WORKERS' COMPENSATION SECTION

THE STATE BAR OF CALIFORNIA

To: Workers' Compensation Appeals Board (WCAB)

From: The Executive Committee of the Workers' Compensation Section of the State Bar of California

RE: Rules of Practice and Procedure –
Article 4 Section 10485 through Article 12 Section 10615
WCAB Forum comment period June 9, 2015 to July 10, 2015

The Executive Committee of the Workers' Compensation Section of the State Bar of California ("Committee"), consisting of a balanced group of attorneys for Applicants, attorneys for Defendants, and Workers' Compensation Judges, respectfully submits the following comments.

1. **Proposed Rule 10529 requires that parties submit all proposed exhibits 20 days prior to a trial or an expedited hearing.**

It is the Committee's collective opinion that this rule is overly burdensome on the WCAB and the parties. The parties routinely submit voluminous amounts of documents prior to trial. The Judge will then reduce that volume based on relevancy, duplication and necessity. To have the parties submit all of the proposed exhibits prior to trial will be unnecessary as numerous documents will be entered into the system that will never be submitted into evidence. Further the WCAB does not have sufficient staff to scan in all of the exhibits that will be submitted, especially since the scanning will need to be done in a very short timeframe so it is ready for trial.

Finally, this rule may result in the denial of due process. If an attorney fails to file a report on time and that report is necessary for the party's case, exclusion of that report would result in an inequitable result.

It is the Committee's opinion that this rule should be stricken.

2. **Proposed Rule 10600(b)(3) proposes that any exhibits not submitted 20 days before trial may be excluded by the WCAB.**

It is the Committee's position that the striking of Rule 10529 would also result in the striking of Rule 10600(b)(3), for the same reasons as stated above.

3. **Proposed Rule <u>10535(c)</u> requires that within 10 days from the date on which designated service is ordered, the person designated to make the service shall serve the document and file the proof of service with the WCAB.**

Most offices would have to enter more than a thousand extra documents per month. A five judge office that has 50 calendared cases and walk-throughs per judge per week would exceed 1000 such documents, and this does not cover the other documents we send out with designated service. The Committee would stress that it is a burden that affects all district offices, not just the larger ones.

The offices do a significant number of hearings every month. The Judge always designates a party to serve the minutes of hearing. Just the filing of the Proof of Service alone would result in a huge increase in filings that the district offices do not have adequate staff to process. This would also increase processing times for other necessary documents and put the offices significantly behind on processing backlog.

However, the Committee is aware that there are certain documents that must be served on the WCAB because further action is necessary by the Judge. Therefore the following language is proposed:

> ***10535(c): For those documents in which a Judge must have evidence of service to issue a final or subsequent order, the person designated to make such service shall serve the document and file the proof of service at the WCAB district office having venue or in EAMS, within 10 days from the date on which designated service is ordered.***

4. **Proposed Rule <u>10606(a)</u>: Line 3 states: "accurate or unreliable".**

   We believe this is a typo and should state "inaccurate or unreliable".

5. **Proposed Rule <u>10512</u>: The drafter indicates that in sections (d)(3)(5) and (6) capitalization was to be removed but this was not done in these places.**

Numbering: The Committee has concerns regarding the renumbering of certain sections. The revised rules propose moving and re-numbering the rules on Filing and Serving of Documents. As proposed those rules would be Article 9 and numbered to 10520-10545 with designated service as 10535. Article 8 would become Petitions related to Administrative orders. Currently the WCAB has a significant number of forms both at the district offices and within EAMS that indicate designated service pursuant to Rule 10500.

For example, the WCAB Minutes of Hearing state "Pursuant to Rule 10500, you are designated to serve this/these document(s) on all parties as shown on the Official Address Record". This form as well as many of the other forms regularly utilized by the parties and the WCAB would need to be revised as a result of this renumbering.

The Committee proposes that the rule for designated service remain as Rule 10500 to avoid this problem. To facilitate this change we propose that the section on Filing and Serving of Documents be returned to Article 8 and the Petitions Related to Administrative Orders be moved to article 9.

6. 10540(d)(e)(f):

The Committee recommends the address for service as required be included in the Rule.

DISCLAIMER:

This position is only that of the Workers' Compensation Section of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Workers' Compensation Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

July 13, 2015
Steve Suchil, Assistant Vice-President/Counsel
American Insurance Association, Western Region

Please find below AIA comments pertaining to the proposed WCAB Rules of Practice and Procedure, Article 4, Section 10485, through Article 12, Section 10615, posted on the WCAB Forum.

New Section 10498 – Petition for Credit

The WCAB has proposed a new rule, Section 10498, which provides that a payor must file a Petition for Credit from the WCAB in order to take credit on an overpayment to an injured worker.

If this rule were to be approved as drafted it appears that it will increase WCAB's workload and could be detrimental to an injured worker because claims administrators often underestimate the Average Weekly Wage and Temporary Disability Rate in an effort to not overpay. Further, often it is rare for an employer to provide to an insurer the wage statement by day 14, when the payment is due.

Examples of overpayment situations:

1. It is not unusual for the employer and injured worker to verbally inform a payor that the worker makes $10.00 an hour and works a standard 40 hour week, and TD payments are initiated based on such statements. Later, the payor receives a wage statement and learns that the worker actually averaged closer to 35 hours and AWW/TD rate was overestimated, which has resulted in an overpayment. Subsequently, the payor adjusts the rate – and advises the worker – and they either issue a check for the overpayment, the funds are recouped from PD, or a payor may walk away from the overpayment.

2. MMI reports may be received while TD is being paid, which results in an over-payment in the TD owed which today is credited against the PD owed – or if no PD the payor may issue an overpayment letter to the injured worker.

At present, when overpayments occur the issue is worked out with the injured worker and, if they are represented, their attorney. The only time overpayment matters are sent to the WCAB is when there is a dispute as to whether an overpayment in fact exists – and this is very rare.

Currently, the WCAB has issues with timely approvals for matters such as Petitions for Dismissal, Settlements, etc. A payor may find it necessary to hire defense counsel to go to the WCAB to get action on such issues. If the Petition for Credit rule is adopted it could further overburden the WCAB and increase payor expenses.

We recommend that WCAB reconsider adoption of this regulation due to its potential impact on injured workers, and the increased workload for the WCAB and additional expense to payors.

Thank you for considering our comments on this matter.

July 10, 2015
Anne Marie Rapola, Attorney at Law
Boehm & Associates

Subject: WCAB - Rules of Practice and Procedure - Article 1 -7: Proposed Rules 10545 & 10559

Boehm & Associates submits the following comments regarding Proposed Rule 10545 [which would replace current Board Rules 10601, 10607, 10608, 10615, and 10616] and Proposed Rule 10559:

Proposed rule 10545 is considerably less specific is a number of aspects when compared to the provisions it will replace. While the essential requirements of the replaced board rules may have been distilled into a simpler format with broad implications, we have found in the past that the specific time and event requirements of Board Rule 10608, as well as its clear and mandatory language were invaluable in obtaining compliance from defendants and carriers with regard to medical-legal discovery.

Additionally, we have noted that the provisions of 10608(c) have been eliminated. This subsection of 10608 provided the "reasonable regulations to ensure compliance" with Labor Code Section 4903.6(d),which prohibits the release of medical information to a non-physician lien claimant "without prior written approval of the appeals board." We have not located any other regulation which replaces this portion of 10608 outlining the procedure for release of medical information to non-physician lien claimants, including the form, content, and judicial disposition of a "Petition by Non-Physician Lien Claimant for Medical Information."

In this regard, we also note that the replacement cross-reference for Rule 10608(c) has not yet been provided in proposed regulation 10559 (which will replace 10538 - Subpoenas for Medical Information by Non-Physician Lien Claimants).

Boehm & Associates has represented medical treatment lien claimants (health plans, union trust funds, government entities and private providers) before the WCAB for over 35 years. The due process provisions found in Board Rule 10608 for the disclosure of medical information to lien claimants who are faced with the necessity of litigating their entitlement to recovery clearly delineated the rights and responsibilities of the parties and lien claimants. We are concerned that the less specific distillation of discovery and due process requirements found in proposed Rule 10545 may lead to more discovery disputes, rather than fewer disputes. We are also

concerned that the simple directive "the parties have an ongoing duty to serve" the qualifying lien claimant who has requested service, without benefit of the specific time requirement found in 10608(b)(4) (which provides for service of the requested documents within 10 days of receipt of a lien claimant's request for information) will unnecessarily encourage deferred compliance by defendants and impede lien claimants' ability to prosecute their interests effectively during the pendency of the case-in chief, as established by Beverly Hills Multispecialty Group, Inc. v. WCAB (1994) 26 Cal. App. 4th 789.

We ask that proposed rules 10545 and 10559 (and the rules they would replace) be re-evaluated in light of our comments.

California Workers' Compensation Institute
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July 10, 2015

VIA E-MAIL to WCABRules@dir.ca.gov.

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142-9459

RE: Rules of Practice and Procedure
Article 1-Section 10300 through Article 7Section 10498
Article 4 Section 10485 through Article 12 Section 10615

These comments on modifications to proposed WCAB Rules are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 72% of California's workers' compensation premium, and self-insured employers accounting for 28% of the state's total annual self-insured payroll.

Insurer members of the Institute include ACE, AIG, Alaska National Insurance Company, Allianz (Fireman's Fund Insurance Company), AmTrust North America, Chubb Group, CNA, CompWest Insurance Company, Crum & Forster, Employers, Everest National Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, Pacific Compensation Insurance Company, Preferred Employers Group, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, State Farm Insurance Companies, Travelers, XL America, Zenith Insurance Company, and Zurich North America.

Self-insured employer members are Adventist Health, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Santa Ana, City of Torrance, Contra Costa County Schools Insurance Group, Costco Wholesale, County of Alameda, County of San Bernardino Risk Management, County of Santa Clara, Dignity Health, Foster Farms, Grimmway Enterprises Inc., Kaiser Permanente, Marriott International, Inc., Pacific Gas & Electric Company, Safeway, Inc., Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group; Southern California Edison, Special District Risk Management Authority, Sutter Health, University of California, and The Walt Disney Company.

Section 10352 -- Joinder
Recommendation
After filing of an Application for Adjudication, the Appeals Board or a workers' compensation judge may ***issue a notice of intent to*** order the joinder of additional parties necessary for the full adjudication of the case ***and provide adequate time for any objections to be heard***.

Discussion
The party or parties to be joined should be given adequate time to file an appropriate objection and have that ruled on prior to joinder. It is not unusual for overbroad requests for joinder to be filed and any objections from a prospective party should be determined at the outset.

Section 10455 -- Identification of Parties
Recommendation
The third party administrator ***~~may~~ shall*** be included on the official address record and case caption if identified as such.

Discussion
The third party administrator is the claims administrator and must be included on the official address record to ensure consistent and accurate communication.

Section 10498 -- Petition for Credit
Recommendation
Delete this proposed regulation.

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

Mendoza v WCAB (2010) 75 CCC 634:

> " … no regulation adopted is valid or effective unless consistent and not in conflict with the statute." Therefore, it has been said that "[w]hen a statute confers upon a state agency the authority to adopt regulations…, the agency's regulations must be consistent, not in conflict with the statute" and that "[a] regulation that is inconsistent with the statute it seeks to implement is invalid." No matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes."

There is nothing in section 4909 that supports the proposition that all claimed benefit overpayments must be adjudicated by the appeals board. The Board has no authority to implement proposed section 10498.

The Board's Rationale
This regulation precludes adjusting an overpayment until it is adjudicated by the WCALJ. In Crocker v Warner Bros (2014) (Board Panel Decision), the Panel reaffirmed the authority to allow or disallow a credit for overpayment. In Crocker, the defendant deducted a claimed overpayment from a judicial order awarding benefits. The issue in that case was not whether

the defendant under section 4909 could take a credit for an overpayment, but whether the defendant failed to pay the award correctly. The penalty was based on the failure to pay the benefits as awarded.

The Board Panel cited the settled interpretation of section 4909:

> "The WCJ has discretion to allow credit where the employer has voluntarily made payments. *{Sea-LandService* v. *Workers' Comp. Appeals Bd. {Lopez)* (1996) 14 Cal.4th 76, 86 [61 Cal.Comp.Cases 1360, 1367].) The WCJ generally has discretion to grant or deny credit for overpayments under section 4909 ***when fixing the amount of compensation to be paid***. *{Herrera* v. *Workmen's Comp. App. Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382].)" (Emphasis added.)

Citing the 1983 case of Rohrback, the Panel then notes that if the failure to pay benefits as awarded could result in a penalty for unreasonable delay:

> A defendant who unilaterally takes credit for an alleged overpayment against benefits by withholding ***awarded benefits*** may be liable for a penalty under section 5814. *{Rohrback* v. *Workers' Comp. Appeals Bd.* (1983) 144 Cal.App.3d 896 [48 Cal.Comp.Cases 78]; *Delta Airlines v. Workers' Comp. Appeals Bd. {Fox)* (2000) 65 Cal.Comp.Cases 177 [writ den.].) (Emphasis added.)

The Board's rationale for the proposed regulation is that, pursuant to "settled case law," section 10498 clarifies that an employer must not unilaterally take credit for alleged overpayment of benefits, but must file "a petition for credit with the WCAB to have the issue adjudicated." The proposed regulation requires all assertions of benefit overpayments to be adjudicated. There is no case law supporting that proposition, settled or otherwise.

The Board cites Rohrback for the proposition that when an employer unilaterally takes credit for an overpayment without first obtaining an order from the WCAB, the employer risks a 5814 penalty. The rationale of Rohrback does not, in fact, say that and it certainly does not translate into the mandatory adjudication of every claimed overpayment, as it deals with the failure to pay an award of benefits. The citation of Delta in the Rohrback opinion is equally unavailing as it is a Writ Denied summary, as is California Comp. Ins. Co.

We are recommending that the proposed regulation be eliminated because it seems to be addressing a problem that does not exist. The Board provides no evidence of the scope of incorrect overpayments, yet it is suggesting a global fix that will require every claimed overpayment to be adjudicated at the local District Offices. From a purely logistical standpoint, the effect of the proposed rule is inconceivable.

It is not unusual for the employer and injured worker to initially provide the claims administrator with an incorrect wage statement, resulting in TD overpayments for a period of time. When the wage statement is corrected, the rate is adjusted, the employer and the injured worker are advised, and the overpayment is recovered from PD or sometimes the injured worker will issue a check for it. Frequently, MMI examinations are conducted while TD is being paid and the permanent and stationary reports are received weeks later but it clearly supports an adjustment to the PD benefits. The vast majority of corrections arise from incidents like these. Allowing these frequent, necessary adjustments to the benefits is far superior to requiring petitions and orders. The requirement to file a Petition for Credit and adjudicate every instance like these would slow the system to a crawl and produce no beneficial effect.

Defendants are required to pay “estimated” permanent disability benefits even before the injured worker becomes permanent and stationary. Therefore, these payments will rarely be correct and will have to be adjusted. To date the adjustment of benefit overpayments has not required routine judicial intervention, but it is readily available when it is needed. If claims administrators are precluded from recovering overpayments until a WCALJ rules, it is likely that benefits will be stopped whenever it appears likely that an overpayment might occur. There will undoubtedly be significant and unnecessary delays in the adjustment of benefit payments if this regulation is implemented.

Thank you for the effort put into these proposed regulations and for considering our comments.

Sincerely,

Michael McClain
General Counsel

MMc/pm

cc: Christine Baker, DIR Director
Destie Overpeck, DWC Administrative Director
Dr. Rupali Das, DWC Executive Medical Director
CWCI Claims Committee
CWCI Medical Care Committee
CWCI Legal Committee
CWCI Regular Members
CWCI Associate Members
California Chamber of Commerce
California Coalition on Workers' Compensation
American Insurance Association

July 9, 2015
Bernardo De La Torre, Esq., President
California Applicant's Attorneys Association

The California Applicants' Attorneys Association offers the following comments regarding the draft WCAB Rules of Practice and Procedure Article 4 Section 10485 through Article 12 Section 10615 which are currently posted on the WCAB Forum.

Renumbered rule 10485, subdivision (a) which sets forth requirements for pleadings filed or served by representatives has been revised to state that "If there is no designated space on the form for the requisite information, this subdivision shall not apply" with the designated information being the name, State Bar number, law firm, , business address, and business telephone number of the attorney representative. This language is taken from a deleted third paragraph from the prior rule setting forth the definition of a pleading. With this revision, subdivision (b) does not apply this exclusion to non-attorney representatives. To correct this inconsistency, we recommend that the language "If there is no designated space on the form for the requisite information, this subdivision shall not apply" be deleted from subdivision (a). To achieve uniformity a final paragraph should be added to rule 10485 that states "Where a form approved by the Workers' Compensation Appeals Board and/or created by the Division of Workers' Compensation calls for different information respecting a representative, provision of the information required by the form shall be deemed in compliance with this section." We believe information should always be provided to identify the attorney or non-attorney representative for the injured worker, whether it is as described in this rule for a pleading or on a required WCAB or DWC form.

New rule 10505 sets forth the requirements for a Petition appealing a denial of an application for a return to work supplement payment. Subdivision (d) requires the petition to include an assigned Adj number. As these appeals will in the majority of cases be filed by unrepresented injured workers, we recommend that a provision be added that the omission of an ADJ number will not result in a rejection of the petition, but shall be added to the petition by the clerk at the WCAB, in the same fashion as with the filing of an application, when the initial ADJ number is assigned. Additionally, subdivision (g) now requires that "The petition shall not be placed on calendar unless a declaration of readiness is filed. The declaration of readiness may not be filed until 30 days have elapsed from the service of the petition." Again, in the majority of cases these appeals will be filed by unrepresented injured workers. Creating procedural roadblocks to obtaining a review of their appeal would defeat what is supposed to be a simple application and review process for obtaining payments from the return to work supplement fund. Therefore, we recommend subdivision (g) either be deleted entirely from rule 10505, or at the very least the last sentence "The declaration of readiness may not be filed until 30 days have elapsed from the service of the petition" be deleted. As an alternative, language may be added to state "(g) Within 15 days of the filing of the petition appealing the denial of the return to work supplement, the Workers' Compensation Appeals Board shall issue a notice of intention to grant or deny the petition, in whole or in part. The notice of intention shall give the petitioner and any adverse party no less than 15 calendar days to file written objection showing good cause to the contrary. If no timely written objection is filed, or if the written objection on its face

fails to show good cause, the Workers' Compensation Appeals Board, in its discretion, may: (1) issue an order regarding the petition, consistent with the notice of intention; or (2) set the matter for hearing." This timeline will allow the Director to file an answer or objection, and/or modify/rescind their decision, without placing an additional procedural burden on the injured worker.

Renumbered rule 10509 subdivision (b), paragraph (1), for Petitions appealing an IMR determination should be amended to delete "shall be limited to raising". Instead subdivision (b), paragraph (1), should be amended to read " The petition shall raise one or more of the five grounds specified in Labor Code section 4610.6(h)." This language would be consistent with subdivision (b), paragraph (2) which recognizes that the petition must also set forth specifically and in full detail the factual and/or legal grounds upon which the petitioner considers the IMR determination to be incorrect, and every issue to be considered by the Workers' Compensation Appeals Board, otherwise the petitioner will be deemed to have waived these objections concerning the IMR determination. A petitioner may have statutory, constitutional or other legal grounds for challenging the IMR determination that aren't specified in Labor Code section 4610.6 (h). Yet as currently worded the petition could be summarily dismissed if any of these legal objections aren't specified in Labor Code section 4610.6(h). The limitation in subdivision (a) must be removed to eliminate this inconsistency and protect the due process rights of the petitioner, specifically the opportunity to be heard on all issues relating to the IMR determination, without waiving the right to set forth those issues in the petition.

Lastly, renumbered rule 10523 which sets forth the time within which to act when a document is served by mail, fax, or e-mail continues to provide for an extension of 5 calendar days from the date of service for a physical address in California, and 10 calendar days for an out of state address. Therefore this proposed rule continues the current practice of deviating from CCP 1013 in providing a uniform 5 day extension of time for service within California for all forms of service other than personal. Given the realities of the speed of modern communications, we believe that the rationale for allowing a longer time period for out of state addresses no longer applies. Therefore, we would suggest that the 5 day rule should be extended to the entire United States, leaving a longer period only for service to a physical address outside of the United States.