sworn statement of the actual efforts undertaken to resolve disputes prior to the filing of a Declaration of Readiness. The Institute believed that such statement was already required, inasmuch as the current DOR form requires the declarant to list "specific, genuine, good faith efforts to resolve the dispute(s)." Bringing the applicable regulation in line with the existing requirements on the form itself may serve to encourage WCJs to enforce compliance.

§10752 – Appearances Required

Recommendation:

(a) Each applicant and defendant shall appear or have an attorney or non-attorney representative appear at all hearings pertaining to the case-in-chief. Neither a lien conference nor a lien trial is a hearing pertaining to the case-in-chief.

(c) An unrepresented injured employee or dependent shall personally appear at any mandatory settlement conference. Failure to appear shall not alone be a basis for dismissal of the application.

(d) A lien claimant need not appear at any mandatory settlement conference or trial in the case-in-chief...

Discussion:

The representation status of the injured worker is irrelevant to the need for personal appearance at a settlement conference. Indeed, the personal appearance of an unrepresented worker is even more necessary to an effective conference, inasmuch as there is no alternative representative present.

Notably, the differential treatment afforded to lien claimants versus parties in subdivision (d) underscores the senselessness of the proposed definition of lien claimants as parties.

Hyphenation of "case-n-chief" is recommended in accordance with common practice and for consistency with subdivision (a).

§10755 – Failure to Appear at Mandatory Settlement Conference in Case-in-Chief

Recommendation:

(a)(2) Close discovery and set the case-in-chief for trial.

(b)(2) Set the case-in-chief for trial.

(c) Where a required party, after notice, fails to appear at a mandatory settlement conference in the case-in-chief and good cause is shown for failure to appear, the workers' compensation judge may take the case off calendar, ~~or may~~ continue the case to a date certain, or 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 party or attorney must be given notice and an opportunity to be heard.

(d) This rule shall not apply to lien conferences, which are governed by rule 10875.

Discussion:

Hyphenation of "case-in-chief" is recommended in accordance with common practice and for consistency.

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 and absence strongly disincentivized.

Notably here once again, the differential treatment afforded to lien claimants versus parties in subdivision (d) underscores the senselessness of the proposed definition of lien claimants as parties.

§10756 – Failure to Appear at Trial in Case-in-Chief

(a) Where an applicant served with notice of trial in the case-in-chief fails to appear either in person or by attorney or non-attorney representative at the trial, the workers' compensation judge may:[...]

(b) Where a defendant served with notice of trial in the case-in-chief fails to appear either in person or by attorney or non-attorney representative at the trial, the workers' compensation judge may hear the evidence and, after service of the minutes of hearing and summary of evidence that shall include a 10-day notice of intention to submit, make such decision as is just and proper.

(c) Where a required party, after notice, fails to appear at a trial in the case-in-chief and good cause is shown for failure to appear, the workers' compensation judge may take the case off calendar, ~~or may~~ continue the case to a date certain, or 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 party or attorney must be given notice and an opportunity to be heard.

(d) This rule shall not apply to lien trials, which are governed by rule 10876.

Discussion:

Hyphenation of "case-in-chief" is recommended in accordance with common practice and for consistency.

Failure to appear at trial likely represents the biggest waste of resources of all (both of the WCAB as well as the opposing parties). In addition to losing valuable time and effort and opportunity for other cases to proceed, a trial represents the last possibility of informal settlement. Accordingly, attendance must be mandatory and absence strongly disincentivized.

Notably here yet again, the differential treatment afforded to lien claimants versus parties in subdivision (d) underscores the senselessness of the proposed definition of lien claimants as parties. The differential treatment begs the question of whether and why lien claimants are being granted all of the privileges of a “party” and none of the obligations.

§10786 – Determination of Medical-Legal Expense Dispute

Recommendation:

(i) Bad Faith Actions or Tactics:

~~(1) If the Workers’ Compensation Appeals Board determines that, as a result of bad faith actions or tactics, a defendant failed to comply with the requirements, timelines and procedures set forth in Labor Code sections 4622, 4603.3 and 4603.6 and the related Rules of the Administrative Director, the defendant shall be liable for the medical-legal provider’s reasonable attorney’s fees and costs and for sanctions under Labor Code section 5813 and rule 10421. The amount of the attorney’s fees, costs and sanctions payable shall be determined by the Workers’ Compensation Appeals Board; however, for bad faith actions or tactics occurring on or after October 23, 2013, the monetary sanctions shall not be less than \$500.00. These attorney’s fees, costs and monetary sanctions shall be in addition to any penalties and interest that may be payable under Labor Code section 4622 or other applicable provisions of law, and in addition to any lien filing fee, lien activation fee or IBR fee that, by statute, the defendant might be obligated to reimburse to the medical-legal provider.~~

~~(2) If the Workers’ Compensation Appeals Board determines that, as a result of bad faith actions or tactics, a medical-legal provider has improperly asserted that a defendant failed to comply with the requirements, timelines and procedures set forth in Labor Code sections 4622 and 4603.6 and the related Rules of the Administrative Director, the medical-legal provider shall be liable for the defendant’s reasonable attorney’s fees and costs and for sanctions under Labor Code section 5813 and rule 10421. The amount of the attorney’s fees, costs and sanctions payable shall be determined by the Workers’ Compensation Appeals Board; however, for bad faith actions or tactics occurring on or after October 23, 2013, the monetary sanctions shall not be less than \$500.00.~~

Discussion:

*Contrary to the Initial Statement of Reasons, the critical issue of §10451.1 is not difficulty in obtaining payment for services rendered but rather the manipulation of current §10451.1(g) (renumbered here as §10786) by some providers who have taken advantage of the opportunity to submit an improper billing, challenge the timely denial of payment, and then use the rules to create a WCAB dispute that now centers on **attorney fees** -- perhaps in excess of \$2000 in a dispute regarding a \$75 cancellation fee charge that was improperly incurred in the first place. Rather than taking steps to curtail this business model, the proposed language seems to double down and sanction the abusive practice.*

The rationale as contained in the Initial Statement of Reasons (“Our intent is not to limit the application of sanctions for bad-faith actions by either defendants or medical-legal providers in any way”) is simply wrong-headed. The Labor Code already provides ample protection for bad faith tactics, and proposed subdivision (i) should be deleted.

§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 greatly 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 managed multiple hearings and/or approved a settlement of the case-in-chief. The lien claimant's rights are still derivative of the injured worker. [See: Barri v. Workers' Compensation Appeals Board (2018) 28 Cal.App.5th 428]. The Institute recommends that the original practice be preserved.

§10789 – Walk-Through Documents

Recommendation:

~~(5) Petitions for Costs pursuant to rule 10545.~~

Discussion:

Proposed rule 10789 (and the deletion of certain provisions in rule 10545) discontinue the requirement 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. It appears that the WCAB has failed to recognize the very serious dangers presented by the proposed 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 walk-through 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 walk-through 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.*

§10790 – Interpreters

Recommendation:

It shall be the responsibility of any party producing a witness requiring an interpreter to arrange for the presence of a qualified interpreter. Subject to the rules of the Administrative Director, the Workers' Compensation Appeals Board may in any case appoint an interpreter and fix the interpreter's compensation.

Interpreter's fees that are reasonably, actually and necessarily incurred shall be allowed as provided by Labor Code Sections 4600, 5710 and 5811. Interpreter's fees as defined in Labor Code section 4620, that are reasonably, actually and necessarily incurred as provided in Labor Code section 4621, shall be allowed in accordance with the fee schedule set by the Administrative Director.

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

Recommendation:

(c) If an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may:

- (1) Sustain the objection; **or**
- (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 over objection and 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.

§10873. Lien Claimant Declarations of Readiness to Proceed

Recommendation:

- (a) A lien conference shall be set when any party files a Declaration of Readiness to Proceed in accordance with rule 10742 on any issue(s) relating to lien claim other than in the case **in**-chief, or by the Workers' Compensation Appeals Board on its own motion at any time. [...]
- (b) When a party files and serves a Declaration of Readiness to Proceed on an issue relating to a lien claim other than in the case **in**-chief, the party shall designate on the Declaration of Readiness to Proceed form that it is requesting a lien conference and shall not designate any other kind of conference. [...]

Discussion:

Hyphenation of "case-in-chief" is recommended in accordance with common practice and for consistency.

§10874 – Verification to Filing of Declaration of Readiness to Proceed by or on Behalf of Lien Claimant

Discussion:

There appears to be a typographical error in the Initial Statement of Reasons accompanying proposed rule 10874, in that the reference is to new subdivision (e) but the additional language is in new subdivision (c).

§10875 – Lien Conferences

Recommendation:

~~(e) Any violation of the provisions of this rule may give rise to monetary sanctions, attorney's fees, and costs under Labor Code section 5813 and rule 10421.~~

Discussion:

The unusually broad language (“any violation”) will create new incentive for manipulation and abuse. The Labor Code already provides ample protection for bad faith tactics, and proposed subdivision (e) should be deleted.

§10880 – Lien Trials

Recommendation:

~~(e) Any violation of the provisions of this rule may give rise to monetary sanctions, attorney's fees, and costs under Labor Code section 5813 and rule 10421.~~

Discussion:

The unusually broad language (“any violation”) will create new incentive for manipulation and abuse. The Labor Code already provides ample protection for bad faith tactics, and proposed subdivision (e) should be deleted.

§10888 – Dismissal of Lien Claims

Recommendation:

~~(d) A dismissal for failure to comply with the Labor Code or these rules shall only be issued if the lien claimant has failed to comply with a statute or rule that provides that a lien may be dismissed for non-compliance.~~

~~(e)~~

Discussion:

Few (if any) statutes or rules specifically provide for dismissal of lien claims. Particularly if lien claimants are now going to be included as “parties,” lien claimants should have to abide by the rules like other parties. There should be no requirement that the lien claim can only be dismissed if specifically provided by the ignored law. The lien claimant’s due process rights are adequately protected by the other provisions of this rule.

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

Recommendation:

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. The filing of a petition for reconsideration, removal, or

disqualification creates a task for the WCJ in EAMS, and in that manner is brought to the WCJ's attention regardless of the physical District Office in which the petition is filed. 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. Notably, this change from current rule §10840 to new rule §10940(a) is not addressed in the Initial Statement of Reasons. The provision should be restored.

§10945 – Required Contents of Petitions for Reconsideration, Removal, Disqualification and Answers

Recommendation:

(c)(2) A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence, and the document is directly related to the asserted ground.

Discussion:

Additional language is recommended for clarity and strict compliance with this proposed exception.

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

Recommendation:

(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. The filing of a petition for reconsideration, removal, or disqualification creates a task for the WCJ in EAMS, and in that manner is brought to the WCJ's attention regardless of the physical District Office in which the petition is filed. 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. Notably, this change from current rule §10866 to new rule §10995(b) is not addressed in the Initial Statement of Reasons. 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