



California Workers' Compensation Institute

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August 21, 2008

VIA E-MAIL

Mr. Keven Star, Court Administrator
Ms. Maureen Gray, Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

**RE: First-15 Day Comments on modifications to proposed:
Rules of the Court Administrator Implementing
the Electronic Adjudication Management System**
Title 8, CCR Sections 10210 et seq.

Disability Evaluation Unit (DEU) Regulations
Title 8, CCR Sections 10150 – 10168

Retraining and Return to Work Unit (RRTW) Regulations
Title 8, CCR Sections 10116 -10133.58

Dear Mr. Star and Ms. Gray:

These recommendations and comments regarding revisions to the proposed regulations are presented on behalf of the members of the California Workers' Compensation Institute (CWCI). Recommended modifications are indicated by underline and ~~strikethrough~~.

General Comments

Implementation Dates Recommendation

The Institute recommends that the court administrator continue to test and improve the functionality of the system in the current environment, and that EAMS not “go live” until after all changes to regulations and forms are finalized and adopted.

Add to the regulations a mandatory implementation date for external users that is at least 90 days after the date the regulations are adopted. Modify the regulations to permit voluntary participation by external users between the adoption date and the mandatory participation date.

Discussion

If adopted, these recommendations will ensure a more orderly transition to EAMS. Adding a mandatory implementation date for external users that is at least 90 days after the date the regulations are adopted will allow external users time to make necessary changes to staffing, systems, work flow and to train staff. The regulations can be modified to permit voluntary participation by external users between the adoption date and the mandatory participation date.

Prior to the adoption of regulatory changes, current regulations are in force. It is not clear that the regulated community may ignore current regulations and required forms in favor of unadopted regulatory changes and forms. In addition, some regulatory changes and forms (WCAB rules and forms) necessary to implement EAMS will not have been to public hearing before the DWC “go live” and “voluntary adoption” date scheduled by the Division for August 25th 2008. Proposed forms published for public hearing and modified forms distributed for this 15 day comment period have since undergone, and continue to undergo, additional changes. Some essential WCAB forms have been circulated but have not yet been posted for public hearing. The regulations and forms are not ready.

Unnecessary Fields — Forms Recommendation

Delete from the forms fields for information that the EAMS system will or can pull from other locations such as from the cover and separator sheets and from WCIS.

Discussion

The EAMS validation spreadsheet circulated to EAMS Forms developers indicates that many fields will be populated into EAMS from fields in the cover sheet and the separator sheet and not from the fields on EAMS forms. Entering information into fields on the EAMS forms, especially by manual entry, is resource intensive. Duplicate entry is unnecessary and can be eliminated. Resources and costs can be saved by deleting all fields possible that are, or can be populated from other forms such as cover sheets and separator sheets, or from other locations such as WCIS fields.

Court Administrator Regulations

Registration

Recommendation – 10210(f) and 10217

Ensure that the system recognizes and accepts slight variations in the names and addresses of the parties.

Discussion

While registration is key to uniformity, the Division must ensure that the system recognizes and accepts slight variations in the names and addresses of the parties. Many Institute members have already experienced the difficulties that can be caused when document fields are overly constricted and the automated system has little or no capacity to “reason” through variations, typos, or other foreseeable human error.

While system users are responsible to correctly report their vital statistics to the Division and communicate that throughout their organizations, the system must be able to account for slight variations and correctly link parties to cases. If it cannot, then regardless of the precision of the system users, errors will impede the mission of the appeals board.

Representative Office – 10210(dd)

Recommendation

The Institute recommends that the DWC add “lien claimant” to the definition of “representative office” as follows:

(dd) “Representative’s office” means any office location for a law firm, lawyer, lien claimant or representative of a party or lien claimant in a workers’ compensation case.

Alternatively add “lien claimant” to sections referencing those who may submit forms and documents to EAMS, including sections 10217 and 10218.

Discussion

Since lien claimants may submit documents directly to EAMS as well as via intermediaries, lien claimants must be included in the language specifying those who submit forms and documents to EAMS.

Documents Discarded without Notice

Recommendation – 10222(b) and (c)

Ensure the rule for a discarded document is the same as the procedure applied in subdivision (a)(2) with a notification that the document was not accepted and an opportunity to cure the defect.

Discussion

While the rules are clear, the consequences are potentially troublesome. As the Institute stated previously, the Board’s primary function is to resolve disputes expeditiously and to that end the evidentiary record must be protected. Filing errors and procedural problems occur but, particularly in the initial phase of EAMS, enforcement of the procedural rules must yield to the Board’s constitutional responsibility. The Institute recommends that the penalty for these kinds of misfiled documents be similar to subdivision (a) – return the document and notify the filer that it has been rejected. The WCAB has the authority to consider sanctions for these errors, if necessary.

Capital Letters

Recommendation – 10232(a)(6)

Delete the requirement to use capital letters to complete OCR forms.

Discussion

Requiring capital letters for forms will complicate the programming needed for external users and vendors to develop compliant forms. To auto-populate forms, existing information is extracted from current systems. Additional programming will be needed to convert the extracted information into capital letters. In addition, capital letters require more space and the field space on the forms may no longer be sufficient to accommodate the required information.

List of Body Part Codes

Recommendation – 10232(a)(8)

The Institute recommends using the body part injury descriptions listed in the 2005 permanent disability rating schedule to denote injured body parts.

Discussion

The body part code list proposed in the regulation is inadequate.

It is unacceptable to force an incomplete or misleading injury description on the parties when these descriptions will be included with documents that are intended to determine the legal rights of injured workers and employers. The list proffered by the regulation is inconsistent with that used by the Disability Evaluation Unit or to report to the Workers' Compensation Information System (WCIS) and wholly inadequate for any purpose of concern to the Workers' Compensation Appeals Board.

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."

No technical or procedural rule can be allowed to dictate the release of the injured workers rights or the employer's liabilities.

Filing Exhibits

Recommendation – 10233(d)(3)

(3) If the compromise and release or the stipulations with request for award is not approved at or after the adequacy hearing, and the matter is set for a mandatory settlement conference or trial, then any additional medical reports, medical-legal reports, medical records, or other documents that are being proposed as exhibits shall be filed ~~in the same manner as set forth in subsections (b)(3) and (b)(4).~~

Discussion

Since there are no subsections (b)(3) or (b)(4) in section 10233, the references must be deleted or corrected.

DWC/ Court Administrator Forms

Compromise and Release forms and Stipulated Findings and Award forms – 10214

Recommendation

Delete the material relating to the inclusion of multiple companion cases on these and other forms.

Discussion

The court administrator has retained the inclusion of specific information regarding companion cases in these 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.

Compromise and Release forms and Stipulated Findings and Award forms – 10214 Recommendation

Replace the “start date” and “end date” fields for specific and cumulative trauma injuries with a single “date of injury” field, and delete the instruction “(If Specific Injury, use the start date as the specific date of injury)” on these and all other proposed forms.

Discussion

Labor Code section 5412 defines a single date of injury for a cumulative injury:

“The date of injury in cases of occupational injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.”

Compromise and Release forms and Stipulated Findings and Award forms – 10214 Recommendation

Delete the drop-down box in the body part field in these and other forms and provide an expandable free form text field or a field of sufficient length to describe the relevant body part(s), conditions, and systems in the forms.

Discussion

The area to describe the injuries is deficient in these and other forms. The forms must provide for an adequate description of the body part(s), conditions, and systems being resolved, or at issue either on the face of the document or by reference to an addendum.

In each area provided to identify the affected body parts or conditions, there is room for only 20 characters or so (13 characters in capital letters). Additionally, there is the instruction that conditions may not be incorporated by reference to medical reports (emphasis original).

This is woefully deficient and will be unacceptable to any applicant's attorney, defense attorney, workers' compensation administrative law judge, or Board commissioner who encounters this procedural Catch-22. Simply stated, such a forced limitation makes the settlement documents defective and the parties will not be getting the resolution they intended. The incomplete descriptions will only lead to additional litigation later on.

There is no necessity for the proposed drop down box from which the user must select. The body parts drop down includes the inadequate list described and commented upon above. The drop down box is a hindrance to all parties.

Contained in the compromise and release form (DWC CA form 10214(c)) is the 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.”

This language creates a trap for the parties and assures that they cannot extricate themselves from the dilemma. No technical or procedural rule can be allowed to dictate the release of the injured worker's rights or the employer's liabilities.

Disability Evaluation Unit (DEU) Regulations and Forms

Summary Rating Determinations, Unrepresented Employee -- 10160. Request for Summary Rating of QME or AME Report – Form 101

Recommendation

CWCI recommends that the DWC delete the proposed OCR form and retain the existing form, modifying the language in the regulation accordingly.

If the AD decides to retain the OCR form, the DWC will need to add QMEs and AMEs to section 10210(dd), as follows:

(dd) “Representative’s office” means any office location for a law firm, lawyer, lien claimant, qualified medical evaluator (QME), agreed medical evaluator (AME), or representative of a party or lien claimant in a workers’ compensation case.

Alternatively “qualified medical evaluator (QME), agreed medical evaluator (AME),” can be added to the sections referencing those who submit OCR forms and documents to EAMS, including sections 10217 and 10218.

Discussion

If the requirement for QMEs and AMEs to submit to the DEU OCR forms in accordance with the proposed regulations is not removed, QMEs and AMEs must be informed and educated on the process. Timely informing and educating QMEs on the EAMS regulations and OCR forms may be difficult if not near impossible and burdensome for the DWC, QMEs and AMEs. If QMEs and AMEs must submit OCR forms and documents directly to the DEU in accordance with the proposed regulations, they must be included in the language specifying those who submit forms and documents to EAMS.

Retraining and Return to Work Unit Regulations and Forms

Offer of Work -- 10117

SJDB Training Voucher – 10133.56

RRTW Forms -- 10118 and 10133.53

SJDB Training Voucher Form – 10133.57

Recommendation

CWCI recommends that the DWC delete the proposed forms and retain the existing Offer of Regular Work Form, Offer of Modified or Alternative Work Form, and SJDB Voucher form.

Discussion

CWCI supports the Division’s decision to remove proposed requirements to submit Offers of Regular Work and Offers of Modified or Alternative Work forms, SJDB Training Voucher forms and associated proofs of service to the Retraining and Return to Work Unit. Since the requirements to submit these forms and proofs of service have been removed from the proposed regulations, EAMS versions of these forms are no longer necessary and the current forms can be retained.

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

Sincerely,

Brenda Ramirez
Claims & Medical Director

Michael McClain
General Counsel & Vice President

BR:MMc/pm

cc: Joseph M. Miller, Chairman, Workers' Compensation Appeals Board
Destie Overpeck, DWC Counsel
CWCI Medical Care Committee
CWCI Claims Committee
CWCI Legal Committee
CWCI Regular Members
CWCI Associate Members