



## California Workers' Compensation Institute

1111 Broadway Suite 2350, Oakland, CA 94607 • Tel: (510) 251-9470 • Fax: (510) 251-9485

September 12, 2008

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

Neil P. Sullivan, Assistant Secretary and Deputy Commissioner  
Workers' Compensation Appeals Board  
Post Office Box 429459  
San Francisco, CA 94142-9459

**Subject:** Regulations of the Workers' Compensation Appeals Board, Rules of Practice and Procedure, CCR section 10301, et. seq.

Dear Mr. Sullivan:

These recommended modifications and comments on the proposed WCAB regulations are presented on behalf of the members of the California Workers' Compensation Institute. Recommended modifications are indicated by underline and strikethrough.

### INTRODUCTORY COMMENTS

As we have stated to the DWC and the court administrator regarding the proposed regulations for EAMS implementation, the paramount rationale in the process of modernizing the information flow of the appeals board and the Division is the efficient and effective resolution of disputes in order to promptly deliver the appropriate benefits to injured workers. The most significant aspect of this process is, therefore, to ensure that the evidentiary record of the appeals board is not adversely affected by procedural or technical processing rules. All documents necessary to fully and fairly adjudicate the entitlement to compensation benefits must be filed, served on the parties, become a part of the record of the Board's proceedings, and must be available for the judge's review in determining an award of benefits.

The constitutional mandate of the Workers' Compensation Appeals Board includes that the administration of the workers' compensation system must accomplish substantial justice expeditiously, inexpensively, and without encumbrance of any kind. The Board must, therefore, also ensure that its procedural rules are fair and cause no undue delay in the adjudication of disputed claims.

In order to avoid exalting form over substance, the procedural regulations creating the information flow for EAMS must ensure that the material essential to a timely adjudication of a claim is part of the Board's evidentiary file – one way or another. The regulations must ensure that no processing, technical, or systems-related issue corrupts the evidentiary record or impedes the dispute resolution process at the appeals board.

#### **Judicial Rules v. Procedural Regulations Recommendation**

Specifically state in the regulations that, in the case of a conflict, the WCAB regulations will supersede the rules of the court administrator.

## **Discussion**

When the rules of the court administrator threaten to interfere with the judicial function of the WCAB, the Board must clearly and definitely assert its judicial authority to supersede the conflicting regulations. In the Initial Statement of Reasons relating to the restrictions on the rejection of documents (proposed regulation 10397), the Board delineates the extent to which the statutory and constitutional authority of the Workers' Compensation Appeals Board must override the authority of the court administrator to regulate "trial level proceedings" when a conflict arises. Section 10397 poses the perfect model.

In a number of proposed regulations, the court administrator establishes new procedures for the filing and management of documentary evidence, including the potential destruction of documents improperly filed without notice to the filing party. The proposed court administrator rules also provided that material successfully loaded into the new electronic system will or may be destroyed immediately. (That proposed regulation has been revised to allow a 30-day period to ensure proper filing in the system.)

In each of the earlier sets of proposed regulations, the appeals board and the court administrator included procedures for documents that are filed incorrectly, but the rules were not consistent. In some cases, the court administrator rules provided that incomplete documents were to be reviewed and discarded, sometimes with notice to the parties, sometimes with notice if the filer has included a SASE, and sometimes without notice to the parties. (See: court administrator proposed regulation section 10222.) These proposed rules were roundly criticized by the workers' compensation community as having potentially disastrous consequences for the Board evidentiary record and for adversely affecting the due process rights of the parties.

The Board's proposed regulation, section 10397, has established a process to deal with improperly filed or procedurally defective documents that protect the Board's trial record and addresses the due process rights of the parties. In doing so, the Board has outlined those areas that require it to assert its judicial authority, even though this may, to some extent, create a conflict with the court administrator's procedural rules.

The Board's rationale regarding this potential conflict is stated in terms of its judicial authority. The Board specifically cites Article XIV, § 4, of the California Constitution, noting that it is "expressly declared to be the social public policy of this State" that the administration of the workers' compensation system "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." The Board's rationale includes case law citations relating to the potential due process problems. The Board also relies on well settled principles within the workers' compensation system:

- That workers' compensation pleadings are intended to be informal,
- That claims are to be adjudicated on the basis of substance rather than form,
- That the Board's jurisdiction is not precluded by technically deficient pleadings,
- That pleadings are to be liberally construed so as not to deprive the right to make a claim,
- That procedural rules are not to restrict the rights of unrepresented injured workers, and
- That similar provisions are found in other areas of the law outside the workers' compensation system.

The Board has articulated the scope of its authority after the Legislature created the court administrator and provided dual regulatory authority (Labor Code section 5307(c)). The Board has demonstrated exactly how and why an ostensibly "trial level" procedural rule would rise to the level of a judicial rule, or a rule that affects the Board's ability to effectively adjudicate a dispute. There are other areas that may require the Board's assertion of authority in order to protect its evidentiary record and enable it to fulfill its constitutional mandate.

## **EAMS Implementation by the Workers' Compensation Community Recommendation**

The Institute recommends that the effective date of the Board's regulations be at least 90 days after the date that the proposed regulations are adopted.

## **Discussion**

The 90-day period is needed for the workers' compensation community to learn the new system, develop the necessary tools to make EAMS effective, and train staff on the final EAMS product.

When these 2 sets of complementary regulations become effective, there will be no "old system" for processing an injured worker's claim through the WCAB. The new system and supporting regulations will not be optional and everyone in the workers' compensation community will have to learn to do things differently.

That comprehensive change alone will require a considerable period of adjustment in order to reprogram automated systems; revise the workflows for workers' compensation judges, law firms and claims administrators; manage the scope of the change; train judges, Board staff, claims adjusters and attorneys; and perfect the interface with the agency, whether that is an electronic interface or the filing of new OCR forms and tracking the scanning of documents.

It has become clear in the past several months that EAMS will not be compatible with other litigation management systems and even though the Division has met with independent system vendors, we are not aware that any vendor has yet created an automated forms package for document preparation (autofill) and filing in EAMS.

The members of the Institute have considerable experience with automated claims and litigation management systems and they have no confidence that the necessary system revisions, training, and workflow modifications can be accomplished in less than several months from the effective date of the final regulations. Yet the Division and the appeals board are referencing an effective date for these regulations of October 15. This seems to leave little or no time to address the implementation issues that will arise for the injured workers, applicant's attorneys, defense attorneys, and claims administrators to manage this change and adjust to the final EAMS product.

In discussions with Institute members, there seems to be no simple, quick solution to permit rapid compliance with EAMS. Current paper forms cannot be used. EAMS will not accept the completed forms from other existing automated systems. The requirements of proposed regulation make documents subject to rejection for purely technical reasons. These new strictures apply to all levels of users from injured workers to highly automated law firms and claims administrators.

The failure to allow for an adequate adjustment period for the community to learn the new system and develop automated tools to make EAMS effective invites confusion, disruption, and unacceptable delay. A chaotic implementation of new technology threatens the Board's primary function – the prompt and fair adjudication of disputed issues. It would seem that the threat of system interference with the Board's judicial function is an issue over which the Workers' Compensation Appeals Board must assert its full and final authority.

## **Local Rules**

### **Recommendation**

The Institute recommends that the WCAB develop an internal monitoring system and an enforcement process within the district offices to achieve the uniformity and internal consistency necessary to implement EAMS effectively.

### **Discussion**

A rationale posed by the court administrator (based on Labor Code section 127.5) for the development of EAMS is that when put in place, the system would require "uniform district office procedures, uniform forms, and uniform time of court settings for all district offices of the appeals board."

Admittedly, the initial phase of such a sweeping change is likely to be chaotic and difficult, but at the outset, it is becoming clear that regardless of the proposed regulations and the imposition of uniform forms, a number of district offices and WCALJs continue to establish additional rules outside of the Division's or the appeals board's rule making process.

These “local rules” are as simple as requiring or prohibiting procedural elements relating to the OCR filing that is at odds with what the Division has trained the community, or requiring a variety of additional material before the acceptance of settlement documents for approval. Attempting to automate “local rules” in a system intended to be uniform will only cause unnecessary delay and added cost.

### **Privacy and File Security**

#### **Recommendation**

The Institute recommends that the Board specify in its regulations the systems created to ensure that privacy rights are maintained and that WCAB files are secure within the Electronic Adjudication Management System.

#### **Discussion**

Throughout both sets of proposed regulations, the Division and the WCAB have referred to the electronic transmission of medical data, personal health information, and other identifying factors that give rise to privacy concerns. Yet, the proposed regulations are essentially silent regarding the delivery of this confidential information by e-mail, fax, or electronic means. If these issues have been resolved by the Division and the appeals board, then the regulations should reflect that consideration and articulate to what extent the regulations create a “safe harbor” for the workers’ compensation community. If these issues have not been fully vetted, then the regulations should be expanded to address the inherent privacy and file security issues.

### **System Failures**

#### **Recommendation**

Provide in the regulations an alternate plan of operation to guard against the disruption that system failure may cause.

#### **Discussion**

The automation of the adjudication process cannot be allowed to interfere with the Workers’ Compensation Appeals Board’s judicial function. There must be an alternate system in place to back up EAMS. Neither the appeals board nor the court administrator has articulated such a back-up plan. Unfortunately, the members of the Institute have considerable experience with claims automation and system failures. Institute members know that, especially at the outset of implementation, systems fail, computers crash, processes become overloaded and stop functioning. The dispute resolution process of the appeals board cannot stop functioning for an extended period or the workers’ compensation system will fail.

The simple, alarming truth is that if the OCR forms and other documents are not perfectly and promptly scanned and indexed, the Board’s evidentiary record will be erroneous and/or incomplete. There appears to be no “back-up” system available; no manual alternative if the system falters or the rate of human error is excessive; and no fail-safe system if the system fails.

## **TECHNICAL COMMENTS**

### **Section 10397 -- Rejection of Documents**

#### **Recommendation**

This section conflicts with the procedure established in the court administrator’s proposed regulation section 10222(b) and (c), which proposes that certain documents can be discarded without notice. In this instance, the Board must definitely assert its judicial authority to supersede the conflicting regulations.

#### **Discussion**

While the Board has asserted its authority to alter this process, it might also clarify more specifically that when a rule of the court administrator conflicts with or appears to interfere with the Board’s judicial function, the Board’s rule will supersede and must be followed.

## **Section 10770.5 – Lien Verification**

### **Recommendation**

This lien verification should include an attestation that the lien is being asserted only for amounts payable under the Administrative Director's relevant fee schedules or the contracted amount.

### **Discussion**

Many liens are filed seeking reimbursement for payments that are not permitted by the relevant fee schedule or are determined by contract and are, therefore, beyond the jurisdiction of the Board. Requiring the lien claimant to make an affirmative assertion under penalty of perjury would ensure that the jurisdiction of the Board has been properly requested.

## **Section 10848 -- Supplemental Petitions**

### **Recommendation**

When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the appeals board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall ~~not be acknowledged or~~ returned to the filing party.

### **Discussion**

While the Board notes that supplemental petitions and answers do not involve any statutory or jurisdictional time limitations and that this original language is not being altered, the Institute would argue that these petitions should be returned to the filing party.

As previously noted, the paramount concern for the WCAB should always be the integrity and completeness of its evidentiary record. To avoid eliminating relevant evidence on purely technical grounds, the Board should use sanctions, as appropriate, rather than eliminate potentially valuable evidence without notice to the parties. Additionally, the filing party will have served the supplemental petition on the other party or lien claimants, and this may cause unnecessary confusion and delay.

## **Settlement Forms – Compromise and Release and Stipulated Findings and Award**

Court administrator proposed regulation section 10214 contains the new forms for compromise and release and request for stipulated findings and award. These are the settlement forms that will be provided pursuant to WCAB rule section 10874, which has not been repealed or amended. These settlement forms are defective and must be revised in order for the Board to conduct an adequate review under its rule section 10870 and to meet its statutory and constitutional obligations.

### **Recommendation**

Instead of the codes contained in the proposed forms, the Institute recommends using the body part injury descriptions listed in the 2005 permanent disability rating schedule to denote injured body parts. In the alternative, the Institute recommends that the Board provide a free form field or allow the parties to attach an addendum to include a complete description of the injuries that are subject to the proposed resolution.

### **Discussion**

Currently, the court administrator regulations require the parties to use 3-digit codes to describe the injuries. (See: Court administrator proposed regulations section 10232(a)(8) and the forms contained in section 10214)

These body part codes are wholly inadequate.

It is unacceptable to force the parties to use an incomplete or misleading injury description when these will be included with documents that are intended to determine the legal rights of injured workers and employers. The list proffered by the regulation and the form is inconsistent with that used by the Disability Evaluation Unit or WCIS, and is wholly inadequate for the Workers' Compensation Judge to evaluate the resolution under WCAB rule section 10870 and Labor Code sections 5003 and 5004.

Contained in the compromise and release form (DWC CA form 10214(c)) is the following statement (Paragraph 3):

"This agreement is limited to settlement of the body parts, conditions, or systems ... set forth in Paragraph 1 despite any language to the contrary in this document or any addendum."

The Institute has raised these concerns with the court administrator, but to date, no revision has been made.

Once again, an apparently procedural rule created by the court administrator to manage the trial level proceedings of the Board will, instead, operate to restrict the judicial function of the WCAB and prevent the Board from meeting its constitutional mandate. No technical or procedural rule can be allowed to dictate the release of the injured worker's rights or the employer's liabilities and the Board cannot countenance any sort of interference with its duty to review and approve the resolution of the injured worker's rights and the employer's liabilities.

### **Stipulated Findings and Award – Form – 10214(a) Recommendation**

Delete the material relating to the inclusion of multiple companion cases on page 5 of this form, as well as other forms.

### **Discussion**

With regard to the stipulated findings and award form, another problem exists. The court administrator has retained the inclusion of specific information regarding companion cases in the stipulated findings and award form as well as in other forms. Labor Code section 3208.2 requires all questions of fact and law to be separately determined with respect to each injury, "including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit."

The WCAB's 2006 En Banc opinion in Benson v WCAB 72 CCC 1620 (currently being reviewed by the District Court of Appeal) reaffirms the intention of the appeals board to ensure that individual cases are determined separately as required by section 3208.2. A stipulated findings and award form must, therefore, be prepared for each separate injury, whether specific or cumulative and cannot combine the factual circumstances underlying any separate injury. The WCALJ, then cannot, lawfully, resolve multiple specific injuries or specific and cumulative injuries in the same award.

### **Forms Recommendation**

The Institute recommends that the Board issue all final forms necessary to conduct the business of the workers' compensation system.

### **Discussion**

The following forms required by the parties to prosecute claims and resolve disputes have not been issued or presented for public comment by either the WCAB or the court administrator:

- DWC 1 -- Application for Adjudication of Claim
- DWC Form 10 – Answer to App
- DWC Form 46 – Petition to Terminate TD
- Application for SIF Benefits
- Pre-Trial Conference Statement 5502(d)
- Arbitration Submittal

Thank you for considering these comments. Please contact me for further clarification or if I can be of any other assistance.

Sincerely,

Michael McClain  
General Counsel and Vice President

MMc/pm

cc: CWCI Medical Care Committee  
CWCI Claims Committee  
CWCI Legal Committee  
CWCI Associate Members