

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
WORKERS' COMPENSATION APPEALS BOARD

FINAL STATEMENT OF REASONS

**Subject Matter of Proposed Regulations:
Rules of Practice and Procedure of the Workers' Compensation Appeals Board**

BACKGROUND:

By its authority under Labor Code sections 5307 and 5307.4 (see also Lab. Code, §§ 133, 5309 and 5708), the Workers' Compensation Appeals Board (WCAB) noticed and held a public hearing and accepted written comments on its proposal to adopt and amend certain Rules of Practice and Procedure (Rules) in Title 8, Division 1, Chapter 4.5, subchapter 2 (§ 10300 et seq.), of the California Code of Regulations. The public hearing on the initially proposed Rules modifications was held on September 24, 2019. The initial written comment period also closed on that date.

The WCAB has considered the public hearing testimony and all of the timely written comments. The WCAB now adopts its proposed Rules, as modified after the public hearing, together with some further modifications subsequent to the written comment period.

In this Final Statement of Reasons (FSOR), the WCAB addresses both the written public comments it received during the written comment period and the further modifications it made to its Rules subsequent to the written comment period.

By analogy to Government Code section 11346.9(b),¹ this FSOR incorporates the Initial Statement of Reasons (ISOR). Accordingly, not all of the provisions of the adopted Rules will be discussed in this FSOR. Instead, unless otherwise expressly noted, the discussion in this FSOR will relate to the proposed new Rules regarding which the WCAB received oral and written comments, as well as changes the WCAB has made to the proposed new Rules after the closure of the written comment period. This FSOR has focused on the most significant changes to the WCAB's Rules made subsequent to those discussed in the ISOR, but does not specifically note many relatively minor, nonsubstantive changes.

A. Responses to Oral and Written Comments

1. Gender-Neutral Language and the Singular "They"

We received comments from both the California Workers' Compensation Institute (CWCI) and the California Lawyers Association (CLA) recommending against using "they" as a singular pronoun. As we indicated in the ISOR, we chose in some instances to use the singular they as a gender-neutral pronoun where appropriate in keeping with Assembly Concurrent Resolution 260, which encourages

¹ As discussed more thoroughly in its ISOR (at p. 1, fn. 3), the WCAB is not subject to the rulemaking provisions of Article 5 (Gov. Code, § 11346 et seq.), Article 6 (*id.* § 11349 et seq.), Article 7 (*id.* § 11349.7 et seq.), and Article 8 (*id.* § 11350 et seq.) of the Administrative Procedure Act (APA), with one exception not relevant here.

state agencies “to use gender-neutral pronouns and avoid the use of gendered pronouns when drafting policies, regulations, and other guidance[.]”

In making this choice, we were mindful of not only the State Assembly’s guidance, but the guidance of many other organizations that have also adopted the singular they as a gender-neutral pronoun. As of this writing, most of the major style guides accept the use of the singular they as a gender-neutral pronoun. The Associated Press, for example, approved of the singular they as a gender-neutral pronoun in 2017, noting that “[t]hey/them/there is acceptable in limited cases as a singular and-or gender-neutral pronoun, when alternative wording is overly awkward or clumsy.”² The MLA style guide followed suit in 2018, noting that “constructions such as “his or her” are often cumbersome, and some writers may find singular, gender-specific constructions insufficient, given that many people do not identify with a particular gender. Using plural constructions, if possible, is often the best solution—and the most inclusive one[.]”³ More recently, Merriam-Webster expanded its definition of “they” to specifically include usage as a singular, non-gendered pronoun. On Merriam-Webster’s website, an explanation of the expanded definition notes “that they has been in consistent use as a singular pronoun since the late 1300s; that the development of singular they mirrors the development of the singular you from the plural you, yet we don’t complain that singular you is ungrammatical; and that regardless of what detractors say, nearly everyone uses the singular they in casual conversation and often in formal writing.”⁴ In this regard, we note that the Oxford English Dictionary traces the singular they back to 1375, while the American Heritage Dictionary notes that “[t]he use of the plural pronouns they, them, themselves, or their with a grammatically singular antecedent dates back at least to 1300, and such constructions have been used by many admired writers, including William Makepeace Thackeray (“A person can’t help their birth”), George Bernard Shaw (“To do a person in means to kill them”), and Anne Morrow Lindbergh (“When you love someone you do not love them all the time”).”⁵

The use of “they” as a singular, non-gendered pronoun is so widespread both in print and in speech that it often passes unnoticed. Thus, while we have carefully considered the commenters’ concerns regarding the apparent grammatical disagreement between a singular antecedent like “a party” and the plural pronoun “their,” the WCAB has elected to move forward with using “they” as a singular, non-gendered pronoun.

2. Proposed New Rule 10305: Definitions.

We received comments on various aspects of proposed new rule 10305.

a. Subdivision (e) of Proposed New Rule 10305: definition of “Claims administrator”

Comment: CLA questioned why the definition of “claims administrator” does not include legally uninsured employers or joint powers authorities.

² <https://www.poynter.org/reporting-editing/2017/ap-style-change-singular-they-is-acceptable-in-limited-cases/>.

³ <https://style.mla.org/singular-they/>.

⁴ <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they>.

⁵ <https://ahdictionary.com/word/search.html?q=they>

Response: A joint powers authority is a collection of self-insured employers, which would be covered by (2) of this definition pertaining to self-insured employers, while most legally uninsured employers are state or municipal entities.

b. Subdivision (o) of Proposed New Rule 10305: definition of “Party”

Comment: CWCI expressed “serious concerns” about the definition of “party” being expanded in proposed new rule 10305(o) to include lien claimants. The comment suggests that lien claimants are “vendors” who do not have any valid interest in the case in chief, like in “every other court system in California.” CWCI expresses concern that the redefinition is “a solution in search of a problem that does not exist.”

Response: We appreciate CWCI’s concerns, but the proposed change is not “a solution in search of a problem that does not exist.” Previously, lien claimants were defined as parties only after the resolution of an injured worker’s case in chief, but in certain circumstances could be required to appear, participate, and/or be available to participate in proceedings despite lacking party status. This created both conceptual and practical confusion, requiring the addition of “and lien claimants” to hundreds of rules in order to remedy the paper distinction between parties and lien claimants that did not exist in reality for most purposes, and made it difficult to exercise jurisdiction over lien claimants when necessary.

Redefining “party” to include lien claimants does not alter the fact that lien claims will not be heard until after the conclusion of the case in chief; the intent of the rule is to reflect the reality of practice. Similarly, the redefinition will not require service on lien claimants of all documents related to the case in chief, because rule 10625 requires service only on “affected” parties. Rule 10629 will provide that the WCJ shall detail the parties to be served when ordering designated service.

More broadly, CWCI’s comparison to the status of vendors in civil litigation is not apposite. A vendor who provides services to a party in civil litigation bills and receives payment from the party to whom services were provided; if payment is not received, separate proceedings can be initiated to secure that payment. As such, there is no need for participation in the case as a party, because the right to payment exists independently. To the extent that exceptional circumstances could make participation in the case appropriate, such an entity may file a petition for intervention, which, if granted, results in joinder to the case as a party. (See Cal. Code Civ. Proc., § 387.) In other words, in the civil justice system, whether an entity is a party depends on whether it has successfully joined the case. Redefining party to include all case participants is therefore consistent with civil court practice.

In contrast to the normal situation in civil litigation, lien claimants depend exclusively on the workers’ compensation system itself to secure payment for their services and have no right to pursue compensation in separate proceedings. (See Lab. Code §§ 5300, 5304; *Hand Rehabilitation Center v. Workers’ Comp. Appeals Bd.* (1995) 34 Cal.App.4th 1204, 1214.) To the extent that lien claimants depend on the workers’ compensation system to secure payment and have filed a lien in the case to protect their rights to such payment, they are parties to the litigation in practical effect, and it makes sense to recognize that reality by including them within the definition of party. The changes are not intended to substantially increase the rights of lien claimants vis-à-vis applicants and defendants, because lien claimants already enjoy most of the rights of a party under current law.

Comment: The California Coalition on Workers' Compensation (CCWC) objected to treating lien claimants as parties before resolution of the case in chief, suggesting that it will clog the system. For example, CCWC asserts that if lien claimants are parties, they will be able to file Declarations of Readiness to force hearings on the case in chief. CCWC also asserts that the change would require the service of medical records on the lien claimant, would increase service costs, and would prohibit settlement of the case in chief without also settling all liens.

Response: CCWC's specific examples are inaccurate. Pursuant to proposed new rule 10742, lien claimants "shall not file" Declarations of Readiness prior to resolution or abandonment of the case in chief. Similarly, proposed new rule 10637, governing service of medical reports, makes clear that service of medical reports on non-medical lien claimants is not permitted absent specific order from the WCAB.

There is no requirement that a settlement of the case in chief resolve all lien claims. For that matter, there is no requirement that a settlement in the case in chief resolve the entirety of the case in chief itself, so it is unclear why CCWC believes designating lien claimants as parties would require the settlement of their claims in a settlement of the case in chief.

It appears CCWC may have read more into the change of designation than is warranted. The changes are not intended to substantially increase the rights of lien claimants vis-à-vis applicants and defendants in the vast majority of cases, because lien claimants already enjoy most of the rights of a party under current law.

Proposed new rule 10629 will require the WCJ to specify the parties to be served when designating service. We anticipate that service on lien claimants will not increase significantly. Therefore, we do not anticipate this change will increase service costs as much as the comment suggests.

We reject the assertion that determining what entities are parties is beyond the scope of our regulatory authority. Determining the parties to the litigation is a core function of any adjudicatory body.

Comment: Debra Russell testified on behalf of Schools Insurance Authority at the public hearing. Ms. Russell expressed opposition to the proposal to define lien claimants as parties, asserting that the only relevant parties in a workers' compensation case are the employee and the employer, and that all other participants are merely vendors. Ms. Russell also asserted that considering lien claimants parties would mean that they must be served with medical reports, and that all lien claims must be resolved prior to the settlement of the case in chief.

Response: We disagree with these contentions. The comparison to the status of vendors in civil litigation is not apposite. A vendor who provides services to a party in civil litigation bills and receives payment from the party to whom services were provided; if payment is not received, separate proceedings can be initiated to secure that payment. As such, there is no need for participation in the case, because the right to payment exists independently. To the extent that exceptional circumstances could make participation in the case appropriate, such an entity may file a petition for intervention,

which, if granted, results in joinder to the case as a party. (See Cal. Code Civ. Proc., § 387.) In other words, in the civil justice system, whether an entity is a party depends on whether it has successfully joined the case. Redefining party to include all case participants is therefore consistent with civil court practice.

In contrast to the normal situation in civil litigation, lien claimants depend exclusively on the workers' compensation system itself to secure payment for their services and have no right to pursue compensation in separate proceedings. (See Lab. Code §§ 5300, 5304; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (1995) 34 Cal.App.4th 1204, 1214.) To the extent that lien claimants depend on the workers' compensation system to secure payment and have filed a lien in the case to protect their rights to such payment, they are parties to the litigation in practical effect, and it makes sense to recognize that reality by including them within the definition of party. The changes are not intended to substantially increase the rights of lien claimants vis-à-vis applicants and defendants, because lien claimants already enjoy most of the rights of a party under current law.

Proposed new rule 10637, governing service of medical reports, makes clear that service of medical reports on non-medical lien claimants is not permitted absent specific order from the WCAB.

There is no requirement that a settlement of the case in chief resolve all lien claims. For that matter, there is no requirement that a settlement in the case in chief resolve the entirety of the case in chief itself, so it is unclear why Schools Insurance Authority believes designating lien claimants as parties would require the settlement of lien claims in order to settle the case in chief.

c. Subdivision (r) of Proposed New Rule 10305: definition of “Significant panel decision”; Proposed New Rule 10325: En Banc and Significant Panel Decisions.

Comment: CWCI objected to definitions for significant panel decisions in proposed new rules 10305(r) and 10325(b) on the basis that the “significant panel decision” designation itself exceeds statutory authority. CWCI asserted that, although the definition makes clear that significant panel decisions are not binding, in practice they are treated as binding by practitioners and judges alike, and that the better solution would be to eliminate the significant panel decision designation entirely, and to issue more en banc decisions instead.

Response: The new definition for significant panel decision was included for the purpose of clearing up any possible confusion regarding the lack of binding status of these decisions. To the extent that CWCI objects to practitioners and judges treating these decisions as binding, the proposed definitions should address such concerns, not undermine them. To the extent that CWCI asserts that the significant panel decision designation itself is invalid, that is not a claim properly addressed in this rulemaking proceeding.

Comment: In a written comment, CCWC related serious concerns regarding the adoption of a definition for significant panel decisions. Additionally, Saul Allweiss testified on behalf of CCWC at the public hearing, emphasizing CCWC's opposition to including a definition for significant panel decisions.

Response: The new definition for significant panel decision was included for the purpose of clearing up any possible confusion regarding the lack of binding status of these decisions. To the extent that CCWC objects to the concept of the significant panel decision itself, that is not a claim properly addressed in this rulemaking proceeding.

3. Proposed New Rule 10330: Authority of Workers' Compensation Judges.

Comment: CLA suggested adding the word "removal" to the last sentence of the rule.

Response: We appreciate the suggested language. However, adding "removal" to the last line of this rule would misrepresent how removal jurisdiction functions.

4. Proposed New Rule 10338: Authority of Commissioners of the Appeals Board.

Comment: CLA suggested adding an expedited procedure to request an order of autopsy or exhumation as those often require prompt action before the body starts to decay. It could be done as a walk-through petition before a WCJ by delegation from the WCAB, as no such procedure currently exists for the WCAB. Alternatively, the WCAB may wish to consider creating such a procedure for itself to avoid possible conflict with Labor Code section 5707.

Response: The existing language of proposed new rule 10338 allows for expediting, and we are not inclined to create a new procedure at this time.

5. Proposed New Rule 10401: Non-Attorney Representatives.

Comment: CLA argued that the last sentence of subdivision (e) is ambiguous, and queries what the authorization referred to in subdivision (e) is supposed to say.

Response: The last sentence of subdivision (e) states, "The supervising attorney's specific written authorization must be included with all Compromise and Release agreements and Stipulations with Request for Award." This means that the attorney identified as being responsible for supervision of non-attorney representatives must provide specific written authorization to enter into all Compromise and Release agreements and Stipulations with Request for Award.

6. Proposed New Rule 10404: Suspension and Removal of a Non-Attorney Representative's Privilege to Appear before the Workers' Compensation Appeals Board under Labor Code Section 4907.

Comment: Regarding subdivision (d)(3), CLA asked whether it would be prudent to include a time limit within which the hearing must be set.

Response: In drafting proposed new rule 10404, we considered whether to include a time limit. We concluded that doing so would decrease the flexibility of the Appeals Board to resolve complaints under Labor Code section 4907, and accordingly have not included one in the rule.

Comment: Regarding subdivision (g), CLA asked whether it would be prudent to include a requirement that such hearings shall require a court or hearing reporter.

Response: Requiring the presence of a court or hearing reporter would exceed the statutory authority granted to the Appeals Board in Labor Code section 4907.

Comment: CLA asked whether there is any right of appeal from a final decision under this rule.

Response: A decision by the Appeals Board to remove or suspend a non-attorney representative's privilege to appear before the Appeals Board may, as is the case with all other Appeals Board decisions, be appealed by a writ of mandate to the Court of Appeal.

7. Proposed New Rule 10421: Sanctions.

Comment: Regarding subdivision (b)(5)(A)(v), CLA argued that the language "intentionally presented in a manner reasonably calculated to deceive" is dangerously close to stifling legal argument, and asks how such intent is determined and defined. Regarding subdivision (b)(5)(B), CLA objected to the language "where a reasonable excuse is not offered," arguing that a party might not know of an obligation to offer an excuse unless the WCJ makes an inquiry.

Response: No new language has been added to either of these subdivisions; we have largely left this rule intact. We do not believe it is wise or necessary to change these subdivisions at this time.

8. Proposed New Rule 10488: Objection to Venue Based on an Attorney's Principal Place of Business.

Comment: CLA asked, "What if there is no appeals board (district) office in the county where the injured worker resides or where the injury occurred? There is no mention of 5501(d), which applies to that circumstance."

Response: The lack of reference to Labor Code section 5501.5(d) is intentional: in cases where there is no district office in the county where the injured worker resides or where the injury occurred, EAMS assigns the case to a district office based on zip code.

9. Proposed New Rule 10540: Petition to Terminate Liability for Continuing Temporary Disability.

Comment: Regarding subdivision (c), CLA recommended that the "or" be changed to read "and counsel, if represented" to avoid service only on the employer or insurer in a represented case.

Response: Subdivision (c) of proposed new rule 10540 is a reworded version of current rule 10466, which requires that the objection and reports be served "upon petitioner or counsel." We are not inclined to make any changes to this requirement at this time.

10. Proposed New Rule 10545: Petition for Costs.

Comment: Regarding subdivision (h), CLA noted that Labor Code section 5813 references fees and costs that were “incurred by ... [a] ... party as a result ...[,]” pointing out that this requires that the fees and costs must be actually incurred in addition to being reasonable. CLA suggested adding the word “incurred” after costs in line 4 of the proposed new rule 10545.

Response: We believe that this change would be superfluous. By definition, a cost is something that has been incurred. If it has not been incurred, it is not a cost.

11. Proposed New Rule 10547: Petition for Labor Code Section 5710 Attorney’s Fees.

Comment: CLA asked, “Should consideration be given to adding hearing representative in addition to attorney to account for the industry practice of hearing representatives sometimes appearing at depositions in lieu of an attorney?”

Response: Proposed new rule 10547 pertains to attorney’s fees under Labor Code section 5710. Hearing representatives are not entitled to attorney’s fees under section 5710, because they are hearing representatives and not attorneys.

Comment: CWCII suggested changing the language of proposed new rule 10547 to allow for dismissing the petition with prejudice for failure to comply with the rule.

Response: We disagree with the proposed language requiring that a petition for attorney’s fees state with specificity the benefits sought, on penalty of dismissal with prejudice. The rule already requires the attorney to serve a written demand for the fees on defendant, and to attach that written demand with the petition; requiring the attorney to also restate the breakdown in the petition on penalty of dismissal with prejudice risks becoming a trap for the unwary.

12. Proposed New Rule 10567: Petition Appealing Independent Bill Review Determination.

Comment: Regarding subdivision (g) of proposed new rule 10567, CLA suggests replacing the word “ones” with the word “those.”

Response: No new language has been added to this subdivision, and we are not inclined to make any changes at this time.

13. Proposed New Rule 10570: Petition to Enforce an Administrative Director Determination.

Comment: CWCII suggested removing “aggrieved” from subdivision (a) of proposed new rule 10570(a), on the rationale that a party seeking to enforce an Administrative Director determination is the party who benefits under the determination, not the aggrieved party.

Response: This is incorrect. A party seeking to enforce an Administrative Director determination will be doing so because the other party failed to abide by the determination, thereby aggrieving the first party. The grievance here is the failure of the other party to abide by the determination. In the absence of such grievance, there is no need for enforcement.

14. Proposed New Rule 10575: Objection to Venue Based on an Attorney’s Principal Place of Business.

Comment: Regarding subdivision (g)(2) of proposed new rule 10575, CLA suggested replacing the word “ones” with the word “those.”

Response: No new language has been added to this subdivision, and we are not inclined to make any changes at this time.

15. Proposed New Rule 10580: Petition Appealing Medical Provider Network Determination of the Administrative Director.

Comment: Regarding subdivision (j)(2) of proposed new rule 10580, CLA suggested removing a dash.

Response: This is a strikethrough of a comma (to remove the comma), not a dash.

16. Proposed New Rule 10600: Time for Actions.

Comment: CWCI suggested including language in proposed new rule 10600 to “define (in all contexts) both ‘business day’ and ‘working day’[.]”

Response: Because the definitions of these terms depend upon the individual statute in question, it would be inappropriate and inadvisable to attempt to provide a universal definition in these rules.

17. Proposed New Rule 10615: Filing of Documents.

Comment: Regarding subdivision (c) of proposed new rule 10615, CLA recommended replacing “Administrative Director” with “district office,” as document discrepancy notices are normally generated by the district office. CLA pointed out that subdivisions (b) and (d) of proposed new rule 10617 make the the same reference to the Administrative Director regarding document discrepancy notices.

Response: While the district offices do issue document discrepancy notices, they do so under the authority delegated to them by the Administrative Director.

18. Proposed New Rule 10617: Restrictions on the Rejection for Filing of Documents Subject to a Statute of Limitations or a Jurisdictional Time Limitation.

Comment: Regarding subdivisions (b) and (d) of proposed new rule 10617, CLA recommended replacing “Administrative Director” with “district office,” as document discrepancy notices are normally generated by the district office.

Response: While the district offices do issue document discrepancy notices, they do so under the authority delegated to them by the Administrative Director.

19. Proposed New Rule 10620: Filing Proposed Exhibits.

Comment: CLA stated that most presiding workers' compensation judges oppose proposed new rule 10620, and argued that "the requirement would unnecessarily flood the district offices with documents that would have to be scanned in or that are not electronically filed correctly so that they can be properly identified in the record." CLA also pointed out that some offices require the hard copy filing of proposed exhibits 7-10 days prior to trial and do not require electronic filing; when the case settles, documents can be returned to the filing party, but if the case proceeds to trial, the exhibits can be scanned in after trial.

Comment: CWCI requested we "delete" proposed new rule 10620, regarding the filing of exhibits.

Response: We are aware that some district offices handle evidence production differently, and indeed that judges within a given district office may handle evidence production differently from other judges within that office. However, in the workers' compensation system, local rules are not allowed. This is an issue of fundamental due process.

With proposed new rule 10620, we are striving to harmonize practice both across and within district offices. As noted in the ISOR, we recognize that the requirement to file exhibits 20 days in advance of trial may be burdensome in certain circumstances, and we again emphasize that the rule gives the WCJ discretion to shorten the time before trial by which such exhibits must be filed. This approach does not violate Labor Code section 5500.3's prohibition on local rules precisely because it allows all WCJs discretion to modify the time period as required.

20. Proposed New Rule 10625: Service.

Comment: CWCI recommended removing the reference to "affected" party in proposed new rule 10625, governing service, in connection with its objection to the redefinition of lien claimants as parties.

Response: As noted above, we believe the recognition of lien claimants as parties is necessary and appropriate. As described below, we have added a subdivision to proposed new rule 10629 that should make it easier for parties to determine who must be served with an order.

21. Current Rule 10626: Examining and Copying Hospital and Physicians' Records. (Proposed Repeal)

Comment: Greg Webber, who testified at the public hearing on behalf of Med-Legal, LLC, expressed opposition to the proposed repeal of current rule 10626, suggesting that it is "absolutely required for an evidence-based medical system."

Response: We disagree with this contention. Statutory and decisional law governs the means to access medical records necessary for resolution of a claim. To the extent that the regulation is read

to provide independent authority to access and copy medical documents held by third parties, it is not valid and should not be retained.

Comment: Lori Kammerer, who testified at the public hearing on behalf of the Coalition of Professional Photocopiers, requested that we not repeal current rule 10626.

Response: Statutory and decisional law governs the means to access medical records necessary for resolution of a claim. To the extent that the regulation is read to provide independent authority to access and copy medical documents held by third parties, it is not valid and should not be retained.

22. Proposed New Rule 10629: Designated Service.

We received comments on various aspects of proposed new rule 10629.

a. Subdivision (a) of Proposed New Rule 10629: designated service generally

Comment: CLA objected to renumbering this rule at all, as it is very familiar to parties and WCJs, easy to remember, and used on myriad pre-printed forms. CLA warned that the renumbering will cause considerable waste of existing preprinted forms.

Response: The current rules reorganization project is aimed at restructuring the rules of practice and procedure so that they are more intuitive and easier to follow. This will necessarily involve changing most of the numbers. Thus, while we certainly understand the commenter's argument that the previous numbering is more familiar, we do not agree with the commenter that this is a compelling reason not to renumber the rules.

b. Subdivision (d) of Proposed New Rule 10629: new requirement to file proof of service

Comment: CLA warned that this change will negatively impact the district offices, potentially adding an additional annual burden to EAMS of as much as one million new filings, which could lead to backups and a need for substantial additional clerical staffing. CLA also warned that this change will impose a significant additional clerical workload burden on parties, increasing system costs. CLA argued that this proposed change is unnecessary, and instead recommended a requirement that proofs of service be filed together with a declaration under penalty of perjury in the event of a dispute among parties involving receipt or timeliness.

Comment: CWCI requested we remove the requirement from proposed new rule 10629 to file a proof of service with the Workers' Compensation Appeals Board after effecting designated service. CWCI asserted that the rule is unduly burdensome, and the same thing can be accomplished by simply requiring the party effecting designated service to retain the proof of service themselves.

Response: As noted in the ISOR, experience has taught us that relying on the serving party to keep a record of the proof of service is both unwieldy and unreliable, leading to delay, confusion, and waste. Wherever possible, disputes should be resolved on the merits, not based upon an inability to determine whether service was made. Requiring the party to keep the record of service itself, on pain of the service being found invalid if the document cannot be produced at some later time, results in

more decisions being made based upon a failure to produce, and fewer being made based upon the merits of the dispute. It also makes it impossible to tell from the record itself whether, when and upon whom a given document was served, without a cumbersome process of requesting production from the designated party and then waiting to see if they can locate the proof of service in their records. Designated service is a valuable cost-saving measure, but it cannot come at the expense of being able to determine reliably whether, when and upon whom a court-issued document was served.

We further note that, with the increase in the number of e-filers, we disagree with CLA that the new requirement to file proofs of service will impose a significant additional clerical workload, either on the district offices or on parties.

Comment: Zenith suggested amending the language of proposed new rule 10629 to clarify that the failure to timely file a proof of service with the Workers' Compensation Appeals Board does not per se invalidate any otherwise valid service of process.

Response: We believe it is important that parties file proofs of service as required by the rule, and therefore that it would be unwise to add the suggested language, because it would risk sending the message that compliance with this provision is unimportant and can safely be ignored.

23. Proposed New Rule 10700: Approval of Settlements.

Comment: CWCI suggested adding language to proposed new rule 10700, concerning the approval of settlements, to allow for settlement of Supplemental Job Displacement Benefit vouchers, codifying the rule of *Beltran v. Structural Steel Fabricators* (2016) Cal. Wrk. Comp. P.D. Lexis 366.

Response: We do not believe such codification is wise or necessary at this time.

24. Proposed New Rule 10742: Declaration of Readiness to Proceed.

Comment: In subdivision (a) of proposed new rule 10742, CLA suggested replacing "Appeals Board" with "Workers' Compensation Appeals Board" for document consistency.

Response: In this case, the term "Appeals Board" is correct, not "Workers' Compensation Appeals Board." It is the Appeals Board – defined in proposed new rule 10305 as "the commissioners and deputy commissioners of the Workers' Compensation Appeals Board acting en banc, in panels or individually" – that is authorized to create forms such as the Declaration of Readiness form, not the greater Workers' Compensation Appeals Board (defined in proposed new rule 10305 as the Appeals Board plus the presiding workers' compensation judges and workers' compensation judges).

25. Proposed New Rule 10752: Appearances Required.

Comment: CWCI suggested modifying the language of proposed new rule 10752(c) to remove the qualification "represented" from the requirement that an applicant appear personally at any mandatory settlement conference, and adding a qualifier "alone" to the prohibition on dismissal of the application based upon failure to personally appear.

Response: The qualifier is included because unrepresented applicants must appear personally at *any* hearing as a general matter, and their failure to appear *is* potentially grounds to dismiss the case. Without the qualifier, an unrepresented applicant's failure to appear at a mandatory settlement conference would not be grounds for dismissing the case, even though a similar failure to appear at a status conference or at trial would be. CWCI's proposed change appears to accomplish the opposite of what it intends.

We do not believe inclusion of the qualifier "alone" adds useful information, and is potentially confusing as it suggests the failure to appear could be a basis for dismissal if coupled with some other failure. The intent of the rule is to prohibit a failure to appear at the mandatory settlement conference itself resulting in dismissal of the case. It is not intended to prohibit a WCJ from ordering an applicant to personally appear at a future hearing, on pain of dismissal.

Comment: CCWC stated, regarding appearances, that "the injured worker **MUST** face consequences for failure to appear at the Mandatory Settlement Conference[.]"

Response: The rules do allow for consequences for failure to appear. Moreover, we note that the intent of the rule is to prohibit a failure to appear at the mandatory settlement conference itself resulting in dismissal of the case. It is not intended to prohibit a WCJ from ordering an applicant to personally appear at a future hearing, on pain of dismissal.

26. Proposed New Rule 10755: Failure to Appear at Mandatory Settlement Conference in Case in Chief.

Comment: CWCI suggested adding hyphens to "case in chief" and adding language to proposed new rule 10755 to allow for the payment of attorney's fees, costs and sanctions for a failure to appear.

Response: As discussed below, we have elected not to hyphenate "case in chief." The proposed language is unnecessary because attorney's fees, costs and sanctions are always available under Labor Code section 5813 for bad-faith actions or tactics.

27. Proposed New Rule 10756: Failure to Appear at Trial in Case in Chief.

Comment: CWCI suggested adding hyphens to "case in chief" and adding language to proposed new rule 10756 to allow for the payment of attorney's fees, costs and sanctions for a failure to appear.

Response: As discussed below, we have elected not to hyphenate "case in chief." The proposed language is unnecessary because attorney's fees, costs and sanctions are always available under Labor Code section 5813 for bad-faith actions or tactics.

28. Proposed New Rule 10782: Expedited Hearings.

Comment: Regarding deleted subdivision (a)(6), CLA suggested adding and specifying the issues described in Administrative Director rule 31.1 as appropriate for an expedited hearing.

Response: The rules of the Administrative Director are not within the jurisdiction of the Appeals Board. Our statutory mandate only extends to the pertinent sections of the Labor Code.

29. Proposed New Rule 10786: Determination of Medical-Legal Expense Dispute.

Comment: CWCI conveyed that our rationale for adoption of the changes to proposed new rule 10786 is “simply wrong-headed” and that the real problem with the determination of medical-legal disputes is that medical-legal providers submit improper bills and then take advantage of defendants’ failure to comply with Labor Code section 4622 to seek attorney’s fees and costs out of proportion with that failure. It appears that CWCI believes that sanctions should not be available for a defendant’s failure to comply with the statute.

Response: While we appreciate CWCI’s input, we disagree that our approach is “simply wrong-headed.” If CWCI’s members do not wish to be sanctioned or assessed attorney’s fees for bad-faith failure to comply with statutory requirements, we recommend that they not engage in such behavior. We emphasize that sanctions are always available under Labor Code section 5813 for bad-faith actions or tactics, regardless of whether a rule specifically mentions attorney’s fees and sanctions. Here, the proposed new rule merely sets a floor of \$500 for bad-faith violation of the relevant Labor Code sections; removing the proposed new rule would not remove the availability of sanctions under Labor Code section 5813.

Comment: Honor System Consulting (HSC) suggested that rule 10786, subdivision (c) be changed to require the WCJ to set the matter for a mandatory settlement conference, rather than giving the WCJ discretion regarding which type of hearing to set.

Response: We disagree with this proposal. We believe the best approach is to give the WCJ discretion to set the type of hearing most appropriate, after review of the petition and Declaration of Readiness to Proceed.

Comment: HSC objected to the omission in proposed new rule 10786 of the list of bad-faith actions or tactics that existed in prior rule 10451.1. HSC also noted that proposed rule 10786 does not state that a medical-legal provider need not file a lien to have the dispute heard before the WCAB. HSC also suggested a new term for medical-legal providers.

Response: We have removed the examples of bad-faith actions and tactics previously listed in the rule because the standards for the application of sanctions are already found within Labor Code section 5813 and rule 10421. Although we recognize that some practitioners found the examples listed in the previous rule useful, we believe it is important that all sanctions be adjudicated based upon the same standards. In practice, we found that the articulation of particular examples in the prior rule created the erroneous impression among many practitioners that special standards govern the issuance of sanctions in this area.

The language noting that a medical-legal provider does not need to file a lien was removed because it is unnecessary and potentially confusing. Medical-legal providers are not lien claimants and therefore by definition do not need to file a lien.

We believe it is preferable to retain the term “medical-legal provider” that appears in the statute, rather than coin a new term. Any comments relating to forms should be directed to the Administrative Director.

Comment: Mr. Webber expressed general concerns that some of the proposed rules could have a negative impact, and suggested that a “sweeping rewrite of the rules” could result in as much as \$100 million of additional costs, which is “just too large a risk to take.” Specifically, Mr. Webber suggested that the proposed changes to current rule 10451.1, proposed new rule 10786, “provide more focus on pathways for dispute and friction versus driving toward resolution.”

Response: We appreciate the concerns articulated, but we disagree that reorganization of the rules is “too large a risk to take,” or that it will result in \$100 million of additional costs. Proposed new rule 10786 exists to clarify procedures for resolving disputes between the parties over payment of medical-legal services. We certainly agree that such disputes should be avoided where possible. However, where the parties have a dispute that cannot be resolved without WCAB intervention, it is preferable that the rule be easy to read and apply. We do not think the changes made to proposed new rule 10786 promote disputes.

Comment: CCWC suggested that “segments of the medical legal provider community have exploited the provisions for costs and sanctions” in current rule 10451.1, proposed new rule 10786, to “create absurd controversies over minimal amounts of monies that may be due[.]” CCWC provides an example, which involves a defendant failing to follow Labor Code section 4622 and the rule over a \$75 dispute, and then being found liable for \$2,000 of attorney’s fees. CCWC believes the best way to address this situation is to abolish sanctions for non-compliance with the statute. Mr. Allweiss, who testified on behalf of CCWC at the public hearing, emphasized these concerns.

Response: We do not agree with CCWC’s suggestion. CCWC’s example involves the defendant failing to comply with the statute – implicitly without excuse, or else sanctions would not be appropriate in any case. The best way to avoid the imposition of sanctions for bad-faith actions and tactics is not to engage in bad-faith actions and tactics in the first place. We do not believe it wise to remove the possibility of sanctions for such non-compliance. Moreover, we note that sanctions are always available under Labor Code section 5813 for bad-faith actions or tactics, regardless of whether a rule specifically mentions that availability. Here, the proposed new rule merely sets a floor of \$500 for bad-faith violation of the relevant Labor Code sections; removing the proposed new rule would not remove the availability of sanctions.

Comment: Brett Freeburg, who testified at the public hearing on behalf of Med-Legal Xchange, stated that, after implementation of 10451.1, progress has been made in adjudicating medical-legal disputes, and urged us to “stay the course” and not upset the balance achieved by that regulation. Mr. Freeburg also stated that defendants are also guilty of using bad-faith objections to deny medical-legal claims, responding to comments by prior speakers suggesting that medical-legal providers were submitting bills in bad faith. Mr. Freeburg also made a number of suggestions regarding what should be required in the Explanation of Review (EOR) when a medical-legal bill is denied by a claims administrator.

Response: The changes made in proposed new rule 10786 are largely non-substantive, and we do not anticipate they will meaningfully alter the adjudication of these disputes.

What must appear in an EOR is defined by Labor Code section 4603.3, and therefore a matter for the Legislature to consider.

Comment: Ms. Kammerer requested that we “keep” current rule 10451.1.

Response: The changes made in proposed new rule 10786 are largely non-substantive, and we do not anticipate they will meaningfully alter the adjudication of these disputes.

Comment: Gabriela Ruiz, who testified at the public hearing on behalf of Med-Legal, LLC, expressed concern that the amendments to prior rule 10451.1, proposed new rule 10786, will result in increased litigation and lead to unintended consequences.

Response: The changes made in proposed new rule 10786 are largely non-substantive, and we do not anticipate they will meaningfully alter the adjudication of these disputes. To the extent that the comment is motivated by concern over the removal of the specific examples of bad-faith actions and tactics, we emphasize that the removal of these provisions should not be read as an endorsement of such behavior. Sanctions are always available under Labor Code section 5813 and rule 10421.

Comment: Zenith requested that subdivision (i)(1) of proposed new rule 10786 limit the application of sanctions for bad-faith actions to not apply when the medical-legal provider is unable to establish that the bill is a medical-legal expense.

Response: We disagree that the proposed language is advisable. The failure to establish that a bill is for medical-legal services certainly prevents recovery under the statute, and might itself constitute grounds for sanctions against the alleged “provider,” if the failure was based upon bad-faith actions or tactics, as the comment appears to hypothesize. However, assuming the defendant engaged in bad-faith actions and tactics in handling the claim, the defendant should not necessarily escape liability for its own bad-faith actions and tactics by pointing to the bad actions of the provider. We believe the WCJ is best placed to evaluate whether sanctions are warranted in such a situation, depending on the facts of the particular controversy.

30. Proposed New Rule 10788: Petition for Automatic Reassignment of Trial or Expedited Hearing to Another Workers’ Compensation Judge.

Comment: CWCI expressed opposition to allowing lien claimants a right to reassignment of a lien trial where the claimant has already exercised the right of reassignment in the case in chief. CWCI suggests there is no justification for allowing a lien claimant 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.”

Response: CWCI’s rationale regarding the disruption of a judicial assignment is not dependent on whether the applicant has exercised a right of reassignment, and would logically lead to elimination of the right of a lien claimant to automatic reassignment altogether. Although we understand CWCI’s

point of view, we do not believe there is a compelling reason to take such a step at this time. Assuming that lien claimants should retain some right to automatic reassignment, we can see no reason to condition that right on whether the applicant has exercised the option previously.

31. Proposed New Rule 10789: Walk-Through Documents.

Comment: CWCI expressed opposition to proposed new rule 10789, which allows Petitions for Costs to be presented as walk-through documents, and suggested changes to proposed new rule 10545 related to Petitions for Costs.

Comment: Zenith also raised a number of concerns related to proposed new rules 10545 and 10789 allowing Petitions for Costs to be processed as walk-through documents. In particular, Zenith requested clarification on the interplay of proposed new rule 10545(g) and proposed new rule 10832, and suggested either eliminating the provision allowing Petitions for Costs to be processed as walk-throughs, or excluding Petitions for Costs relating to partially paid interpreter bills.

Response: To respond to Zenith’s particular question about the interplay of proposed new rule 10545(g) and proposed new rule 10832(b), proposed new rule 10832(b) does not independently authorize so-called “self-destruct” notices of intention. In the interest of clarity, we have removed this language from subdivision (b) and have added a new subdivision (e) to proposed new rule 10832, clarifying that so-called “self-destruct” notices of intention must be served by the Workers’ Compensation Appeals Board, not through designated service. Proposed new rule 10545(g) therefore governs how a workers’ compensation judge may act upon a Petition for Costs.

On the more general issue of Petitions for Costs on a walk-through basis, we recognize that not all Petitions for Costs will be amenable to resolution on a walk-through basis. In such circumstances, the WCJ may decline to act on the petition on a walk-through basis or accept it for later view and action, as with any other walk-through document. No due process protections have been removed. We note that the rule does not mandate processing petitions for costs as walk-throughs, and that WCJs always retain discretion to refuse to handle a given petition on a walk-through basis. The intent of the rule is to open the possibility of processing these petitions on a walk-through basis in those circumstances where it makes sense to do so, not to mandate any particular approach. We remain open to the possibility of revisiting the rule in future if the proposed change proves unduly burdensome.

32. Proposed New Rule 10790: Interpreters.

Comment: CCWC recommended that language be retained in proposed new rule 10790, regarding interpreter fees. Similarly, CWCI suggests language in proposed new rule 10790 specifying that only interpreter’s fees that are reasonably, actually and necessarily incurred shall be allowed.

Response: We do not believe the suggested language is required, although we certainly agree that only fees that are reasonably, actually and necessarily incurred are compensable.

33. Proposed New Rule 10807: Inspection of Workers’ Compensation Appeals Board Records.

Comment: CLA suggested replacing “Appeals Board” with “Workers’ Compensation Appeals Board” in subdivision (c) of proposed new rule 10807.

Response: In this case, the term “Appeals Board” is correct, not “Workers’ Compensation Appeals Board.” Only the presiding workers’ compensation judge, their designee, or the Appeals Board – “the commissioners and deputy commissioners of the Workers’ Compensation Appeals Board acting en banc, in panels or individually” – may order inspection of adjudication case files. This is not a power that the Appeals Board intends to delegate to all workers’ compensation judges.

34. Proposed New Rule 10811: Destruction of Records.

Comment: CLA suggested replacing “Appeals Board” with “Workers’ Compensation Appeals Board” for document consistency.

Response: In this case, the term “Appeals Board” is correct, not “Workers’ Compensation Appeals Board.” The rule requires that adjudication files be retained, returned, and destroyed as provided by rule 10208.7, unless otherwise ordered by either a WCJ or the Appeals Board – “the commissioners and deputy commissioners of the Workers’ Compensation Appeals Board acting en banc, in panels or individually.”

35. Proposed New Rule 10813: Sealed Documents.

Comment: CLA suggests replacing “Appeals Board” with “Workers’ Compensation Appeals Board” in subdivisions (a), (b), (b)(4), (c), (d), and (f) of proposed new rule 10813.

Response: Our use of “Appeals Board” throughout proposed new rule 10813 was intentional. We use this term specifically to convey that the sealing of documents may only be ordered by the presiding workers’ compensation judge, their designee, or the Appeals Board – meaning “the commissioners and deputy commissioners of the Workers’ Compensation Appeals Board acting en banc, in panels or individually” – and not by WCJs in general. As we noted in our ISOR, “[l]anguage has been added ... empowering the presiding workers’ compensation judge or their designee, rather than all WCJs, to make the determination on whether to seal documents.”

36. Proposed New Rule 10832: Notices of Intention and Orders after Notices of Intention.

Comment: CWCI objected to the language in proposed new rule 10832 allowing a WCJ, upon receipt of an objection to a notice of intention, to issue an order consistent with the notice of intention together with an opinion on decision, rather than setting the matter for a hearing. CWCI suggested that due process requires a hearing.

Comment: CCWC expressed concern with the ability of a WCJ to issue an order after an objection to a notice of intention, arguing that due process requires a hearing.

Response: We disagree with this point of view. The opportunity to file an objection, combined with the opinion on decision, provides due process and the opportunity to be heard. To be sure, in

most cases, when an objection to a notice of intention is filed, the best course of action will be to set a hearing. However, in circumstances where the objection is invalid on its face, or where issuance of the contemplated order is appropriate even when taking everything in the objection as true, it makes little sense to mandate a hearing.

37. Proposed New Rule 10862: Filing and Service of Lien Claims and Supporting Documents.

Comment: At the public hearing, Gabriela Ruiz testified on behalf of Med-Legal, LLC. Ms. Ruiz requested clarification as to the requirement to serve amended liens under proposed new rule 10862.

Response: We are not sure to what precisely Ms. Ruiz is referring. Proposed new rule 10862 does not relate to when an amended lien must be filed; it merely states that *if* an amended lien is filed, it must be served in the same manner as the original lien, with the same documents attached.

38. Proposed New Rule 10872: Notification of Resolution or Withdrawal of Lien Claims.

Comment: Ms. Ruiz suggested that proposed new rule 10872 should not require lien claimants to obtain leave not to appear at a scheduled hearing if the lien is resolved prior to the hearing.

Response: Proposed new rule 10872 only requires a lien claimant to appear if they have not obtained leave from the WCJ. Such leave is routinely granted, but seeking leave is critical to the WCJ's ability to manage the lien calendar.

39. Proposed New Rule 10873: Lien Claimant Declarations of Readiness to Proceed.

Comment: CWCI suggested hyphenation of "case in chief" in proposed new rule 10873.

Response: The WCAB has elected not to hyphenate "case in chief."

40. Proposed New Rule 10875: Lien Conferences.

Comment: CWCI suggested that the language in proposed new rule 10875 stating that "any violation of the provision of this rule may give rise to monetary sanctions, attorney's fees, and costs under Labor Code section 5813 and rule 10421" is "unusually broad" and "will create new incentive for manipulation and abuse."

Response: The language in question is permissive, not mandatory, and is not intended to suggest that any violation of the rule constitutes per se bad-faith actions or tactics subject to sanctions.

41. Proposed New Rule 10880: Lien Trials.

Comment: CWCI suggested that the language in proposed new rule 10880 stating that "any violation of the provision of this rule may give rise to monetary sanctions, attorney's fees, and costs under Labor Code section 5813 and proposed new rule 10421" is "unusually broad" and "will create new incentive for manipulation and abuse."

Response: The language in question is permissive, not mandatory, and is not intended to suggest that any violation of the rule constitutes per se bad-faith actions or tactics subject to sanctions.

42. Proposed New Rule 10888: Dismissal of Lien Claims.

Comment: CWCI suggested that subdivision (d) of proposed new rule 10888, relating to dismissal of lien claims, unfairly treats lien claimants differently from other parties by only allowing dismissal when the particular rule they have violated authorizes dismissal.

Response: We believe CWCI is misreading the subdivision. Subdivision (a) outlines the three bases to dismiss a lien: for failure to prosecute, for non-appearance, or for failure to comply with the Labor Code or these rules. Subdivision (c) simply makes clear that rule 10888 itself does not provide blanket approval to dismiss for failure to comply with any provision of the Labor Code or our rules, no matter how trivial. If a lien is to be dismissed for failure to comply with the Labor Code or our rules, it must be because such dismissal is warranted under the statute or rule that has been violated. In this respect, lien claimants stand in the same shoes as any other party.

43. Current Rule 10888: Resolution of Liens. (Proposed Repeal)

Comment: Mr. Webber expressed opposition to the proposed repeal of current rule 10888, suggesting that the provision should instead be strengthened to require greater efforts to settle liens along with the case in chief.

Response: We do not believe strengthening the requirement to consult with lien holders prior to settlement is necessary or wise. Although we encourage the parties to work proactively to settle liens, the resolution of lien claims should not hold up approval of a resolution of the case in chief, absent a particular reason or concern. We note that pursuant to proposed new rule 10702, lien claimants must be served with a copy of any Compromise & Release or Stipulations with Request for Award, and we encourage the parties to engage with one another on a voluntary basis to resolve lien claims.

44. Proposed New Rule 10914: Record of Arbitration Proceeding.

Comment: CLA suggested replacing “Appeals Board” with “Workers’ Compensation Appeals Board” in subdivision (d) of proposed new rule 10914 for document consistency.

Response: Our use of “Appeals Board” here was purposeful. We use this term specifically to convey that the arbitrator must file any finding, order, or award together with their opinion on decision with the Appeals Board – meaning “the commissioners and deputy commissioners of the Workers’ Compensation Appeals Board acting en banc, in panels or individually” – and not with the broader Workers’ Compensation Appeals Board.

45. Proposed New Rule 10940: Filing and Service of Petitions for Reconsideration, Removal, Disqualification and Answers.

Comment: CWCI asked that proposed new rule 10940 not eliminate the ability to file petitions for reconsideration, removal or disqualification at any district office, rather than only the district office where the case is venued.

Comment: CCWC asked that we retain the ability of parties to file petitions for reconsideration, removal and disqualification at any district office.

Response: We appreciate that the ability to file these petitions in any district office is convenient to some members of the workers' compensation community. However, the same is true for the filing of any document in any case. To the extent that the members of CCWC and CWCI value not having to travel to the district office having venue in order to file case documents, we suggest that CCWC and CWCI encourage these members to become e-filers. Unfortunately, the provision of the prior rules allowing filing of these petitions at any district office has created problems in the past, and we must discontinue it to avoid such problems in the future.

46. Proposed New Rule 10945: Required Contents of Petitions for Reconsideration, Removal, and Disqualification and Answers.

Comment: CWCI suggested adding language to proposed new rule 10945 making clear that documents not in the adjudicatory file may only be attached to a petition for reconsideration on the grounds of newly discovered evidence when those documents actually relate to the claim of newly discovered evidence.

Response: We believe this is fairly implied from the proposed language.

47. Proposed New Rule 10955: Petitions for Removal and Answers.

Comment: CCWC asked that we retain the ability of parties to file petitions for reconsideration, removal and disqualification at any district office.

Response: We appreciate that the ability to file these petitions in any district office is convenient to some members of the workers' compensation community. However, the same is true for the filing of any document in any case. To the extent that CCWC's members value not having to travel to the district office having venue in order to file case documents, we suggest that CCWC encourage these members to become e-filers. Unfortunately, the provision of the prior rules allowing filing of these petitions at any district office has created problems in the past, and we must discontinue it to avoid such problems in future.

48. Proposed New Rule 10995: Reconsideration of Arbitrator's Decisions or Awards Made Pursuant to the Mandatory or Voluntary Arbitration Provisions of Labor Code Sections 5270 through 5275.

Comment: CWCI suggested allowing petitions for reconsideration of an arbitrator's order to be filed at any district office, not only the office with venue over the case.

Response: We appreciate that the ability to file these petitions in any district office is convenient to some members of the workers' compensation community. However, the same is true for the filing of any document in any case. To the extent that CWCI's members value not having to travel to the district office having venue in order to file case documents, we suggest that CWCI encourage these members to become e-filers. Unfortunately, the provision of the prior rule allowing filing of these petitions at any district office has created problems in the past, and we must discontinue it to avoid such problems in the future.

B. Changes to Proposed Rules Based on Oral and Written Comments

1. Sections Amended: Subdivisions (a), (g), and (p) of Proposed New Rule 10305 (definitions of Administrative Director and Director, and new definition of presiding workers' compensation judge)

Comment: CWCI suggested changing "their designee" in proposed new rule 10305(a) to "the Administrative Director's designee."

Response: The WCAB has elected to make a minor, non-substantive modification to subdivisions (a) and (g) of proposed new rule 10305, i.e., the phrase "their designee" has been changed to "a designee" in both subdivisions, which the WCAB believes accomplishes the same objective with greater economy.

Additionally, after careful consideration, the WCAB has elected to add a definition of "presiding workers' compensation judge" clarifying that, for purposes of our rules, all references to "presiding workers' compensation judge" include workers' compensation judges who have been designated to perform the functions of a presiding workers' compensation judge. In light of this new definition, all references to a presiding workers' compensation judge's designee have been removed throughout the rules.

2. Section Amended: Proposed New Rule 10320 ("Appeals Board Decisions and Orders.")

Comment: CLA noted that subdivision (a) refers to rule 10861, which does not exist.

Response: The WCAB agrees, and has corrected this in the final rules.

3. Section Amended: Proposed New Rule 10325 ("En Banc and Significant Panel Decisions.")

Comment: CCWC noted that the definition in proposed new rule 10305 states that "all" members of the Appeals Board have designated the decision as significant, but proposed new rule 10325 provides for designation based upon a majority vote of the Commissioners.

Response: The WCAB agrees that the reference to a majority vote contained in proposed new rule 10325 is incorrect, and has elected to remove the second sentence of subdivision (b) of this rule in the final rules.

4. Section Amended: Proposed New Rule 10465 (“Answers.”)

Comment: CLA pointed out that Labor Code section 5505 specifies that a party “may file an answer based upon disagreement with some aspect of the application,” and argues that the proposed language – “shall be filed” – appears arguably to require an answer in all cases.

Comment: CWCI suggested changing some language in proposed new rule 10465 to make clear that an answer is not required in all cases, as provided by Labor Code section 5505.

Response: The language to which these comments refer is: “An answer to each Application for Adjudication of Claim shall be filed and served no later than the shorter of either: 10 days after service of a Declaration of Readiness to Proceed, or 90 days after service of the Application for Adjudication of Claim.” The plain meaning of this language is not to require an answer in all cases; it is to require that if a defendant does wish to file an answer, the defendant must file and serve that answer within the proscribed time frame. This mirrors the statutory language from Labor Code section 5505, which states, in pertinent part, “A copy of the answer *shall* be forthwith served upon all adverse parties.” (Emphasis added.)

Nonetheless, after careful consideration and out of an overabundance of caution, the WCAB has elected to revise the wording of the prefatory language of proposed new rule 10465 to clarify that we are not requiring an answer in all cases.

5. Section Amended: Proposed New Rule 10470 (“Labor Code Section 4906(h) Statement.”)

Comment: CWCI suggested changing some language in proposed new rule 10470, regarding compliance with the Labor Code section 4906(h) statement. CLA asked whether subdivision (a) of this rule was necessary, as compliance with all sections of the Labor Code is inherently required, and suggested beginning proposed new rule 10470 with subdivision (b).

Response: The WCAB has elected to maintain the language regarding compliance with all sections of the Labor Code to continue to provide additional guidance to practitioners. However, in the interest of clarifying the language of the rule and making it easier to read and understand, we have revised the final subdivision, incorporating a number of the changes suggested by CWCI. Additionally, we will combine subdivisions (a) and (b) and renumber subdivision (c) as (b).

6. Section Amended: Proposed New Rule 10500 (“Form Pleadings.”)

Comment: CWCI suggested breaking the last sentence of proposed new rule 10500(c)(2) into a new subdivision (d), and deleting the reference to hard copy.

Response: The WCAB agrees, and has revised the final rule so that the last sentence of subdivision (c)(2) is now a standalone subdivision (d).

7. Section Amended: Proposed New Rule 10540 (“Petition to Terminate Liability for Continuing Temporary Disability.”)

Comment: CWCI suggested changing the language of proposed new rule 10540 regarding when a petition to terminate liability for temporary total disability must be filed vis-à-vis the termination of benefits.

Comment: CCWC objected to proposed new rule 10540, governing petitions to terminate liability for temporary disability.

Response: After careful consideration, the WCAB has elected to redraft subdivision (a) of proposed new rule 10540 to state what shall be included in a petition to terminate liability for temporary total disability, without reference to when such a petition must be filed. The presumptions in the statute speak for themselves.

8. Section Amended: Proposed New Rule 10547 (“Petition for Labor Code Section 5710 Attorney’s Fees.”)

Comment: CWCI suggested changing the language of proposed new rule 10547 to require specific pleading, and to eliminate (d)(4) as unnecessary.

Comment: CCWC suggested that sanctions should be available under proposed new rule 10547 if the applicant’s attorney files a premature petition, to mirror the availability of sanctions for failure to pay under subdivision (g).

Response: The WCAB agrees that subdivision (d)(4) of proposed new rule 10547 is unnecessary because verification is already mentioned in subdivision (c); we have made this change in the final rules. Additionally, the WCAB notes that subdivision (g) of proposed new rule 10547, which references petitions for costs, was erroneously included and will be deleted from the final rule. However, we note that sanctions are always available under Labor Code section 5813 for bad-faith actions or tactics, regardless of whether a rule specifically mentions that availability.

9. Section Amended: Proposed New Rule 10555 (“Petition for Credit.”)

Comment: CWCI expressed concern over proposed new rule 10555 regarding petitions for credit, and the prohibition on taking a credit unless ordered or awarded by the WCAB.

Comment: CLA proposed adding language to comport with caselaw precluding an employer from unilaterally asserting a credit only when the credit will be insufficient to cover the full amount of the compensation due, and suggested adding a subdivision providing a path to sanctions where an injured worker fails to timely provide the third-party settlement or judgment document.

Comment: At the public hearing, Matthew O’Shea testified on behalf of Albertsons/Safeway and expressed concern with proposed new rule 10555.

Comment: State Compensation Insurance Fund (SCIF) suggested a number of detailed changes to proposed new rule 10555, governing petitions for credit.

Response: After careful consideration, the WCAB has elected to redraft proposed new rule 10555 to address the concerns raised by commenters, to place the emphasis on what must be included in a petition for credit when a dispute arises as to the credit rights of a party. In addition, we have added subdivision (c) to make clear that a WCJ may order production of a settlement document, to the extent that such production is required in order to determine whether a credit is owed under Labor Code section 3861.

10. Section Amended: Proposed New Rule 10565 (“Petition Appealing Denial of Return-to-Work Supplement.”)

Comment: CLA pointed out that the internal cross-references to new rule numbers in subdivision (b) were listed in reverse numerical order, and suggested changing the order.

Response: The WCAB agrees, and has changed the final rule accordingly.

11. Section Amended: Proposed New Rule 10567 (“Petition Appealing Independent Bill Review Determination.”)

Comment: CLA suggested deleting the word “workers” in subdivision (d) as an apparent typographical error.

Response: The WCAB agrees, and has changed the final rule accordingly.

12. Section Amended: Proposed New Rule 10570 (“Petition to Enforce an Administrative Director Determination.”)

Comment: CLA suggested adding the word “the” in subdivision (b) to correct an apparent word omission typographical error.

Response: The WCAB agrees, and has changed the final rule accordingly.

13. Section Amended: Proposed New Rule 10575 (“Petition Appealing Independent Medical Review Determination.”)

Comment: CLA suggested adding the word “the” in subdivision (e) to correct an apparent word omission typographical error.

Response: The WCAB agrees, and has changed the final rule accordingly.

14. Section Amended: Proposed New Rule 10580 (“Petition Appealing Medical Provider Network Determination of the Administrative Director.”)

Comment: Regarding subdivision (l) of proposed new rule 10580, CLA recommends deleting references to a “similar” or “future” regulation or statute because these references are vague.

Response: The WCAB agrees, and has changed the final rule accordingly.

15. Section Amended: Proposed New Rule 10625 (“Service.”)

Comment: Regarding subdivision (c) of proposed new rule 10625, CLA noted, “The specific proofs of service for email service and fax service set forth in the current rule 10505 are not included and this more generic version is apparently intended to cover all forms of service[,]” and suggested requiring that the proof of service also include the form of service used for each person or entity served. CLA also suggested non-substantive language changes.

Response: The WCAB agrees, and has elected to include a requirement that the proof of service reflect the form of service used for each person or entity served. The WCAB has also changed the verb form from the present participle (not the passive voice) to the third-person singular present, as suggested by CLA, to parallel the first clause of the sentence in question.

16. Section Amended: Proposed New Rule 10629 (“Designated Service.”)

Comment: After careful consideration, the WCAB has elected to add a subdivision to the final version of proposed new rule 10629 directing the WCJ to specify upon whom an order must be served when service is designated. We believe this will address some of the concerns regarding determination of who must be served with an order. We note this does not require the WCJ to list each party by name; for example, a WSJ might specify “applicant and defendant only,” or “all parties except lien claimants,” or “all parties in the OAR.” The WCAB has also corrected an erroneous internal cross-reference in subdivision (c) of proposed new rule 10629.

17. Section Amended: Proposed New Rule 10650 (“Subpoena for Medical Witness.”)

Comment: CLA suggested a grammatical change, replacing “less” with “fewer.”

Response: The WCAB agrees, and has changed the final rule accordingly.

18. Section Amended: Proposed New Rule 10682 (“Physicians’ Reports as Evidence.”)

Comment: In subdivision (c) of proposed new rule 10682, CLA suggested replacing “Appeals Board” with “Workers’ Compensation Appeals Board” for document consistency.

Response: The WCAB agrees, and has changed the final rule accordingly.

19. Section Amended: Proposed New Rule 10683 (“Specific Finding of Fact--Labor Code Section 139.2(d)(2).”)

Comment: We received a comment from Winslow West requesting we not repeal rule 10631, because it is useful in proceedings related to QME licensing.

Response: Based upon this request, we will retain the rule, with minor, non-substantive changes for clarity. Additionally, the rule will be renumbered as 10683.

20. Section Amended: Proposed New Rule 10752 (“Appearances Required.”)

Comment: CWCI noted that the phrase “case in chief” is sometimes hyphenated and sometimes not.

Response: The WCAB has elected to remove the hyphens from the phrase “case in chief” throughout the rules. We appreciate the matter being brought to our attention.

21. Section Amended: Proposed New Rule 10786 (“Determination of Medical-Legal Expense Dispute.”)

Comment: HSC and Zenith both noted that subdivision (a) of proposed new rule 10786 should have language added to make clear it applies to denials of all or a portion of a medical-legal provider’s billing. HSC also noted that subdivision (b) should have language added requiring both a petition and a Declaration of Readiness, while Zenith noted that subdivision (f) should also have that same language.

Response: We agree these words were inadvertently left out of subdivisions (a), (b), and (f) of proposed new rule 10786, and have added them to the final rule. We appreciate these omissions being brought to our attention.

22. Section Amended: Proposed New Rule 10813 (“Sealed Documents.”)

Comment: Regarding subdivision (a) of proposed new rule 10813, CLA suggested replacing the word “wellbeing” with the hyphenated “well-being.” Regarding subdivision (e)(1) of proposed new rule 10813, CLA proposed redrafting to eliminate the use of the passive voice and improve clarity.

Response: The WCAB agrees, and has changed the final rule accordingly.

23. Section Amended: Proposed New Rule 10818 (“Recording of Proceedings.”)

Comment: Regarding subdivision (b) of proposed new rule 10818, CLA suggested replacing “between” with “among” to correct grammar. Regarding subdivision (c)(6)(A) of proposed new rule 10818, CLA suggested replacing “which” with “that” to correct grammar. Regarding subdivision (d), CLA suggested adding the word “and” for clarification.

Response: The WCAB agrees, and has changed the final rule accordingly.

24. Section Amended: Proposed New Rule 10832 (“Notices of Intention and Orders after Notices of Intention.”)

Comment: We noted in our ISOR that proposed new rule 10832 would “clarify that only the WCAB may serve a notice of intention that is in the form of an order with a clause rendering the order null and void if an objection is filed within a certain time period (so-called “self-destruct” notices of intention).” After careful consideration, the WCAB has elected to make changes to the text of proposed new rule 10832 to make more explicit that designated service of “self-destruct” notices of

intention will no longer be permitted; instead, only the Workers' Compensation Appeals Board may serve "self-destruct" notices of intention.

25. Section Amended: Proposed New Rule 10872 ("Notification of Resolution or Withdrawal of Lien Claims.")

Comment: The WCAB has elected to correct a typographical error by removing a comma in subdivision (c) of proposed new rule 10872.

26. Section Amended: Proposed New Rule 10873 ("Lien Claimant Declarations of Readiness to Proceed.")

Comment: The WCAB has elected to correct a typographical error by removing the word "directly" from the first line of subdivision (b) of proposed new rule 10873.

27. Section Amended: Proposed New Rule 10888 ("Dismissal of Lien Claims.")

Comment: CLA pointed out that the words "to proceed" are written twice in subdivision (b) of proposed new rule 10888, and recommended that the second instance be removed.

Response: The WCAB agrees, and has changed the final rule accordingly.

28. Section Amended: Proposed New Rule 10905 ("Voluntary Arbitration.")

Comment: CLA suggested adding the word "an" in the second paragraph before the words "arbitration submittal form" to correct an apparent word omission.

Response: The WCAB agrees, and has changed the final rule accordingly.

29. Section Amended: Proposed New Rule 10920 ("Arbitrator Fee and Cost Disputes.")

Comment: CLA suggested replacing the phrase "appropriate local office" with "district office having venue" in the first paragraph of proposed new rule 10920. CLA also suggested replacing "local office" with "district office" in the fourth paragraph of proposed new rule 10920.

Response: The WCAB agrees, and has changed the final rule accordingly.

30. Section Amended: Proposed New Rule 10990 ("Reconsideration of Arbitration Decisions Made Pursuant to Labor Code Sections 3201.5 and 3201.7.")

Comment: After careful consideration, the WCAB has elected to change the word "caption" in subdivision (c)(1) of proposed new rule 10990 to "include" to correct unclear wording.

31. Section Repealed: Current Rule 10302 ("Working Titles of Workers' Compensation Administrative Law Judges and Presiding Workers' Compensation Administrative Law Judges.")

Comment: We received a comment from Aderant noting that the proposed amendments include a new rule 10302 (Rulemaking Notice) but do not indicate whether current rule 10302 (Working Titles of Workers' Compensation Administrative Law Judges and Presiding Workers' Compensation Administrative Law Judges) has been repealed or renumbered.

Response: The WCAB agrees, and has corrected this in the final rules. We appreciate this omission being brought to our attention.