

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

FINAL STATEMENT OF REASONS

Subject Matter of Regulations:

**Title 8, California Code of Regulations, Sections 10300 through 10999.
Rules of Practice and Procedure of the Workers' Compensation Appeals Board.**

BACKGROUND TO REGULATORY PROCEEDING:

By the authority vested in it under Labor Code section 5307 (see also, Lab. Code, §§ 133, 5309, 5708), the Workers' Compensation Appeals Board (WCAB) amends, adopts and repeals certain Rules of Practice and Procedure in Title 8, Chapter 4.5, subchapter 2, of the California Code of Regulations, commencing with section 10300.¹

In accordance with Government Code section 11351, the WCAB is *not* subject to Article 5 (commencing with Government Code section 11346), Article 6 (commencing with Government Code section 11349), Article 7 (commencing with Government Code section 11349.7), or Article 8 (commencing with Government Code section 11350) of the rule-making provisions of the Administrative Procedures Act (APA), with the sole exception that section 11346.4(a)(5) [publication in the California Regulatory Notice Register] does apply to the WCAB. Instead, the WCAB's changes to its Rules of Practice and Procedure are made pursuant to its rule-making power under Labor Code section 5307(a) (see also Lab. Code, §§ 133, 5309, 5708), subject to the procedural requirements of Labor Code section 5307.4. This Final Statement of Reasons has been prepared to comply with the procedural requirements of section 5307.4 and for the convenience of the regulated public.

The changes to the WCAB's Rules of Practice and Procedure are prompted by a number of factors, but, briefly, two reasons stand out.

First, in 2002, the Legislature created the position of "Court Administrator" within the Division of Workers' Compensation (DWC). As relevant here, the Legislature gave the Court Administrator rule-making authority over certain elements of "district office procedure regarding trial level proceedings of the workers' compensation appeals board." (Lab. Code, § 5307(c) [Stats. 2002, ch. 6, § 72 (A.B. 749)].) Although there is some statutory ambiguity regarding what elements of the WCAB's trial level proceedings remain within the jurisdiction of the WCAB to regulate (see Lab. Code, §§ 133, 5307(a), 5309, 5708) and what elements are now within the Court Administrator's jurisdiction (see Lab. Code, §§ 133, 5307(c)), the WCAB and the Court Administrator, for the most part, have reached a tentative division of the regulations.² Therefore, the WCAB is deleting certain of its current rules, the subject matter of which will be covered by certain proposed Court Administrator regulations. The Court Administrator recently submitted his final regulation package to the Office of Administrative Law.

¹ Existing WCAB rules that are not being amended or repealed will remain in full force and effect.

² This division of regulatory authority is characterized as "tentative" for the following reasons. First, although the WCAB's rules are *not* subject to substantive review by the Office of Administrative Law (see Gov. Code, § 11351(a)), the Court Administrator's rules *are* subject to substantive OAL review (see Gov. Code, § 11351(c)), including review for statutory "authority," "consistency," and "reference" (see Gov. Code, § 11349.1(a)(2), (4) & (5); see also, § 11349(b), (d) & (e)). Second, both the WCAB's own rules and those of the Court Administrator are subject to initial judicial review by the WCAB (Lab. Code, § 5300(f); Gov. Code, §§ 11351(a) & (c); see also *Boughner v. CompUSA, Inc.* (2008) 73 Cal.Comp.Cases 854, 859 (Appeals Board en banc)); and to appellate review by the Courts of Appeal and the Supreme Court (Lab. Code, § 5950 et seq.). Because this division of regulatory authority is merely "tentative," nothing in this Final Statement of Reasons should be construed to represent either a fixed opinion or a final determination by the WCAB (or by any of its Commissioners, Deputies or legal staff) regarding the proper allocation of regulatory authority.

Second, in the Budget Act of 2004, the Legislature appropriated funds “for the development of a workers’ compensation case management system.” (Stats. 2004, ch. 208, Item 7350-001-0223(4), p. 592 (S.B. 1113 [appropriations bill].)³ In accordance with this appropriation, DWC has been developed the Electronic Adjudication Management System (EAMS), which is a computerized system that DWC will utilize to electronically store and maintain WCAB adjudication case files and to perform various case management functions.⁴ Phase 1 of EAMS went “live” on August 25, 2008. Some of the changes or additions to the existing WCAB rules result from the implementation of EAMS.

The WCAB’s rules changes become effective on November 17, 2008.

1. Section Amended: 10301.

Statement of Specific Purpose and Reasons for the Amendments to Section 10301

Rule 10301 establishes “Definitions” for terms used throughout the WCAB’s rules, including rules that will not be changed or deleted as a result of the WCAB’s present regulatory action. These definitions help ensure that the meanings of the terms are clearly understood by the workers’ compensation community.

The WCAB amends Rule 10301 to change the definition of “Administrative Director” to include a “designee” of the Administrative Director. Some of the WCAB’s new, amended, or deleted rules – and some of its rules that are not being amended or deleted – refer to actions by the “Administrative Director,” including but not limited to petitions appealing certain decisions issued by the Administrative Director (AD). The change to the definition of “Administrative Director” gives recognition to the fact that some AD actions are actually performed by his or her designees. The change is consistent with numerous existing Administrative Director regulations regarding delegation of the AD’s authority to her or his designees. (E.g., Cal. Code Regs., tit. 8, §§ 9704(b), 9768.8(g), 9792.11, 9792.12(b)(1), 9792.13, 9792.15, 9820(a), 9924(e), 10100.1(b), 10100.2(b), 10112.1(b), 10112.2(d), (e) & (g), 10112.3(a), 10113.3, 10113.5, 10113.6, 10114.3, 10115.2, and 10133.54.)

The WCAB amends Rule 10301 to add a definition for the term “adjudication file” (or “ADJ file”). This new definition is being added because DWC will utilize EAMS not only to electronically store and maintain WCAB case files, but also to electronically store and maintain the files of ancillary units of DWC, such as the Disability Evaluation Unit (DEU), the Information and Assistance Office (I&A), the Rehabilitation Unit (RU), and the Retraining and Return to Work Unit (RRTW). The term “adjudication file” (or “ADJ file”) distinguishes a WCAB case file from the files of DWC ancillary units (e.g., a “DEU file”).

The WCAB amends Rule 10301 to change the definition of “Appeals Board” to include Commissioners and Deputy Commissioners “individually.” Under the Labor Code (e.g., Lab. Code, §§ 130, 131, 134, 5701, 5808) and the WCAB’s current rules (e.g., Cal. Code Regs., tit. 8, §§ 10342, 10344), some actions may be taken by a single Commissioner or Deputy Commissioner. Therefore, the new definition recognizes that “Appeals Board” actions may be taken by individual Commissioners or Deputy Commissioners.

The WCAB amends Rule 10301 to add a definition for the term “carve-out case,” i.e., “a workers’ compensation case that, in accordance with the criteria specified in Labor Code sections 3201.5 through 3201.9, is subject to an alternative dispute resolution (ADR) system that supplements or replaces all or part of the dispute resolution processes contained in Division 4 of the Labor Code.” The term “carve-out case” is informally used in the workers’ compensation community, and it is also used in Rule 10865, but it has never been defined. The definition of “carve-out case,” which is drawn in part from the language of section 3201.5(a)(1), is intentionally very brief. This very brief definition is *not* intended to change or limit, in any way, the statutory requirements and other provisions of Labor Code section 3201.5 et seq.

³ Although the Legislature also provided that these funds “shall not be available for expenditure until a Feasibility Study Report is approved by the Department of Finance,” the Feasibility Study Report was approved by the Department of Finance on June 28, 2004.

⁴ The WCAB “exercise[s] all judicial powers” with respect to the workers’ compensation system, however, “[i]n all other respects” the workers’ compensation system is administered by DWC. (Lab. Code, § 111(a).) Accordingly, EAMS is being developed and managed by DWC.

The WCAB amends Rule 10301 to add a definition for the term “case opening document.” The term “case opening document” is used in different places in the WCAB’s Rules, but it is not elsewhere defined. In essence, “case opening document” comprehends any document that creates an adjudication case and invokes the jurisdiction of the WCAB for the first time. Therefore, under current statutory and regulatory provisions, a “case opening document” will include, but not necessarily be limited to, an initial (but not an amended) Application for Adjudication of Claim, a Stipulations with Request for Award where no application was previously filed, a Compromise and Release agreement where no application was previously filed, an initial Request for Findings of Fact under section 10405, a petition for reconsideration in a carve-out case, and a petition appealing a Labor Code section 129.5(g) audit penalty assessment.

The WCAB amends Rule 10301 to add a definition for the term “Court Administrator,” i.e., “the administrator of the workers’ compensation adjudicatory process at the trial level, or his or her designee.” In 2002, the Legislature created the position of “Court Administrator.” (Stats. 2002, ch. 6, §§ 24, 27-30, 35-38, 72, 75-76, 80 [AB 749].) Some of the WCAB’s new or amended rules refer to the “Court Administrator.” They also refer to the rules or regulations of the “Court Administrator” adopted under Labor Code section 5307(c). Therefore, Rule 10301 defines “Court Administrator” by using the statutory definition of “Court Administrator” contained in Labor Code section 110(f)). Rule 10301, however, also expands the definition of “Court Administrator” to include any “designee” of the Court Administrator, in recognition of the fact that some Court Administrator actions are actually performed by his or her designees.

The WCAB amends Rule 10301 to change the definitions both for the term “Declaration of Readiness to Proceed” (DOR) and for the term “Declaration of Readiness to Proceed to Expedited Hearing” (Expedited DOR) so as to strike “before the Workers’ Compensation Appeals Board” and to substitute “at a district office.” This is because the term “Workers’ Compensation Appeals Board” is currently defined to include the Appeals Board, the Commissioners, the Deputy Commissioners, the presiding workers’ compensation judges, and the workers’ compensation judges. (See now Cal. Code Regs., tit. 8, § 10301(v) [which is being renumbered to § 10301(hh)].) However, when a DOR or Expedited DOR requests a proceeding, the proceeding will not be conducted before the Commissioners or Deputy Commissioners of the Appeals Board at its headquarters in San Francisco. Rather, the proceeding will be conducted before a workers’ compensation judge at a district office of the WCAB.

The WCAB amends Rule 10301 to add a definition for the term “district office.” The term “district office” is used throughout the WCAB’s Rules, yet, the term is nowhere defined. Defining “district office” to mean “a location of a trial court of the Workers’ Compensation Appeals Board” gives recognition to the fact that the “district offices” conduct “trial level proceedings of the Workers’ Compensation Appeals Board.” (Lab. Code, § 5307(c); see also, e.g., §§ 5300(a) [“all [workers’ compensation] proceedings shall be instituted before the appeals board and not elsewhere”], 5500.3(a) [referring to “district offices of the appeals board”], 5501 [providing that applications, which are the jurisdictional documents in workers’ compensation proceedings, “may be filed with the appeals board”], 5501.5(b) & (d) [venue statutes that repeatedly refer to the filing of applications with the “office of the appeals board” or at the “location of the appeals board” within the various counties].) It also gives recognition to the fact that it is the “Workers’ Compensation Appeals Board” which the Legislature has vested with “judicial powers” (Lab. Code, § 111(a); see also, e.g., see also, *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355-356 (the WCAB has “been legislatively endowed with judicial powers pursuant to a specific constitutional authorization”)) and that, pursuant to Labor Code sections 5309 and 5310, the Appeals Board *delegates* its judicial powers to the WCJs of the district offices. Finally, describing the district offices as “trial courts” of the WCAB is consistent with the fact that, for over 90 years, it has repeatedly been held that the WCAB – and its statutory predecessor, the Industrial Accident Commission (IAC) – exercises a portion of the judicial powers of the State of California and, in legal effect, is a court. (E.g., *Laisne v. Cal. State Bd. of Optometry* (1942) 19 Cal.2d 831, 837-838; *Bankers Indemnity Ins. Co. v. Industrial Acc. Com. (Merzoian)* (1935) 4 Cal.2d 89, 97; *Carstens v. Pillsbury (Silva)* (1916) 172 Cal. 572, 577; *Pacific Coast Casualty Co. v. Pillsbury (McCay)* (1915) 171 Cal. 319, 322; *Hand Rehab. Center v. Workers’ Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204, 1214; *Azadigian v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 376; *Crawford v. Workers’ Comp. Appeals Bd.* (1989) 213 Cal.App.3d 156, 164; *Fremont Indemnity Co. v. Workers’ Comp. Appeals Bd. (Zepeda)* (1984) 153 Cal.App.3d 965, 970-971.)

[NOTE: At the September 12, 2008 public hearing on the WCAB’s Rules, Sue Borg testified on behalf of the California Applicants’ Attorneys Association (CAAA). CAAA suggests that a specific reference to the

“Workers’ Compensation Appeals Board” should be included within the definition of “district office,” so as to create a clear demarcation between the administrative functions of the Court Administrator and the judicial functions of the WCAB. The WCAB believes, however, that its definition of a “district office” as “a location of a trial court of the Workers’ Compensation Appeals Board” does emphasize that its proceedings are judicial, and distinguishes WCAB proceedings at the district offices from administrative functions that also may be performed at the district offices, such as the Disability Evaluation Unit, the Rehabilitation and Return to Work Unit, and the Information and Assistance Office.]

The WCAB amends Rule 10301 to add a definition for the term “document.” This proposal largely relates to EAMS because: (1) it would define “document” to include an electronically filed a document or an electronically scanned version of a paper document; and (2) it would specify that each separate medical report or other record “having a different author and/or a different date” is a different “document.” This latter portion of the definition would work hand-in-hand with the “document cover sheet” and “document separator sheet” requirements so that, when individual documents are scanned or otherwise inputted into EAMS, they can be separately identified (and, therefore, easily located) within the EAMS adjudication file.

The WCAB amends Rule 10301 to add a definition for the term “document cover sheet.” The “document cover sheet,” which is the form that has been adopted by the Court Administrator under section 10232.1, would be placed on top of a document or set of documents being filed at one time in a specific case. Among other things, it would identify the adjudication case(s) to which the document or documents relate. The “document cover sheet” is necessary so that paper documents being scanned or otherwise inputted into EAMS are routed to the correct adjudication file(s).

The WCAB amends Rule 10301 to add a definition for the term “document separator sheet.” The “document separator sheet,” which is the form adopted by the Court Administrator under section 10232.2, would be: (1) placed on top of each individual document, when one or more documents are being filed at the same time in the same case; and (2) placed on top of each individual attachment to each document being filed, when an individual document has one or more attachments. Among other things, the “document separator sheet” would identify the title, the author, the date, and the type of each document and each attachment being filed. The “document separator sheet” is necessary so that, when individual documents are scanned into EAMS, they can be separately identified (and, therefore, easily located) within the EAMS adjudication file. [NOTE: *In written comments e-mailed to the WCAB on September 2, 2008, Judge Joan M. Succa suggests that, with respect to trial exhibits, there should be one document separator sheet for each exhibit, not for each document within an exhibit. Therefore, for example, where three differently-dated medical reports from the same physician are being offered into evidence as Exhibit A, only one document separator sheet should be required, rather than three document separator sheets. However, Judge Succa’s concern more properly relates to Rule 10629 regarding the listing of exhibits, than to Rule 10301(o) defining “document separator sheet.” Rule 10629 requires that different reports from a particular physician or other provider are to be listed as separate exhibits for several reasons. First, it is not uncommon that, where there has been an objection by a party, certain reports by a particular physician will be excluded from evidence, even though other reports are admitted. This may occur, for example, where a physician has issued multiple reports, but the latest report issued after the closure of discovery at the mandatory settlement conference (MSC). If the proponent of the last report fails to show that it could not have been obtained earlier with the exercise of due diligence, then that report might be excluded (see Lab. Code, § 5502(e)(3)), even though the earlier reports are admitted. Second, it is not uncommon that a particular physician will issue a significant number of lengthy reports. If that occurs, then, under EAMS, it may be difficult to electronically “leaf” through the reports to find a particular one, if all the reports are grouped together as one exhibit. Third, new Rule 10842 now requires that petition for reconsideration and other pleadings make specific references to the record by, among other things, exhibit number/letter, author of the report, date of the report, and relevant page numbers. This rule will be easier to comply with and administer if each report of an individual physician is required to be listed as a separate exhibit.]*

The WCAB amends Rule 10301 to add a definition for the term “Electronic Adjudication Management System” (EAMS). EAMS is a computerized system that, beginning on August 25, 2008, DWC has been utilizing to electronically store and maintain WCAB adjudication case files and to perform various case management functions. There are references to EAMS throughout the WCAB’s new and amended rules and, therefore, it needs to be defined.

The WCAB amends Rule 10301 to add a definition for the term “fax.” Of course, this is a term that is commonly used in the general public’s lexicon. However, the definition that “fax” is a document that has been “electronically served” by a facsimile machine or other facsimile technology (emphasis added) helps to highlight the fact that documents are not to be “filed” with the WCAB by fax. (See current Rule 10391 [providing that a document “that has been sent directly to the Workers’ Compensation Appeals Board by fax or e-mail will not be accepted for filing.”].)

The WCAB amends Rule 10301 to change the definition of the term “[to] file” to strike the references to “Workers’ Compensation Appeals Board” and to change the phrase “case file” to “adjudication file.” The reason for the latter change is explained in the discussion regarding the definition of “adjudication file,” set out above. The phrase “Workers’ Compensation Appeals Board district office” is redundant because the new rules define “district office” to mean “a location of the Workers’ Compensation Appeals Board.” The phrase “Workers’ Compensation Appeals Board adjudication file” is redundant because the new rules define “adjudication file” to mean “case file within the jurisdiction of the Workers’ Compensation Appeals Board.”

The WCAB amends Rule 10301 to change the definition of the term “hearing” to include “any trial, mandatory settlement conference, rating mandatory settlement conference, status conference, lien conference, or priority conference at a district office or before the Appeals Board.” Although the term “lien conference” is used in the WCAB’s current rules, it appears to have been inadvertently omitted from the current definition of “hearing.” Also, although most “hearings” take place before workers’ compensation administrative law judges at the district offices of the WCAB, some hearings do take place directly before the Appeals Board – such as conferences regarding cases pending before the Appeals Board on reconsideration or removal, contempt proceedings, or cases that the Appeals Board has removed to itself under Labor Code section 5310.

The WCAB amends Rule 10301 to change the definition of the term “lien claimant” to include “any person or entity” filing a lien. This change is necessary because incorporated and non-incorporated businesses and other organizations may file liens.

The WCAB amends Rule 10301 to add a definition for the term “lien conference,” which would mean a proceeding held for the purpose of assisting the parties in resolving disputed lien claims or, if the dispute cannot be resolved, to frame the issues and stipulations in preparation for a lien trial. This addition is necessary because, although the term “lien conference” is used in the WCAB’s current rules, it is not currently defined.

The WCAB amends Rule 10301 to change the definition of the term “mandatory settlement conference” (MSC) to strike the phrase “before the Workers’ Compensation Appeals Board” because, in light of other definitions, this phrase is no longer necessary.

The WCAB amends Rule 10301 to add a definition for the term “optical character recognition form” (OCR form), for which no definition yet exists. OCR forms are a necessary element of EAMS. The OCR forms will be scanned with a flatbed scanner and then software will be used to recognize and digitize the printed or handwritten information on the forms. Printed or handwritten information entered in certain fields (i.e., lines or boxes) on the OCR forms will be extracted and entered into the corresponding data fields within EAMS.

The WCAB amends Rule 10301 to change the definition of “party.” Among other things, the amendment would clarify that the term “party” includes the injured employee, or the dependent(s) of a deceased employee, even if the employee or dependent was not the “applicant,” i.e., not the person or entity filing the application for adjudication of claim. The amendment also provides that a “lien claimant” may become a “party” when the underlying case of the injured employee (or any dependent(s) of a deceased employee) has been “resolved,” which is somewhat broader than the current provision that the underlying case has been “settled by way of a compromise and release.”

The WCAB amends Rule 10301 to delete the definition of “record of proceedings,” which is essentially duplicative of current Rule 10750 (and amended Rule 10750).

The WCAB amends Rule 10301 to add a definition for the term “venue.” The term is used in various places in the current and new rules, but it is nowhere defined.

The WCAB also makes certain other amendments to Rule 10301, but the amendments are non-substantive in that they either merely re-letter certain subsections (to keep the definitions in alphabetical order) and/or they make minor changes to currently existing definitions (i.e., the definitions of “priority conference” and “status conference”).

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

2. Section Amended: 10302.

Statement of Specific Purpose and Reasons for the Amendments to Section 10302

The WCAB amends Rule 10302, which is currently entitled “Working Titles of Referees and Referees in Charge,” so that it instead refers to “workers’ compensation administrative law judges” and “presiding workers’ compensation administrative law judges.” The terms “referees” and “referees in charge” are no longer in use. (See Lab. Code, § 27.) Moreover, the WCAB amends Rule 10302 to provide that “workers’ compensation administrative law judges” and “presiding workers’ compensation administrative law judges” may be referred to, respectively, as “workers’ compensation judges” and “presiding workers’ compensation judges,” to reflect short-hand custom and usage in the workers’ compensation community. The term “workers’ compensation judge” includes pro tempore judges, consistent with Court Administrator Rule 10210(kk).

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

3. Section Repealed: 10306.

Statement of Specific Purpose and Reasons for the Repeal of Section 10306

The WCAB repeals Rule 10306, relating to the “Index of Cases.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10306 are being transferred to Court Administrator Rule 10215 (which is making some changes to the substance of current Rule 10306 in light of EAMS).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

4. Section Repealed: 10308.

Statement of Specific Purpose and Reasons for the Repeal of Section 10308

The WCAB repeals Rule 10308, relating to the “Official Address Record.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10308 are being transferred to Court Administrator Rule 10217(a) (which is making some changes to the substance of current Rule 10308 in light of EAMS).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

5. Section Amended: 10324.

Statement of Specific Purpose and Reasons for the Amendments to Section 10324

The WCAB amends Rule 10324, relating to “Ex Parte Communications,” so that it is divided into four subdivisions.

Rule 10324(a) is essentially identical to the first sentence of current Rule 10324, except that in accordance with other amendments to the Rules, the reference to “Rule 10514” is changed to “Rule 10505.”

Rule 10324(b) especially incorporates language that is currently in the WCAB/DWC Policy and Procedure Manual, section 1.0, so as to provide that, when the WCAB receives an ex parte letter or other document, the WCAB shall serve copies of the letter or document on all other parties to the case, with an explanation that the letter or document was received ex parte.

Rule 10324(c) is identical to the second sentence of current Rule 10324.

Rule 10324(d) essentially provides that, where a physician has been appointed by the WCAB pursuant to one of the provisions of the Labor Code, any communications by the parties to the appointed physician shall be made through the WCAB.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

6. Section Amended: 10346.

Statement of Specific Purpose and Reasons for the Amendments to Section 10346

The WCAB amends Rule 10346, entitled “Assignment or Transfer of Cases,” to provide that a presiding workers’ compensation judge (PWCJ) may utilize EAMS to assign cases. When DWC developed EAMS, one of its purposes was to utilize EAMS to assign WCJs to cases, so as to help balance the workload among judges and to help limit how far cases are calendared out. However, the provision that a PWCJ “may” utilize EAMS to assign cases makes it clear that using EAMS to assign cases is discretionary, not mandatory.

Specific Technologies or Equipment

The amendment to this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendment.

Effect on Small Businesses

The amendment to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendment to this rule will not have a significant economic impact on California business enterprises and individuals.

7. Section Repealed: 10347.

Statement of Specific Purpose and Reasons for the Repeal of Section 10347

The WCAB repeals Rule 10347, entitled “Assignment of Judges.” Rule 10347 currently provides that, where practical, the workers’ compensation judge (WCJ) assigned for trial should be different than any WCJ who conducted a mandatory settlement conference (MSC) in the case. The current rule is not workable under EAMS. Although EAMS will attempt to set new or continued MSCs before the previously assigned MSC judge, one or more new and different MSC judges will be assigned if the previously assigned MSC judges are unavailable in the time frame designated for calendaring. (See Lab. Code, § 5502(e)(1).) Therefore, multiple WCJs within a district office could wind up conducting an MSC in a particular case, resulting in the possibility that, at some district offices (particularly smaller to mid-size ones), there could be few or no WCJs who could be assigned for trial who have not conducted an MSC. Moreover, there is no statute or case law which mandates that a WCJ who conducts an MSC and a WCJ who is assigned for trial must be different. The practical reality is that, given the current caseloads of the WCJs, there are relatively few MSCs in which a WCJ becomes so deeply involved in settlement negotiations that his or her impartiality for trial could be reasonably questioned. If such a situation occurs, however, the WCJ could recuse himself or herself, or one of the parties could seek automatic reassignment or disqualification pursuant, respectively, to Rules 10453 or 10452.

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

8. Section Repealed: 10390.

Statement of Specific Purpose and Reasons for the Repeal of Section 10390

The WCAB repeals Rule 10390, relating to the “Place and Time of Filing Documents.” Pursuant to Labor Code section 5307(c), some of the provisions of current Rule 10390 have been transferred to Court Administrator Rules 10227 and 10230.

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

9. Section Repealed: 10391.

Statement of Specific Purpose and Reasons for the Repeal of Section 10391

The WCAB repeals Rule 10391, relating to the “Filing of Copies of Documents.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10391 are being transferred to Court Administrator Rule 10236 (which is making substantial changes to the substance of current Rule 10391 in light of EAMS).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

10. Section Repealed: 10392.

Statement of Specific Purpose and Reasons for the Repeal of Section 10392

The WCAB repeals Rule 10392, relating to the “Form and Size Requirements for Filed Documents.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10392 are being transferred to Court Administrator Rule 10232 (which is making substantial changes to the substance of current Rule 10392 in light of EAMS).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

11. Section Repealed: 10395.

Statement of Specific Purpose and Reasons for the Repeal of Section 10395

The WCAB repeals Rule 10395, relating to the “Improper Filing of Documents.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10395 are being transferred to Court Administrator Rule 10222 (without any significant changes to the substance of current Rule 10395).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

12. Section Repealed: 10396.

Statement of Specific Purpose and Reasons for the Repeal of Section 10396

The WCAB repeals Rule 10396, relating to the “Duty to Furnish Correct Address.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10396 are being transferred to Court Administrator Rule 10217 (which is making some substantial changes to the substance of current Rule 10396 in light of EAMS).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

13. Section Added: 10397.

Statement of Specific Purpose and Reasons for the Addition of Section 10397

The WCAB adds Rule 10397, entitled “Restrictions on the Rejection for Filing of Documents Subject to a Statute of Limitations or a Jurisdictional Time Limitation.” In essence, Rule 10397 provides that an application for adjudication of claim, a petition for reconsideration, a petition to reopen, or any other petition or other document that is subject to a statute of limitations or a jurisdictional time limitation shall not be rejected for filing solely on the basis that: (1) the document is not filed in the proper office of the Workers’ Compensation Appeals Board; (2) the document has been submitted without the proper form, or it has been submitted with a form that is either incomplete or contains inaccurate information; or (3) the document has not been submitted with the required document cover sheet and/or document separator sheet(s), or has been submitted with a document cover sheet and/or document separator sheet(s) not containing all of the required information.

Nevertheless, Rule 10397 provides that a document that is subject to a statute of limitations or a jurisdictional time limitation *may* be rejected for filing if it does not contain a combination of information sufficient to establish the case or cases to which the document relates or, if it is a case opening document, sufficient information to open an adjudication file. Under such circumstances, however, Rule 10397 requires the Court Administrator to return the document to the filer and notify the filer, through the service of a Notice of Document Discrepancy, that the document has not been accepted for filing. The Notice of Document Discrepancy shall specify the nature of the discrepancy(ies) and the date of the attempted filing, and it shall state that the filer shall have 15 days from the service of the Notice within which to correct the discrepancy(ies) and resubmit the document for filing. If the document is corrected and resubmitted for filing within 15 days, or at a later date upon a showing of good cause, it shall be deemed filed as of the original date the document was submitted.

Also, Rule 10397 provides that, where document that it is subject to a statute of limitations or a jurisdictional time limitation has been accepted for filing in accordance with the rule, but the document nevertheless cannot be processed by EAMS, the Court Administrator may serve a copy of the filed document on the filing party or lien claimant, together with a Notice of Document Discrepancy. The notice may specify the nature of the discrepancy(ies) and request that the party correct the discrepancy(ies) within 15 days after service of the Notice. However, a failure to timely correct the discrepancy(ies) shall not nullify the acceptance of the document for filing.

Finally, Rule 10397 indicates that its provisions do not excuse non-compliance with any of other provisions of the WCAB’s rules or with the rules the Court Administrator. Therefore, the acceptance for filing of a non-compliant document will not preclude the imposition of sanctions under Labor Code section 5813 and Rule 10561.

Rule 10397 is being adopted in response to various informal public comments the WCAB received after posting tentative versions of its rules on its web forum from April 8 to April 28, 2008. Both the California Applicants’ Attorneys Association (CAAA) and the American Insurance Association (AIA) expressed significant concerns regarding both the rejection of improperly filed or misfiled documents and the absence of notification to the filing party of the rejection so that corrective action could be taken. Although these comments were directed to the WCAB’s rules regarding petitions for reconsideration, the comments appear to be equally applicable to any document that is subject to a statute of limitations or a jurisdictional time limitation.

A failure to adopt a rule of this kind could result in significant adverse consequences not only to unwary or somewhat careless workers’ compensation practitioners, but also to any attorney not very strongly versed in the complexities of EAMS. However, a failure to adopt this kind of rule would most likely have the greatest adverse impact on self-represented injured employees (i.e., “pro pers”), the vast majority of whom will have no understanding of the complexities of EAMS and little or no familiarity with the filing requirements established by the WCAB and the Court Administrator’s rules. Moreover, these pro pers may have disability and/or transportation problems that restrict their ability to consult with an Information and Assistance Officer regarding filing requirements and the correction of filing errors.

The adoption of Rule 10397 is consistent with Article XIV, § 4, of the California Constitution, which provides that it is “expressly declared to be the social public policy of this State” that the administration of the workers’ compensation system “shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character.”

The adoption of Rule 10397 should also minimize potential due process problems, not only relating to documents filed in the wrong place (see, e.g., *County of Orange v. Workers’ Comp. Appeals Bd. (Lean)* (2008) 73 Cal.Comp.Cases 1 [unpublished opinion not citable in judicial proceedings] and *Scott Pontiac GMC v. Workers’ Comp. Appeals Bd. (Olsen)* (2007) 72 Cal.Comp.Cases 346 [unpublished opinion not citable in judicial proceedings]), but also relating to filing defects that may not be not the fault of the filer. (See *Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493] (where a petition for reconsideration was timely filed, but, through no fault of the petitioner, it was not acted upon by the Appeals Board within the time limits of Labor Code section 5909, due process required the Board to consider the petition on the merits).)

Further, the adoption of Rule 10397 is consistent with the principles: (1) that, in workers’ compensation proceedings, pleadings may be informal (e.g., *Zurich Ins. Co. v. Workmen’s Comp. Appeals Bd. (Cairo)* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500]; *Bland v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 328-334 [35 Cal.Comp.Cases 513]; *Martino v. Workers’ Comp. Appeals Bd.* (2002) 103 Cal.App.4th 485, 491 [67 Cal.Comp.Cases 1273]; *Rivera v. Workers’ Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 151]; *Liberty Mutual Ins. Co v. Workers’ Comp. Appeals Bd. (Aprahamian)* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866]; *Blanchard v. Workers’ Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 594-595 [40 Cal.Comp.Cases 784]); (2) that workers’ compensation claims should be adjudicated based on substance rather than form (*Bland v. Workmen’s Comp. Appeals Bd.*, *supra*, 3 Cal.3d at p. 334; *Martino v. Workers’ Comp. Appeals Bd.*, *supra*, 103 Cal.App.4th at p. 491; *Bassett-McGregor v. Workers’ Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]; *Rivera v. Workers’ Comp. Appeals Bd.*, *supra*, 190 Cal.App.3d at p. 1456; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [24 Cal.Comp.Cases 274]); (3) that technically deficient pleadings, if they give notice and are timely, normally do not deprive the WCAB of jurisdiction (*Bland v. Workmen’s Comp. Appeals Bd.*, *supra*, 3 Cal.3d at pp. 331-332 & fn. 13; *Rivera v. Workers’ Comp. Appeals Bd.*, *supra*, 190 Cal.App.3d at p. 1456; *Liberty Mutual Ins. Co v. Workers’ Comp. Appeals Bd. (Aprahamian)*, *supra*, 109 Cal.App.3d at pp. 152-153; *Blanchard v. Workers’ Comp. Appeals Bd.*, *supra*, 53 Cal.App.3d at pp. 594-596; *Beaida v. Workmen’s Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 210 [35 Cal.Comp.Cases 245]); (4) that pleadings should liberally construed so as not to defeat or undermine an injured employee’s right to make a claim (*Martino*, *supra*, 103 Cal.App.4th at p. 490; *Rubio v. Workers’ Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 199-201 [50 Cal.Comp.Cases 160, 162-163]; *Liberty Mutual Ins. Co. v. Workers’ Comp. Appeals Bd. (Aprahamian)*, *supra*, 109 Cal.App.3d at pp. 152-153; *Blanchard v. Workers’ Comp. Appeals Bd.*, *supra*, 53 Cal.App.3d at pp. 594-595; *Beaida v. Workers’ Comp. Appeals Bd.*, *supra*, 263 Cal.App.2d at pp. 208-209; and (5) that procedural rules should not constrict the rights of unrepresented workers, who generally are not versed in “procedural niceties.” (*Bland v. Workmen’s Comp. Appeals Bd.*, *supra*, 3 Cal.3d at p. 334; *Beveridge v. Industrial Acc. Com.*, *supra*, 175 Cal.App.2d at p. 598.)

Finally, the adoption of Rule 10397 is consistent with other provisions of law. For example, if a petition for writ of review in a workers’ compensation matter is not filed with “the court of appeal for the appellate district in which [the petitioner] resides,” as required by Labor Code section 5950, this filing defect is not jurisdictional and the appropriate procedure is to have the Supreme Court transfer the matter to the correct appellate district. (See *National Kinney of Cal. v. Workers’ Comp. Appeals Bd. (Casillas)* (1980) 113 Cal.App.3d 203, 208-209 [45 Cal.Comp.Cases 1266].) Moreover, there are a wide variety of rules of court in civil matters that require or allow for the filing of documents, even if they are not in full compliance with the rules. (See, e.g., Cal. Rules of Court, Rule 2.118 (a document cannot be rejected for filing solely on the ground that it is handwritten or hand-printed, the handwriting or hand printing on the paper is in a color other than black or blue-black, it does not contain an attorney’s or a party’s fax number or e-mail address on the first page; moreover, for good cause shown, the court may permit the filing of papers that do not otherwise comply with the rules); Rule 3.220(c) (a complaint or other initial papers in a civil case must be accepted for filing even if the party fails to submit a civil case cover sheet, or provides a defective or incomplete cover sheet); Rule 8.20(d) (“For good cause, a reviewing court may relieve a party from default for any failure to comply with these rules except the failure to file a

timely notice of appeal”); Rule 8.204(e)(2)(C) (allowing an appellate court to accept a brief for filing, even if the brief does not comply with the rules of court).)

Once again, however, Rule 10397 is limited only to documents that are subject to a statute of limitations or a jurisdictional time limitation. Thus, for example, the filing of the following documents would *not* be affected by this rule: non-case opening settlements; medical reports and medical-legal reports; answers to applications and to petitions; amended lien claims (and most initial lien claims); and declarations of readiness and objections thereto. Further, even objections to notices of intention or documents filed in response to other deadlines imposed by the WCAB or by its rules would not fall within the scope of Rule 10397, which is limited to documents are filed in the face of a statute of limitations or a statutory jurisdictional limitation.

[NOTE: In its written comments dated September 12, 2008, the American Insurance Association (AIA) suggests that there may be a conflict between WCAB Rule 10397 and Court Administrator Rule 10222. Presumably, this is a reference to Court Administrator Rule 10222(a), which provides that if a document is not filed in compliance with the Court Administrator’s rules, either because it does not comply with the procedural requirements or with the place of filing requirements, the Court Administrator may either: (1) correct the defect and file the document; or (2) notify the filer that the document is not accepted for filing by service of a Notice of Document Discrepancy. Rule 10222(a) further provides that the Notice shall state the discrepancy, the date of the attempted filing, and provide the filer with 15 business days from service to cure the discrepancy. If the document is corrected within 15 business days, or at a later date upon a showing of good cause, it shall be deemed filed on the original date the document was submitted.]

Preliminarily, AIA does not point to an inherent discrepancy between WCAB Rule 10397 and Court Administrator Rule 10222, nor is the WCAB aware of one. Rule 10397(b) provides that a document subject to a statute of limitations or a jurisdictional time limitation may be rejected for filing if it does not contain a combination of information sufficient to establish the case or cases to which the document relates or, if it is a case opening document, sufficient information to open an adjudication file. If a document is rejected in accordance with Rule 10397(b), the Court Administrator shall return the document to the filer and shall notify the filer, through the service of a Notice of Document Discrepancy, that the document has not been accepted for filing. The Notice of Document Discrepancy shall specify the nature of the discrepancy(ies) and the date of the attempted filing, and it shall state that the filer shall have 15 days from the service of the Notice within which to correct the discrepancy(ies) and resubmit the document for filing. If the document is corrected and resubmitted for filing within 15 days, or at a later date upon a showing of good cause, it shall be deemed filed as of the original date the document was submitted. Thus, Rules 10397(b) and 10222(a) have substantially similar provisions relating to what happens when a document is rejected.

Moreover, even assuming there is some conflict between Rules 10397(b) and 10222(a), AIA’s comment that “[i]t would seem far more productive for the Court Administrator’s regulation to be in agreement with the Board’s” should be directed to the Court Administrator, not the WCAB.

*Finally, to the extent that there might be a conflict between Rules 10397(b) and 10222(a), any such potential conflict could be resolved through the adjudication process. As noted above (see fn. 2, supra), the WCAB’s own rules and those of the Court Administrator are subject to initial judicial review by the WCAB (Lab. Code, § 5300(f); Gov. Code, §§ 11351(a) & (c); see also *Boughner v. CompUSA, Inc.* (2008) 73 Cal.Comp.Cases 854, 859 (Appeals Board en banc)) and then they are subject to appellate review by the Courts of Appeal and the Supreme Court (Lab. Code, § 5950 et seq.).*

Similarly, in its written comments dated September 12, 2008, the California Workers’ Compensation Institute (CWCI) states that Rule 10397 “conflicts with the procedure established in the court administrator’s proposed regulation section 10222(b) and (c), which proposes that certain documents can be discarded without notice. CWCI asserts that, “[i]n this instance, the Board must definitely assert its judicial authority to supersede the conflicting regulations.” However, the WCAB does not discern any conflict between Court Administrator Rule 10222(b) and WCAB Rule 10397. That is, Rule 10222(b) merely specifies certain documents that should not be filed (letters to opposing parties or counsel, subpoenas, notices of taking deposition, medical appointment letters, etc.), and none of the documents listed in Rule 10222(b) are documents that would be subject to a statute of limitations or jurisdictional time limitation, to which Rule 10397 is directed. Indeed, Rule 10222(b) is essentially a restatement of former WCAB Rule 10395 [“Improper Filing of Documents”], with some slight

expansions. Similarly, the WCAB does not discern any conflict between Court Administrator Rule 10222(c) and WCAB Rule 10397. That is, Rule 10222(c) merely specifies that no document shall be sent by e-mail or fax directly to the district office or the appeals board, unless ordered by the WCAB, and that any documents sent in violation of the rule shall not be accepted for filing or deemed filed, shall not be acknowledged, and may be discarded. Nothing in Rule 10397 permits the direct filing of documents with the WCAB by e-mail or fax. Moreover, Rule 10222(c) merely reiterates the provisions of former Rule 10391 against direct filing of documents by fax or e-mail in the provision of former Rules 10390 and 10395 that improperly filed documents shall neither be accepted for filing, deemed filed, acknowledged, or returned to the filing party. To the extent that CWCI's comments could be deemed to relate to any purported conflict between Rule 10397 and Rule 10222(a), they are addressed in the WCAB's response to AIA's comments.]

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

14. Section Amended: 10400.

Statement of Specific Purpose and Reasons for the Amendments to Section 10400

The WCAB amends Rule 10400, currently entitled "Applications," but which would be re-titled "Filing and Service of Applications."

In part, the changes to Rule 10400 clarify that a case opening compromise and release agreement (C&R), a case opening stipulation with requests for award (Stip F&A), and a request for findings of fact under section 10405 (the latter of which is not specifically mentioned current Rule 10400) are all "applications" for purposes of invoking the jurisdiction of the WCAB, but, none of those documents are "applications" for purposes of attorney's fees under Labor Code section 4064(c).

Another change to Rule 10400 clarifies that, when an initial application is filed, the application will be assigned both an adjudication case number *and* a venue, which is necessary because, under EAMS, the venue will no longer be reflected in the case number. [NOTE: Under EAMS, WCAB files will no longer be assigned case numbers that reflect the venue (i.e., the district office of the WCAB) to which the case was originally assigned (e.g., currently, Case No. VNO 0123456 would have been originally venued at the Van Nuys [VNO] district office, while Case No. SAC 6543210 would have been originally venued at the Sacramento [SAC] district office). Instead, EAMS will assign "adjudication" (or "ADJ") case numbers serially, regardless of the venue designated by the application for adjudication of claim (or other case opening document) being filed (e.g., under EAMS, an application filed in Van Nuys might be assigned Case No. ADJ 0000001, while the next application entered into the system would be assigned Case No. ADJ 0000002, even if the application designated venue in Sacramento).]

Next, the changes to Rule 10400 provide that, when filing an amended application, the applicant shall indicate (in the appropriate box on the application form) that it is an "amended" application.

Also, additional changes to Rule 10400 move the application filing provisions of current Rule 10500 into Rule 10400, so that these related provisions are consolidated in a single section. Then, with respect to these application filing provisions, Rule 10400 essentially takes the same approach as the last sentence of current Rule 10400 and the first paragraph of current Rule 10500, except that there are some changes in light of EAMS and some other minor changes or clarifications. Specifically:

(1) Consistent with the first paragraph of current Rule 10500, amended Rule 10400 provides that, if the applicant is an unrepresented injured employee, an unrepresented dependent of a deceased employee, or (as newly proposed) a certain type of lien claimant (basically, an unrepresented lien claimant who is asserting a lien for living expenses, burial expenses, or spousal or child support expenses), then the WCAB is still required to serve a conformed copy of the application on the filing party. In these circumstances, the WCAB also is still required to serve a conformed copy on all other parties (but, as proposed, also on *all lien claimants*) who are listed on the application or the address record (or, as proposed, as listed on the proof of service to the application). Further, for initial applications, the WCAB is concurrently required to notify all such parties and lien claimants of the adjudication case number *and* the venue, because, under EAMS, the venue will no longer be reflected in the case number.

(2) Consistent with the last sentence of current Rule 10400, amended Rule 10400 provides that, for all other applicants, the WCAB will notify the filing party or lien claimant of the adjudication case number (for an initial application). However, the WCAB also is required to concurrently notify the filing party or lien claimant of the venue, because, under EAMS, the venue will no longer be reflected in the case number. Moreover, Rule 10400 requires that the WCAB's notification of the adjudication case number and venue be accomplished by serving a conformed copy of the application on the filing party. This brings Rule 10400 more clearly into compliance with Labor Code section 5501. (Similarly, for *amended* applications, the WCAB also will have to serve a conformed copy of the application on the filing party or lien claimant.) Then, consistent with the last sentence of current Rule 10400, but also in clearer conformance with Labor Code section 5501, the filing party is required to serve a copy of the conformed copy on all other parties and lien claimants who are listed on the application, the address record (if one exists) or the proof of service to the application. For initial applications, the filing party also is required to give concurrent notification of the adjudication case number and the venue.

Finally, Rule 10400 is amended to make clear that the disclosure of the applicant's Social Security number on the application is voluntary, not mandatory, and that a failure to provide a Social Security number will not have any adverse consequences. This amendment, although it is being first introduced after the closure of the public comment period on September 12, 2008, is required by law. For example, uncodified sections 7(a)(1) and 7(b) of the Federal Privacy Act of 1974 provide in relevant part that: (a) "It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number"; and (b) "Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary." (Public Law No. 93-579, § 7(a)(1) & (b), 88 Stat. 1896, 1909 [for codified portions, see 5 U.S.C. § 552a].) This provision of Rule 10400 makes it clear, however, that applicants are encouraged to provide their Social Security numbers. In this regard, although the California Information Practices Act of 1977 places certain limits on the use of Social Security numbers (see Civ. Code, § 1798.85 et seq.), it further expressly provides that the Act "does not prevent ... the use of a social security number for internal verification or administrative purposes." (Civ. Code, § 1798.85(b).) Social Security numbers are used for identification and verification purposes in administering the workers' compensation system, and they are particularly useful to help distinguish between injured employees with the same or similar names. A Social Security number will not be disclosed, made available, or otherwise used for purposes other than those specified, except with the consent of the applicant, or as permitted or required by statute, regulation, or judicial order.

[NOTE: In written comments e-mailed on September 11, 2008 [but dated September 12, 2008] and in testimony presented at the September 12, 2008 public hearing, the California Applicants' Attorneys Association (CAAA) objects to the portion of Rule 10400(b) providing that neither a case opening Compromise and Release agreement (C&R) nor a case opening Stipulated Findings and Award (Stip or Stip F&A) would be considered an "application" for purposes of attorney's fees under Labor Code section 4064(c).

In the Initial Statement of Reasons, the WCAB responded to similar concerns that CAAA had expressed in its informal public comments to the tentative proposed rule the WCAB had posted on its Web forum. The Initial Statement of Reasons stated:

While CAAA does not dispute the WCAB's power to define certain documents as "applications," it asserts that the WCAB does not have the authority to define these documents as "applications" for one purpose but not for another. CAAA also asserts that the language of proposed Rule 10400(b) is directly contrary to the intent of Labor Code section 4064(c). However, the WCAB has the power to adopt regulations (Lab. Code, § 5307; see also, §§ 133, 5309, 5708), as long as its regulations are not inconsistent with statute. (Gov. Code, § 11342.2; *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1029.) Labor Code section 4064(c) provides in relevant part that "if an employer files an application for adjudication and the employee is unrepresented at the time the application is filed, the employer shall be liable for any attorney's fees incurred by the employee in connection with the application for adjudication." Section 4064(c) was enacted by Assembly Bill 276 (AB 276) [Stats. 1989, ch. 892, § 28], which became operative on January 1, 1990. As part of the same bill, the Legislature also enacted Labor Code section 5401(c), which provided that it was the filing of a claim form with the employer (and not the filing of an application with the WCAB) that invoked the jurisdiction of the WCAB [Stats. 1989, ch. 892, § 46]. Labor Code section 5500, which also was part of AB 276, provided that (1) an application was not to be filed unless there was "a bona fide dispute after service of the claim form" and (2) the application was supposed to "specify the nature of the dispute, the action being requested of the appeals board, the efforts previously made to resolve the issues in dispute, and shall be accompanied by medical reports or other documents indicating the basis of the dispute and supporting the action requested" [Stats. 1989, ch. 892, § 50]. Therefore, at the time Labor Code section 4064(c) was adopted, its basic premise was that an employer should not file an application unless there were legitimate disputes necessitating a hearing before the WCAB (which, among other things, would require the WCAB to invest time and resources to resolve the dispute and would require the employee to attend the hearing, thereby possibly missing time from work). Effective January 1, 1994, the Labor Code was again amended to make the application (and not the claim form) the document that invoked the jurisdiction of the WCAB. (See current Lab. Code, §§ 5401, 5500 [Stats. 1993, ch. 121, §§ 58, 63 (Assembly Bill 110); Stats. 1994, ch. 1118, §§ 9 (Senate Bill 1768)].) However, the language of section 4064(c) remained unchanged. Therefore, it appears the continued legislative intent is that section 4064(c) attorney's fees should be allowed only where there are unresolved disputes between the employer and employee requiring a hearing before the WCAB. However, when the parties file a case opening compromise and release agreement (C&R) or a case opening stipulations with request for award (Stips), all or most of the "disputes" between the parties will have been resolved by the settlement documents. Moreover, when C&Rs or Stips are filed, it is questionable whether it is the "employer" that is filing them; instead, C&R or Stips could be viewed as a joint filing by both the employer and the employee. Accordingly, it is proper to conclude that section 4064(c) attorney's fees are not applicable to case opening C&R or Stips, even if they are deemed "applications" for other purposes. Moreover, with respect to the Requests for Findings of Fact under section 10405, these are special proceedings under the Government Code or Labor Code in which the WCAB's jurisdiction is expressly limited by statute. There is nothing in these special Government Code and Labor Code statutes which suggests that the WCAB could award attorney's fees if a Request for Findings of Fact was filed by an employer.

In essence, CAAA's current comments disagree with the rationale set out in the WCAB's Initial Statement of Reasons for two basic reasons. First, CAAA agrees that, in most instances, the disputes between the parties will be resolved by a C&R or Stip F&A. CAAA emphasizes, however, this will not always be the case because, under Rule 10882, the WCAB may set the C&R or Stip F&A for a hearing on adequacy. According to CAAA, if this happens, this "essentially causes the same set of circumstances to occur as those that occur when an employer files an application and a [declaration of readiness] in a case where an injured worker is unrepresented -- that is, [the worker has] the need for an appearance, missed work, and the hiring of a lawyer." Second, CAAA acknowledges that it "may be technically correct" to view a C&R or Stip F&A as a joint filing by both the employer and employee. CAAA states, however, that in reality the unrepresented worker is often unclear about his or her rights and responsibilities -- or about the adequacy of the proposed settlement -- and the defendant is in a position of power in offering, documenting, and filing the settlement papers.

In response to CAAA's comments, the WCAB reiterates that, as stated as in the Initial Statement of Reasons, the legislative intent underlying Labor Code section 4064(c) was to make a defendant liable for the attorney's fees of an injured employee only where a defendant has filed an application because of unresolved disputes between the employer and employee requiring a hearing before the WCAB. Indeed, at the time section 4064(c) was adopted, the claim form was the jurisdictional document and the application was filed only to bring the case to a hearing, in the same way as a declaration of readiness is used now. Indeed, by making a defendant liable for attorney's fees if it filed an application (i.e., the equivalent of the current declaration of readiness), the Legislature was effectively encouraging defendants to settle cases involving unrepresented injured workers through C&Rs and Stip F&As and penalizing defendants who did not enter such settlements and requested hearings instead.

Moreover, when a C&R or Stip F&A involving an unrepresented applicant is filed, the parties are implicitly representing that they have resolved their disputes through the proposed settlement. Although each C&R and Stip F&A must be reviewed for adequacy under Rule 10882, the vast majority of C&Rs and Stip F&As involving unrepresented applicants are approved without the need for a hearing on adequacy. If a C&R or Stip F&A involving an unrepresented applicant is set by the WCAB for a hearing on adequacy, this does not somehow transform the settlement documents into an unresolved dispute between the parties. Indeed, it is not uncommon that, after discussing the C&R or Stip with the parties at the hearing, the WCAB will approve the settlement agreement as submitted. This is not to say that adequacy hearing cannot arise because, among other things, the unrepresented worker may not be fully aware of his or her rights and/or the defendant may have been exerting its superior bargaining power or knowledge. Even in such cases, however, the WCAB's involvement may result in a new and different settlement, without the need for the injured employee to obtain an attorney. Further, if an inadequate settlement is submitted due to bad faith or frivolous actions or tactics by a defendant, and if the injured employee obtains an attorney, then attorney's fees may be payable under Labor Code section 5813 and WCAB Rule 10561.

In any event, attorney's fees are not payable under section 4064(c) unless the application has been filed by the defendant. CAAA admits that it "may be technically correct" to view a C&R or Stip F&A as a joint filing by both the employer and employee. This is not only technically correct; it is legally correct.]

Specific Technologies or Equipment

The amendment to this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendment.

Effect on Small Businesses

Certain entities who might file an application (applicant's attorneys, defense attorneys, insurance carriers, self-insured employers, claims administrators, and certain lien claimants) will now have to serve a post-filing conformed copy of the application, in addition to serving a pre-filing non-conformed copy of the application. However, many of these entities will not be "small businesses" within the meaning of Government Code section

11342.610. Further, except for amended applications, there is really no *additional* post-filing service being required, just a *different* type of post-filing service. That is, under the first sentence of current Rule 10500, whenever one of these entities files an application, they are concurrently required to serve a copy of it on all other parties. This is still true under amended Rule 10400. Then, under the last sentence of current Rule 10400, when the WCAB notifies the filing entity of the assigned case number for an initial application, the filing entity must serve that case number on all other parties and lien claimants. Under amended Rule 10400, the filing entity still has to make a post-filing service, however, that service now consists of a copy of a conformed copy of the application plus notice of the adjudication case number and venue, instead of just notification of the case number. Moreover, under amended Rule 10505, service will no longer necessarily be accomplished by first-class mail, but in certain instances it may be accomplished by e-mail, fax, or other agreed-upon method of service. As a result, costs could be reduced in some cases.

Economic Impact on California Business Enterprises and Individuals

For the reasons just discussed, the amendment to this rule will not have a significant economic impact on California business enterprises and individuals.

15. Section Added: 10403.

Statement of Specific Purpose and Reasons for the Addition of Section 10403

The WCAB adds Rule 10403, entitled “Application Required Before Jurisdiction Invoked and Before Compelled Discovery May Be Commenced.” In essence, Rule 10403 provides that the jurisdiction of the WCAB is invoked only by the filing of an application or other case opening document. [NOTE: Under current statutory and regulatory provisions, a “case opening document” would include an initial (but not an amended) Application for Adjudication of Claim. Also, a “case opening document” would likely include a Stipulations with Request for Award where no application was previously filed, a Compromise and Release agreement where no application was previously filed, an initial Request for Findings of Fact under section 10405, a petition for reconsideration in a carve-out case, and a petition appealing a Labor Code section 129.5(g) audit penalty assessment.]

This rule is consistent with the language of Labor Code section 5500 that “the filing of an application for adjudication ... shall establish the jurisdiction of the appeals board” and it is consistent with *Yee-Sanchez v. Permanente Medical Group* (2003) 68 Cal.Comp.Cases 637 (WCAB Significant Panel Decision), which held in substance that an application must be filed with the WCAB before hearings may be conducted, orders issued, or the WCAB’s judicial process invoked to compel discovery – although non-compelled pre-application investigations and medical reports are permissible.

The rule is necessary because ancillary units of DWC (such as the Disability Evaluation Unit, the Information and Assistance Office, the Rehabilitation Unit, and the Retraining and Return to Work Unit) also will be utilizing EAMS and, in many instances, they will be assigning non-adjudication EAMS case numbers before an application is ever filed with the WCAB. For example, if the Disability Evaluation Unit (DEU) were to receive a pre-application request to rate a medical report for a particular employee with a particular date of injury, it could designate its file as Case No. DEU 123456789. Then, if an application is subsequently filed with the WCAB relating to the same employee and the same date of injury, the numerical portion of the DEU case number would be carried over to the adjudication case number (Case No. ADJ 123456789). This rule simply clarifies that the pre-application assignment of a non-adjudication EAMS case number by an ancillary unit of DWC: (1) does not establish the jurisdiction of the WCAB and, therefore, does not permit the WCAB to conduct any pre-application hearings or issue any pre-application orders (including orders compelling medical evaluations); (2) does not toll the statute of limitations (except as provided in Labor Code section 5454 for submissions to the Information and Assistance Unit); and (3) does not authorize the commencement of formal, compelled discovery using subpoenas or other process issued by or under the auspices of the WCAB. The rule, however, does not preclude non-compelled pre-application medical evaluations or investigations.

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

16. Section Added: 10409.

Statement of Specific Purpose and Reasons for the Addition of Section 10409

The WCAB adds Rule 10409, entitled “Venue.” The rule provides that any person or entity filing an initial application (or other case opening document) must designate venue, in accordance with the provisions of Labor Code section 5501.5. The rule also establishes venue for the workers’ compensation claims of DWC employees, so that a DWC employee’s claim will be heard by a WCJ unfamiliar with the employee and at a district office that is different than the one at which the employee works, but which is within a reasonable geographic distance.

[NOTE: Subsequent to the closure of the public comment period on September 12, 2008, the WCAB amended Rule 10409. In essence, adopted Rule 10409 differs from proposed Rule 10409 in that, when an employee of the Division of Workers’ Compensation (DWC) files his or her own application:

(1) the venue will not automatically be changed to a district office other than the one where he or she is assigned to work; instead, venue may be based on the agreement of the parties (subject to the approval of the presiding workers’ compensation judge (PWCJ) of the agreed-upon venue) or, failing such an agreement, venue will be determined by the Secretary or other Deputy Commissioner of the Appeals Board; and

(2) regardless of the venue, the Secretary or other Deputy Commissioner of the Appeals Board will determine which workers’ compensation judge will be assigned to the DWC employee’s case (i.e., whether or not that judge is within the same region as the employee’s region); however, the judge still must be unfamiliar with the DWC employee.

The first post-hearing change was made because there is no reason to automatically change the venue of a DWC employee’s case where the parties are able to mutually agree to keep the venue at the district office to which he or she is assigned. The old procedure of automatically moving the case (which was adopted through a policy and procedure manual, not a regulation) was implemented primarily to save the DWC employee from the embarrassment of making his or her claim and/or medical condition public to people who work with or around the employee. Also, if the DWC employee’s claim was related to stresses or tensions at work (e.g., with other DWC employees), then having the hearing at another district office could make it easier for the employee or for his or her co-workers, especially if the case went to trial and the employee and/or co-workers had to testify. Yet, presumably, if the parties have agreed to keep the case at the DWC employee’s own district office, then these issues are not present or are not paramount. Moreover, it may be substantially more convenient for the employee, the attorneys, the witnesses and others to keep the case venued at the employee’s own district office. It is only where no agreement can be reached that the involvement of the Secretary or other Deputy Commissioner of the Appeals Board becomes necessary. Moreover, it is appropriate to have the Secretary or other Deputy Commissioner of the Appeals Board make the decision on venue – rather than the Court Administrator or the Regional Manager/Associate Chief Judge – because the Appeals Board has jurisdiction over venue issues (see Lab. Code, §§ 5501.5, 5501.6), because the Secretary and other Deputy Commissioners

already determine disputed venue issues (WCAB Rule 10346), and because the Secretary and other Deputy Commissioners, being employees of the Appeals Board and not DWC, do not directly or indirectly supervise the employee or control his or her work environment.

The second post-hearing change was made because the Secretary or other Deputy Commissioner of the Appeals Board already assigns the workers' compensation judge (WCJ) who will hear the DWC employee's case, if it is necessary to bring in a WCJ from outside the employee's region. It is also appropriate for the Secretary or other Deputy Commissioner – rather than the Court Administrator, a Regional Manager/Associate Chief Judge, or the PWCJ of the district office where the case will be heard – to assign any WCJ who comes from within the employee's region. Once again, this is because the Secretary and other Deputy Commissioners already have authority over case assignments. (WCAB Rule 10346.) Also, the Secretary and other Deputy Commissioners do not directly or indirectly supervise the employee or control his or her work environment. Therefore, questions regarding bias or prejudice in assigning the WCJ are less likely to arise.]

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

17. Section Amended: 10410.

Statement of Specific Purpose and Reasons for the Amendments to Section 10410

The WCAB proposes to amend Rule 10410, currently entitled “Objection to Venue,” but which would be re-titled “Objection to Venue under Labor Code Section 5501.5(c).”

Initially, Rule 10410 is amended to make it clear that it applies only to objections, made under Labor Code section 5501.5(c), to venue selections based on the applicant's attorney's principal place of business, made under Labor Code section 5501.5(c).

Also, current Rule 10410 provides that the 30-day time period for a defendant to object to the venue designated in an initial application starts running from the date that the “notice of the case number is served” on the defendant. (Emphasis added.) Amended Rule 10410, however, provides that the 30-day time period for objecting starts running from the date that “notice of the adjudication case number and venue is received” by the objecting defendant. (Emphasis added.) This is more consistent with the language of Labor Code section 5501.5(c), which provides in relevant part, “The employer shall have 30 days from receipt of the information request form to object to the selected venue site.” (Emphasis added.) Further, amended Rule 10410 provides that if a defendant objects to venue, it must declare under penalty of perjury when it received notice of the adjudication case number and venue.]

[NOTE: Former Labor Code section 5401.5, which required an applicant's attorney to send an “information request form” to the defendant, and former Labor Code section 5401.6, which required the defendant to respond to the “information request form” within 30 days of its receipt, were both repealed in 1993. (Stats. 1993, ch. 121, §§ 59, 60 (AB 110).) Nevertheless, because Labor Code section 5501.5(c) still provides that a

defendant “shall have 30 days from receipt of the information request form to object to the selected venue site,” the WCAB has concluded that the repeal of former sections 5401.5 and 5401.6 does not preclude a defendant from timely objecting to venue. (E.g., Fister v. City of Merced (1996) 24 Cal. Workers’ Comp. Rptr. 138 (WCAB panel decision); Koine v. Fontana Unified School Dist. (1999) 27 Cal. Workers’ Comp. Rptr. 138 (WCAB panel decision). Moreover, although the information request form no longer exists, the language of section 5501.5(c) makes it clear that it is the “receipt” of the written notice of venue that triggers the time for filing an objection.)

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

18. Section Amended: 10411.

Statement of Specific Purpose and Reasons for the Amendments to Section 10411

The WCAB amends Rule 10411, currently entitled “Petition for Change of Venue,” but which is re-titled “Petition for Change of Venue under Labor Code section 5501.6.” The changes clarify that the section relates solely to a petition to change venue pursuant to Labor Code section 5501.6, as opposed to an objection to a venue designation pursuant to Labor Code section 5501.5. The changes also clarify that the determination of a petition for change of venue shall be made by the presiding judge (or the designee of the presiding judge) of the district office having venue, i.e., the petition is not to be decided by the PJ of the district office to which venue is sought to be changed.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

19. Section Amended: 10412.

Statement of Specific Purpose and Reasons for the Amendments to Section 10412

The WCAB amends Rule 10412, currently entitled “Location of File After Venue Change,” but which is re-titled “Proceedings and Decisions After Venue Change.” The change is necessary because there is no “physical” location of an electronic (paperless) adjudication case file residing within EAMS, i.e., the file exists only in cyberspace. Therefore, when venue is changed, there will be no physical transfer of a case file from one district office to another (with the exception of some “legacy” paper case files that existed before EAMS). However, once venue has been changed, the new district office will conduct all trial level proceedings in issue all trial level decisions, unless another order changing venue is issued.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

20. Sections Repealed: 10414, 10415, and 10416.

Statement of Specific Purpose and Reasons for the Repeal of Sections 10414, 10415, and 10416

The WCAB repeals Rules 10414 and 10415 entitled, respectively, “Declaration of Readiness to Proceed” and “Declaration of Readiness to Proceed to Expedited Hearing.” Pursuant to Labor Code section 5307(c), the provisions of current Rules 10414 and 10415 are transferred to Court Administrator Rule 10250 (which makes some minor changes to the substance of current Rules 10414 and 10415). The WCAB also repeals Rule 10416, entitled “Objection to Declaration of Readiness.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10416 are transferred to Court Administrator Rule 10251 (which makes some minor changes to the substance of current Rule 10416).

Specific Technologies or Equipment

The repeal of these rules does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeals.

Effect on Small Businesses

The repeal of these rules will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of these rules will not have a significant economic impact on California business enterprises and individuals.

21. Section Repealed: 10417.

Statement of Specific Purpose and Reasons for the Repeal of Section 10417

The WCAB repeals Rule 10417, entitled “Walk-Through Calendar Setting.” Pursuant to Labor Code section 5500.3(a), which vests the Court Administrator with rule-making authority over “court settings,” the authority over walk-through calendar settings now falls under the jurisdiction of the Court Administrator. (See, also, Lab. Code, § 5307(c) [giving the Court Administrator authority to adopt rules “regarding conferences, hearings, continuances, and other matters deemed reasonable and necessary to expeditiously resolve disputes”].) Currently, the Court Administrator is *not* proposing to adopt a rule regarding walk-through calendar settings. This is because, when a declaration of readiness (DOR) is filed, the initial mandatory settlement conference (MSC) date will be automatically calendared by EAMS, so as to balance the caseload among judges and to help limit how far cases are calendared out. In the first phase of EAMS, the calendars of the individual attorneys or hearing representatives will not be considered. (See DWC’s website re EAMS at http://www.dir.ca.gov/dwc/EAMS/EAMS_FAQs.htm#5.) Therefore, an attorney or hearing representative who intends to file multiple DORs for one venue at one time will not be able to request that all of the MSCs be “bulk set” for the same date and time. [NOTE: DWC has advised the WCAB that, given the way that EAMS has been designed to calendar cases, the walk-through calendaring of cases is no longer feasible. (In Phase 2 of EAMS, it is anticipated that attorneys will have some degree of control over calendaring, although not to the extent they do under current Rule 10417). In any event, there appears to be no statutory or other legal requirement that attorneys be permitted to “bulk set” the calendaring of their cases on a walk-through basis.]

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule (or, more accurately, the implementation of phase 1 of EAMS by DWC) could have a significant effect on some small businesses, particularly law firms, attorneys, and lien representatives who routinely appear at more than one district office. Because the calendars of individual attorneys and hearing representatives will not be considered in setting MSCs, these attorneys and representatives will be unable to “block set” several MSCs in which they are case participants at the same district office at the same date and time. This could result in business inefficiencies in that attorneys and hearing representatives may be required to spend more time in making appearances at MSCs (and in traveling to and from them) and less time working at their offices. Also, the repeal of this rule (or, more accurately, the implementation of phase 1 of EAMS) may result in more calendar conflicts (because EAMS may automatically set two or more cases involving the same attorney or hearing representative at different district offices at the same date and time) and, therefore, more continuance requests.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals, except as described in the paragraph above.

22. Section Amended: 10450.

Statement of Specific Purpose and Reasons for the Amendments to Section 10450

The WCAB amends Rule 10450, relating to “Petitions.” The changes are minor, including (1) eliminating language regarding the place for filing petitions that request trial level WCAB action (because this will be

covered by Court Administrator Rule 10227(a)) and (2) providing that previously filed documents “shall not” be attached to petitions (instead of “should not” be attached), making it clear that this duty is mandatory, not discretionary. Amended Rule 10450 continues to provide that “[a] request for action by the Workers’ Compensation Appeals Board ... shall be made by petition.” The retention of this language makes it clear that any action on a petition will be by the WCAB, i.e., either by the Appeals Board itself or by a WCJ pursuant to the Appeals Board’s delegation of its judicial authority. (See discussion at pp. 3-4, supra.) This language also clearly distinguishes petitions for action by the WCAB from petitions for action by ancillary units of DWC.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

23. Section Amended: 10500.

Statement of Specific Purpose and Reasons for the Amendments to Section 10500

The WCAB amends Rule 10500, currently entitled “Service,” but which is re-titled “Service by the Workers’ Compensation Appeals Board.” The changes put all of the provisions relating to service by the WCAB into a single rule (i.e., current Rule 10520, relating to proof of service by the WCAB, is being repealed and, instead, proof of service by the WCAB is now covered by Rule 10500). Rule 10500 continues to provide that the WCAB may designate a party or lien claimant to serve various documents issued by the WCAB (i.e., notices of hearing, orders approving compromise and release agreements, stipulated awards, and interim or procedural orders). Rule 10500 also continues to provide that the WCAB itself shall serve any final order on a disputed issue after submission. However, Rule 10500 is clarified to specifically state that designated service shall not be used to serve a final order relating to a submitted disputed issue. Moreover, unlike current Rule 10520 (which addresses proof of service only when the WCAB serves a document personally or by mail), proposed Rule 10500 addresses personal, mail, e-mail, and fax service by the WCAB (the latter two of which are new under EAMS).

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

24. Section Amended: 10505.

Statement of Specific Purpose and Reasons for the Amendments to Section 10505

The WCAB amends Rule 10505, currently entitled “Service by the Parties,” but which is re-titled “Service by the Parties or Lien Claimants.” The changes put all of the service provisions relating to parties and lien claimants into a single rule (i.e., current Rule 10514, relating to proof of service by the parties and lien claimants, is being repealed and such proof of service is covered by amended Rule 10505). [NOTE: Rule 10505 is limited to the service of documents by the parties and lien claimants on each other. The filing of documents by parties and lien claimants is largely addressed by Court Administrator Rules 10227 et seq.] Rule 10505 addresses personal, mail, e-mail, and fax service by the parties and lien claimants (the latter two types of service being new under EAMS), including service on another party or lien claimant using its designated preferred method of service (see Court Administrator Rule 10218) or using a previously agreed to alternative method of service. Rule 10505 also addresses the duty to re-serve a document, when the serving party or lien claimant receives notice that its service on another party or lien claimant has failed.

[NOTE: In e-mailed written comments of July 30, 2008, Andrea Jones, on behalf of EDEX Information Systems (EDEX), expressed concern regarding the language of proposed Rule 10505(b) that, apart from personal service, “service of any document shall be made by first-class mail” (Emphasis added.) EDEX questioned whether service can be made “via FedEx, UPS, etc.” In light of these comments, the WCAB has made a post-public hearing change to provide that “service of any document shall be made by first-class mail or by an alternative method that will effect service that is equivalent to or more expeditious than first-class mail.” (Emphasis added.) Moreover, “an alternative method that will effect service that is equivalent to or more expeditious than first-class mail” has been defined as “(i) use of express (overnight) or priority mail; or (ii) use of a bona fide commercial delivery service or attorney service promising delivery within two business days, as shown on the service’s invoice or receipt.”]

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

25. Section Amended: 10507.

Statement of Specific Purpose and Reasons for the Amendments to Section 10507

The WCAB amends Rule 10507, currently entitled “Mail and Fax Service,” but which is re-titled “Time Within Which To Act When A Document Is Served by Mail, Fax, or E-mail.” The change addresses the time requirements for a party or lien claimant to act or respond when a document is served on it by mail, fax, e-mail, or any method other than personal service. Rule 10507 provides that, for all non-personal service (either by the

WCAB or by the parties or lien claimants), the time for the party or lien claimant being served to act or respond is extended by five calendar days from the date of service if its physical address is within California, by ten calendar days if its physical address is outside California but within the United States, and by twenty calendar days if its physical address is outside the United States. The term “physical address” is defined to mean the street address or Post Office Box of record of the party or lien claimant being served, even if the service is made on a non-physical address (e.g., and e-mail address or a fax number).

The WCAB recognizes that current Rule 10507 cites to the provisions of Code of Civil Procedure section 1013. The WCAB also recognizes that the current version of Code of Civil Procedure section 1013 provides for the time extensions of five calendar days, ten calendar days, and twenty calendar days only if service is made by first-class mail. (Code Civ. Proc., § 1013(a).) That is, current Code of Civil Procedure section 1013 provides for the time extensions of only two court days if service is made either by express mail or overnight delivery service (Code Civ. Proc., § 1013(c)) or by fax (Code Civ. Proc., § 1013(e)). The WCAB has concluded, however, that less confusion will result if the time extensions of five calendar days, ten calendar days, and twenty calendar days apply to all non-personal service, whether made by first-class mail or by some other authorized method.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

26. Section Added: 10508.

Statement of Specific Purpose and Reasons for the Addition of Section 10508

The WCAB adds Rule 10508, entitled “Extension of Time for Weekends and Holidays.” Rule 10508 simply codifies the principle that, if the last day to exercise a right or to perform a duty falls on a weekend or on a holiday (when the WCAB’s offices are closed), the act may be performed or exercised on the next business day. This principle is consistent with case law (see *Alford v. Industrial Acc. Com.* (1946) 28 Cal. 2d 198 [11 Cal. Comp. Cases 127]) and with various statutes (see Gov. Code, §§ 6707, 6700, 6701; Code Civ. Proc., §§ 10, 12-12b, 13, 135).

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

27. Section Amended: 10510.

Statement of Specific Purpose and Reasons for the Amendments to Section 10510

The WCAB amends Rule 10510, currently entitled “Service on Attorney or Agent,” but which is re-entitled “Service on Represented Employees or Dependents and on Attorneys or Agents.” In essence, the changes require that all documents issued by the WCAB (including decisions, orders, minutes, and notices) – whether served by the WCAB itself or by a party designated to serve under Rule 10500 – must be served on the injured employee (or the dependent of a deceased employee), even if the employee (or dependent) is represented.

Otherwise, the provisions of amended Rule 10510 are unchanged from current Rule 10510.

That is, notwithstanding the provision that represented employees and dependents are to be served with all WCAB documents (including those designated to be served by a party under Rule 10500), Rule 10510 continues to provide that the employee or dependent’s attorney or hearing representative also must be served.

Also, Rule 10510 continues to provide that, when a defendant or lien claimant is represented, service of WCAB documents is only required to be made on the defendant or lien claimant’s attorneys or other representative. WCAB documents still must be served directly on defendants or lien claimants only if they are unrepresented.

Moreover, the requirement to serve a represented employee or dependent is limited to service of documents issued by the WCAB. This provision does not apply to service by the parties or lien claimants (other than designated service under Rule 10500). Therefore, as before, Rule 10510 still provides that service by the parties and lien claimants (apart from designated service) must be made only on the attorneys or other representatives of represented applicants, defendants, or lien claimants. Parties and lien claimants must be served with non-WCAB generated documents only if those parties and lien claimants are unrepresented.

However, nothing in Rule 10510 precludes more comprehensive service, either as ordered by the WCAB or in the discretion of the WCAB or the parties.

The principal purpose of the amendments to Rule 10510 is to help ensure that injured employees (and the dependents of deceased employees) are apprised of any decisions, orders, notices of hearing, or other actions by the WCAB, even if the employee or dependent is represented. Each year, the WCAB receives numerous untimely petitions for reconsideration from injured employees or dependents whose attorneys (or recently dismissed attorneys) had elected not to file or had failed to file a timely petition for reconsideration. These petitions frequently allege that the attorney (or former attorney) had failed to copy them with – or advise them of – the decision for which reconsideration is now being sought. Moreover, the WCAB has been advised by the Division of Workers’ Compensation that both its Information and Assistance Offices and its Ethics Committee routinely receive complaints from represented injured employees and dependents that they do not know what is happening in their cases.

The WCAB recognizes that the provision of proposed Rule 10510 requiring service of WCAB documents on represented employees and dependents, when taken in conjunction with the designated service provisions of current and proposed Rule 10500, will mean that, in some instances, a defendant will be serving a WCAB documents directly on a represented injured employee or dependent. The WCAB also is aware that Rule 2-100(A) of the Rules of Professional Conduct provides: “While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.” However, the WCAB believes that designated service of WCAB-generated documents (e.g., notices, decisions, orders, awards) is a pure ministerial act, and would not constitute a “communication” within the meaning of Rule 2-

100(A). Further, Rule 2-100(C)(3) provides: “This rule shall not prohibit: ... Communications otherwise authorized by law.” Therefore, even if designated service could be deemed a “communication,” it would appear that designated service ordered by the WCAB under Rule 10510 would constitute a communication “authorized by law.”

[NOTE: In written comments e-mailed on September 11, 2008 [but dated September 12, 2008] and in testimony presented at the September 12, 2008 public hearing, the California Applicants’ Attorneys Association (CAAA) suggests that new Rule 10510 does not go far enough because it does not require that parties and lien claimants serve non-WCAB generated documents on injured workers if the workers are represented. CAAA states, “We fail to understand why it is important for a represented injured employee to receive documents issued by the Board but not other documents in his or her case.”

Preliminarily, CAAA disregards the fact that if an injured employee’s attorney is served with documents that he or she believes are “important” to the employee, the attorney may simply serve those documents on the employee. Indeed, an attorney has a duty to keep a client reasonably informed regarding the subject matter of the representation, including the duty to provide the client with copies of significant documents. (Bus. & Prof. Code, § 6068(m) & (n); Cal. Rules Prof. Conduct, Rule 3-500.)

*CAAA also disregards the fact that an attorney may not communicate with another party who is represented by an attorney, without the other attorney’s consent. (Cal. Rules Prof. Conduct, Rule 2-100(A).) This prohibition against an attorney directly communicating with a represented party extends to documents sent directly to the represented party. (Crane v. State Bar of California (1981) 30 Cal.3d 117, 121.)⁵ Moreover, violations of this prohibition can lead to disciplinary action by the State Bar and the Supreme Court. (E.g., Crane, *supra*, 30 Cal.3d at p. 124; Mitton v. State Bar of California (1969) 71 Cal.2d 525, 534-535.)*

Arguably, if Rule 10510 required attorneys for defendants and lien claimants to serve non-WCAB generated documents on represented employees, then such service might fall within the “communications otherwise authorized by law” exception of Rule 2-100(C)(3). However, to have Rule 10510 so provide would undermine the purpose of Rule 2-100(A):

*“Th[e] rule [against direct communications with a represented party] is necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice It shields the opposing party not only from ... approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. [¶] The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing [party] from impeding his performance in such role. [The rule permits] a [represented] party’s counsel ... [to] easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist. Consequently, before any direct communication is made with the opposing party, consent of the opposing attorney is required.” (Mitton, *supra*, 71 Cal.2d at p. 534; accord: Abeles v. State Bar of California (1973) 9 Cal.3d 603, 609.)*

Of course, Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation. (Cal. Rules Prof. Conduct, Rule 2-100 [“Discussion”].)⁶ Therefore, there is no absolute bar against, for example, requiring non-attorney claims adjusters to serve documents on represented employees. Nevertheless, this does not mean that such a requirement should be imposed. The reasons underlying Rule 2-100 counsel against such an approach. That is, by not adopting such a provision, it helps prevent a non-attorney who is well-versed in workers’ compensation from potentially taking advantage of

⁵ Indeed, even copying a represented party with documents directed to his or her lawyer could be treated as an “indirect communication” with the opposing party within the meaning of Rule 2-100(A).

⁶ California State Bar Formal Opinion 1993-131 acknowledges the tension between prohibited “indirect communications” and permitted party-to-party communications, and suggests a “matter of degree” approach. The Opinion takes the position that when the content of the communication “originates with or is directed by the client,” the communication is not prohibited by Rule 2-100. On the other hand, if the content of the communication “originates with or is directed by the attorney,” the communication amounts to a prohibited “indirect communication” under Rule 2-100. (See Rutter Group, California Practice Guide: Professional Responsibility, Ch. 8-D, § 8:367.5.)

a represented employee, without his or her attorney's knowledge, and it helps preserve the integrity of the attorney-client relationship.

Furthermore, there are practical reasons why parties and lien claimants should not be required to serve all documents on represented employees. As pointed out in the September 12, 2008 public hearing testimony of David Robin, on behalf of the 4600 Group, many documents directly served on injured employees generate phone inquiries from those employees. These phone inquiries can be time-consuming or, on occasion, even unnecessary – such as where the document served has no direct impact on the employee (e.g., a group health medical treatment lien for which the employee will have no liability).

Accordingly, for all these reasons, the WCAB will not amend Rule 10510 to require defendants and lien claimants (or their attorneys) to serve documents directly on a represented injured employee, except when they have been designated to serve WCAB documents.]

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

28. Sections Repealed: 10514 and 10520.

Statement of Specific Purpose and Reasons for the Repeal of Sections 10514 and 10520

The WCAB repeals Rule 10514, entitled “Proof of Service by Parties and Lien Claimants,” and Rule 10520, entitled “Proof of Service by Workers’ Compensation Appeals Board.” The provisions relating to proof of service by the parties and lien claimants are being moved to Rule 10505 and the provisions relating to proof of service by the WCAB are being moved to Rule 10500.

Specific Technologies or Equipment

The repeal of these rules does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeals.

Effect on Small Businesses

The repeals of these rules will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeals of these rules will not have a significant economic impact on California business enterprises and individuals.

29. Section Amended: 10541.

Statement of Specific Purpose and Reasons for the Amendments to Section 10541

The WCAB amends Rule 10541, relating to “Submission at Conference.” The amendment provides that, if documentary evidence is required to determine any issue that has been submitted for decision at a conference, the parties shall comply with the provisions of Rule 10629 regarding the listing and filing of exhibits.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

30. Section Repealed: 10548.

Statement of Specific Purpose and Reasons for the Repeal of Section 10548

The WCAB repeals Rule 10548, entitled “Continuances.” Pursuant to Labor Code section 5307(c), its provisions are being transferred to Court Administrator Rule 10243 (which does not make any changes to the substance of current Rule 10548).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

31. Section Added: 10550.

Statement of Specific Purpose and Reasons for the Addition of Section 10550

The WCAB adds Rule 10550, entitled “Proper Identification of the Parties and Lien Claimants.” This new rule essentially provides that whenever a party or lien claimant (or an attorney or other representative for a party or lien claimant) appears in any WCAB proceeding – either (i) by filing any application, answer, settlement, lien, petition, or other pleading or (ii) by appearing at any hearing – the following requirements must be met:

- (1) the full legal name of the party or lien claimant must be set forth;
- (2) the attorney or hearing representative must identify which party or parties he or she is representing;
- (3) when a claims administrator appears, it must identify which party or parties (i.e., an employer, an insurance carrier, or both) it is representing and, if it is representing an insurance carrier, the claims administrator must state whether the policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity or entities actually liable for the payment of compensation;
- (4) when insurance carrier appears, it must identify whether it is solely representing itself, or also representing an employer, and it must state whether its policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity or entities actually liable for the payment of compensation; and
- (5) a lien claimant must state whether is the original owner of the alleged that or whether it purchased the alleged debt from the original owner or some subsequent purchaser.

The need to properly set forth the full legal names of the parties and lien claimants is self-evident. Nevertheless, a few reasons will be specified. Preliminarily, it is important to have the correct names of all of the parties and lien claimants because, among other things, this will facilitate searches of the EAMS database and minimize the chances that a particular party or lien claimant will be confused with a similarly named party or lien claimant. Further, it is important to have the full legal name of an injured employee so that he or she can enforce an award made in his or her name, if necessary. (See Lab. Code, §§ 5806, 5807.) Similarly, it is important have the full legal name of an employer or insurance carrier so that an award may be enforced against it. (*Id.*) Also, the correct name of an employer may be necessary to determine, for example, whether a workers’ compensation insurance policy actually covers it. Finally, it is important to have the full legal name of a lien claimant because, in order to perfect a lien, it may have to establish that it, under its legal name, has complied with all applicable licensure, fictitious business name, or accreditation requirements. (See *Zenith Insurance Co. v. Workers’ Comp. Appeals Bd. (Capi)* (2006) 138 Cal.App.4th 373 [71 Cal. Comp. Cases 374].)

In part, Rule 10550 is merely a codification of the principles enunciated in the WCAB’s en banc decisions in *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 289 (“*Coldiron I*”) and *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 1466 (“*Coldiron II*”). In *Coldiron*, the defendant was represented by a third party administrator, Gallagher Bassett Services, Inc. (Gallagher Bassett). Based on stipulations made by applicant and Gallagher Bassett, the WCJ found, among other things, that applicant sustained an industrial injury while employed by Compuware, *permissibly self-insured*. Thereafter, Compuware sought reconsideration contending that the award should have been made against its insurance carrier, Reliance National Insurance Company (Reliance). In *Coldiron*, the WCAB held that where a third-party administrator is adjusting liability for workers’ compensation benefits, the administrator must disclose to the WCAB, to the other parties, and to its own counsel, if any, the identity of its client (whether a self-insured employer, an insurance carrier, or both). The WCAB further held that, if the client is an insurance carrier, the administrator must disclose whether the insurance policy includes a “high self-insured retention,” a large deductible, or any other provision that affects the identity of the entity actually liable for the payment of compensation. [NOTE: This would include a so-called “fronting policy,” where the policy limit equals and includes the amount of the deductible, thereby failing to shift any actual liability from the employer to the insurer.]

Also, in part, Rule 10550 merely extends the principles of *Coldiron* to cases where an insurance carrier is appearing directly (i.e., it is not appearing through a third-party administrator) because, in such circumstances, it

is equally important to know whether the policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity actually liable for the payment of compensation.

Furthermore, the question of whether the insurance policy is a fronting policy or is a policy that includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity actually liable for the payment of compensation will affect the question of whether the employer should be dismissed from the case and the carrier entirely substituted in. (See Lab. Code, §§ 3755-3759.)

Finally, an injured employee's workers' compensation benefits are not assignable before payment (Lab. Code, § 4900), but a lien claim may be filed against the employee's compensation (Lab. Code, § 4903 et seq.) and the lien itself is assignable. (*Engle v. Endlich* (1992) 9 Cal.App.4th 1152, 1164 [57 Cal.Comp.Cases 617]; see also *Morris v. Standard Oil Co.* (1926) 200 Cal. 210.) However, the question of whether a lien claimant is the original owner of the lien or is an assignee is important because issues may arise as to whether the lien was properly assigned or whether the defendant received proper notice of the assignment.

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

32. Section Repealed: 10555.

Statement of Specific Purpose and Reasons for the Repeal of Section 10555

The WCAB repeals Rule 10555, relating to the "Priority Conference Calendar." Pursuant to Labor Code sections 5307(c) and 5502(b) & (c), the provisions of current Rule 10555 are transferred to Court Administrator Rule 10254 (which does not make any substantial changes to the substance of current Rule 10555).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

33. Section Amended: 10561.

Statement of Specific Purpose and Reasons for the Amendments to Section 10561

The WCAB amends Rule 10561, relating to “Sanctions.”

Among other things, the amendments to Rule 10561 provide that sanctions may be imposed not only for violations of the WCAB’s rules of practice and procedure, but also for violations of the rules and regulations of the Administrative Director (AD) and the Court Administrator of the Division of Workers’ Compensation. Rule 10561 allows the imposition of sanctions for violations of AD or Court Administrator’s rules: (1) because significant portions of the workers’ compensation system are now under the regulatory authority of the AD and the Court Administrator (see, e.g., Lab. Code, §§ 5307(c), 5307.3; Cal. Code Regs., tit. 8, §§ 9700-10115.3 [AD Rules], §§ 10210-10297 [Court Administrator Rules]); and (2) because many of these rules directly or indirectly impact proceedings before the WCAB (see Lab. Code, § 5813).

The amendments to Rule 10561 also expand its current provisions so that the failure to timely serve *any* document (not just “evidentiary” documents) may result in the imposition of sanctions, if the document is required to be served by rule, unless the failure to serve results from mistake, inadvertence, surprise, or excusable neglect. However, the amendments clarify that this provision applies only to documents that are within a party or lien claimant’s “possession or control.”

The amendments to Rule 10561 further provide that, unless a reasonable excuse is offered or the offending party has not demonstrated a pattern of such conduct, sanctions may be imposed for executing declarations or verifications that contain false or substantially false statements of fact, that contain statements of fact that are substantially misleading, that contain substantial misrepresentations of fact, that contain statements of fact that are made without a reasonable basis or with reckless indifference as to their truth or falsity, that contain statement of fact that are literally true but are intentionally presented in a manner reasonably calculated to deceive, or that conceal or substantially conceal material facts. (See, e.g., *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709 (“concealment of a material fact misleads the judge as effectively as a false statement No distinction can therefore be drawn among concealment, half-truth, and false statement of fact” [internal quotation marks omitted]); *In re Ciraolo* (1969) 70 Cal.2d 389, 394 (“the filing by an attorney of an affidavit containing statements known to be false, or with disregard as to their truth or falsity, is contemptuous, as is any other attempt to deceive a court”); *In re White* (2004) 121 Cal.App.4th 1453, 1480-1488 (sanctions warranted where attorney grossly and repeatedly misrepresented both the law and the facts); *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 193 (attorney sanctioned for dishonest or inexcusably inaccurate factual representations, made under penalty of perjury, in declarations supporting motions for extensions of time to file an appeal); *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, 21 (attorney and party sanctioned for material factual allegations that were completely false and utterly devoid of supporting evidence); Bus. & Prof. Code, § 6068(d) (attorney shall employ “those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law”); Cal. Rules of Professional Conduct, Rule 5-200 (A) & (B) (similar to Bus. & Prof. Code, § 6068(d)); Civ. Code, § 1710 (defining fraud or deceit to include: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact); Civ. Code, § 1572 (dealing with fraud in making a contract and defining “fraud” consistent with Civ. Code, § 1710, but also including “[a]ny other act fitted to deceive”).)

[NOTE: The WCAB recognizes that some of the legal authority it cites in support of the above – and other – amendments to Rule 10561 relates specifically to attorneys. Of course, a party or lien claimant may be self-represented (Lab. Code, §§ 5501, 5700; see also, *Baba v. Bd. of Sup’rs of City and County of San Francisco* (2004) 124 Cal.App.4th 504, 523 (noting that self-representation “at law and in legal proceedings ... is not just a privilege but also a right”)) and even non-attorneys may appear on behalf of a party or lien claimant in proceedings before the WCAB. (Lab. Code, §§ 5501, 5700; see also, *Eagle Indemnity Co. v. Industrial Acc.*

Com. (Hernandez) (1933) 217 Cal. 244, 248 [19 I.A.C. 150]; 99 Cents Only Stores v. Workers' Comp. Appeals Bd. (Arriaga) (2000) 80 Cal.App.4th 644, 648 [65 Cal.Comp.Cases 456]; Longval v. Workers' Comp. Appeals Bd. (1996) 51 Cal.App.4th 792, 798 [61 Cal.Comp.Cases 1396].) Nevertheless, the general rule is that non-attorneys are held to the same standards as attorneys. (Burnete v. La Casa Dana Apartments (2007) 148 Cal.App.4th 1262, 1267 ("When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney." [internal quotation marks and references to citations omitted]); People v. \$17,522.08 United States Currency (2006) 142 Cal.App.4th 1076, 1084 ("civil litigants and criminal defendants who represent themselves in the trial court are held to the same standards as are parties who are represented by counsel"); Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1247 (non-attorney "is entitled to the same, but no greater consideration than ... [an] attorney[.]" and is "held to the same restrictive procedural rules as an attorney" [internal quotation marks and citations omitted]); Lombardi v. Citizens National Trust & Savings Bank of Los Angeles (1955) 137 Cal.App.2d 206, 208-209 (non-attorneys "should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded" [internal quotation marks and citations omitted]).) Therefore, lay representatives in workers' compensation proceedings are fully subject to being sanctioned to the same extent as attorneys. Nevertheless, consistent with the principles that informality of pleading characterizes workers' compensation case (e.g., Bland v. Workmen's Comp. Appeals Bd., supra, 3 Cal.3d at pp. 328-334; Blanchard v. Workers' Comp. Appeals Bd., supra, 53 Cal.App.3d at pp. 594-595) and that unrepresented workers generally are not versed in the "procedural niceties" (Bland v. Workmen's Comp. Appeals Bd., supra, 3 Cal.3d at p. 334; Beveridge v. Industrial Acc. Com., supra, 175 Cal.App.2d at p. 598), it has been periodically held that pleading requirements are significantly relaxed for self-represented injured workers. (E.g., Fisher Ranch v. Workers' Comp. Appeals Bd. (Ramirez) (1984) 49 Cal.Comp.Cases 701 (writ den.); Maloney v. Boise Cascade Corp. (1988) 17 Cal. Workers' Comp. Rptr. 45 (Appeals Board panel decision).) Therefore, the WCAB may take these principles into consideration when deciding whether to impose sanctions against a self-represented injured worker.]

The amendments to Rule 10561 further provide that sanctions may be imposed for bringing a claim, conducting a defense, or asserting a position that is indisputably without merit, done solely or primarily for the purpose of harassing or maliciously injuring any person, or done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation, where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct. (See, e.g., Code Civ. Proc., § 128.7(b) (providing that an attorney, law firm, or party may be sanctioned by filing a pleading where: (1) it is being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions do not have evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; or (4) the denials of factual contentions are not warranted on the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief); Cal. Rules of Professional Conduct, Rules 3-200(A) (an attorney shall not seek, accept, or continue employment if he or she knows or should know that the objective of such employment is to bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person) & Rule 3-700(B) (an attorney must seek to withdraw from representing a client if he or she knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person).)

The amendments to Rule 10561 also provide that sanctions may be imposed for presenting a claim or a defense, or raising an issue or argument, that is not warranted under existing law – unless it can be supported by a nonfrivolous argument for an extension, modification, or reversal of the existing law or for the establishment of new law – and where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct. (See, e.g., Code Civ. Proc., § 128.7(b) (providing that an attorney, law firm, or party may be sanctioned by filing a pleading unless "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"); Cal. Rules of Professional Conduct, Rule 3-200(B) (an attorney shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is "[t]o present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of

such existing law”).) In determining whether a claim, defense, issue, or argument is warranted under existing law, or if there is a reasonable excuse for it, Rule 10561 provides that consideration shall be given to: (A) whether there are reasonable ambiguities or conflicts in the existing statutory, regulatory, or case law, taking into consideration the extent to which a litigant has researched the issues and found some support for its theories; and (B) whether the claim, defense, issue, or argument is reasonably being asserted to preserve it for reconsideration or appellate review. This subdivision is specifically intended not to have a “chilling effect” on a party or lien claimant’s ability to pursue new theories, at least in areas of the law that reasonably can be regarded as not settled. (Cf. *Hudson v. Moore Business Forms* (9th Cir. 1987) 836 F.2d 1156, 1160.)

The amendments to Rule 10561 additionally provide that sanctions may be imposed for asserting a position that misstates or substantially misstates the law, where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct. (See, e.g., Bus. & Prof. Code, § 6068(d) (an attorney shall “never to seek to mislead the judge or any judicial officer by ... [a] false statement of ... law”); Cal. Rules of Professional Conduct, Rule 5-200(C) & (D) (an attorney “[s]hall not intentionally misquote to a tribunal the language of a book, statute, or decision” and “[s]hall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional”); *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, fn. 9 (discussing an attorney’s duty of “Candor Toward the Tribunal,” e.g., an attorney “must not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel,” and stating that “[t]he obligation to disclose adverse legal authority is an aspect of the lawyer’s role as ‘officer of the court.’ ”).)

The amendments to Rule 10561 also provide that sanctions may be imposed for using any written or spoken language or gesture at or in connection with any hearing, or using any language in any pleading or other document: (1) where the language or gesture is directed to the WCAB, to any of its officials or staff, or to any party or lien claimant (or the attorney or other representative for a party or lien claimant) and it is patently insulting, offensive, insolent, intemperate, foul, vulgar, obscene, abusive, or disrespectful; or (2) where the language or gesture impugns the integrity of the WCAB. (See, e.g., *In re Buckley* (1973) 10 Cal.3d 237, 248-250 (“[i]nsolence to the judge in the form of insulting words or conduct” made in open court either orally or in writing “impugns the integrity of the court,” and “when ... aggressive advocacy gives way to insolence and disrespect towards the court and particularly when it degenerates into impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court it is the trial judge’s bounden duty to protect the integrity of his court.” (internal citations in quotation marks omitted)); *In re Koven* (2005) 134 Cal.App.4th 262, 271-272 (attorney sanctioned for brief that, among other things, accused the Court of Appeal of “deliberate judicial dishonesty,” of having “fixed” the appeals so that the opposing parties would prevail, and of “having committed fraud in betraying its duty to uphold the public trust in a fair, impartial judiciary”; Court held that an attorney may not impugn the integrity of the court by using impertinent, scandalous, or insulting language, and a “judge of a court is well within his rights in protecting his own reputation from groundless attacks upon his judicial integrity and it is his bounden duty to protect the integrity of his court.” [internal quotation marks omitted]); *Dwyer v. Crocker National Bank* (1987) 194 Cal.App.3d 1418, 1438 (sanctions under Code Civ. Proc. § 128.5 warranted where attorney failed to prevent vulgar and racist language by witnesses); *In re Grossman* (1972) 24 Cal.App.3d 624, 629 (“the court has the right to expect and demand that, in the course of judicial proceedings, advocates will conduct themselves in a courteous, professional manner”); Bus. & Prof. Code, § 6068(b) (“It is the duty of an attorney to ... maintain the respect due to the courts of justice and judicial officers.”); Code Civ. Proc., § 1209(a)(1) (“[d]isorderly ... or insolent behavior toward the judge” is contemptuous).) The WCAB recognizes, however, that where an insulting intonation, facial expression, or gesture accompanies words that are wholly innocuous, then the facial expression, gesture, or tone of voice by itself might not be sufficient to support the imposition of sanctions; instead, a warning from the judge that the tone, expression, or gesture is offensive might be required. (*In re Buckley, supra*, 10 Cal.3d at p. 249.)

Also, the amendments to Rule 10561 make clear that, notwithstanding any other provision of the WCAB’s rules (see, e.g., current Rule 10301(l) or proposed Rule 10301(v) [generally defining when a lien claimant is a “party”]), a lien claimant may be deemed a “party” at any stage of the proceedings before the WCAB for purposes of imposing sanctions. In this regard, Labor Code section 4903.6(c) specifically gives the WCAB the authority to impose sanctions under Labor Code section 5813 against a medical treatment or medical-legal lien claimant for filing an application or a declaration of readiness in violation of the time provisions of section 4903.6(a) and (b). Moreover, the term “party” is not defined or limited by Labor Code section 5813, nor is it

otherwise defined or limited by any provision of Division 4 of Labor Code, and the WCAB has long considered lien claimants to be subject to sanctions under Labor Code section 5813. (E.g., *Garcia v. The Vons Company, Inc.* (2001) 66 Cal.Comp.Cases 362 & 66 Cal.Comp.Cases 465 (Appeals Board en banc decisions).) Further, a statute should be construed to promote, rather than defeat, its general purpose and to avoid absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Estate of Griswold* (2001) 25 Cal.4th 904, 911; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978.) The obvious purpose of section 5813 is to prevent the use of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay in WCAB proceedings, and to give the WCAB the power to punish such bad faith actions or tactics when they are used. Therefore, it would be absurd to construe the term “party” in section 5813 to mean that the WCAB may sanction bad-faith actions or tactics by parties or their attorneys, but that it cannot also sanction lien claimants for equally bad-faith actions or tactics. This is particularly true given that the case law clearly establishes that, at all stages of the WCAB’s proceedings, a lien claimant is a “party in interest” with full due process rights, including the right to be heard. (E.g., *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811 [65 Cal.Comp.Cases 1402]; *Premier Medical Management Systems, Inc. v. Cal. Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 468 [71 Cal.Comp.Cases 210]; *Beverly Hills Multispecialty Group, Inc. v. Workers’ Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789, 803 [59 Cal.Comp.Cases 461].)

Finally, the amendments to Rule 10561 make clear that a lay representative is an “attorney” for purposes of imposing sanctions. As noted above, a lay representative may appear on behalf of a party or lien claimant in WCAB proceedings. (Lab. Code, §§ 5501, 5700; see also, *Eagle Indemnity Co. v. Industrial Acc. Com. (Hernandez)*, *supra*, 217 Cal. at p. 248; *99 Cents Only Stores v. Workers’ Comp. Appeals Bd. (Arriaga)*, *supra*, 80 Cal.App.4th at p. 648; *Longval v. Workers’ Comp. Appeals Bd.*, *supra*, 51 Cal.App.4th at p. 798.) Although such a lay representative is not an attorney at law, the lay representative may properly be deemed an attorney in fact. Moreover, the general rule is that non-attorneys are held to the same standards as attorneys. (*Burnete v. La Casa Dana Apartments*, *supra*, 148 Cal.App.4th at p. 1267; *People v. \$17,522.08 United States Currency*, *supra*, 142 Cal.App.4th at p. 1084; *Nwosu v. Uba*, *supra*, 122 Cal.App.4th at p. 1247; *Lombardi v. Citizens National Trust & Savings Bank of Los Angeles*, *supra*, 137 Cal.App.2d at pp. 208-209.) Therefore, it is appropriate to consider a lay representative as an “attorney” for purposes of imposing sanctions under Labor Code section 5813 and Rule 10561.⁷ This would be consistent with the principal, discussed above, that a statute should be construed to promote, rather than defeat, its general purpose and to avoid absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Estate of Griswold* (2001) 25 Cal.4th 904, 911; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978.) The obvious purpose of section 5813 is to prevent the use of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay in WCAB proceedings, and to give the WCAB the power to punish such bad faith actions or tactics when they are used. Therefore, it would be absurd to construe the term “attorney” in section 5813 to mean that the WCAB may sanction attorneys at law for their bad-faith actions or tactics, but that it cannot also sanction lay representatives (i.e., and attorneys in fact) for equally bad-faith actions or tactics.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

⁷ Indeed, the WCAB already considers a lay representative as an “attorney” for purposes of imposing sanctions. (*Chavez v. Vista Metals Corp.* (2007) 2007 Cal. Wrk. Comp. P.D. LEXIS 68 (Appeals Board panel decision).)

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

34. Section Repealed: 10563.

Statement of Specific Purpose and Reasons for the Repeal of Section 10563

The WCAB repeals Rule 10563, relating to “Appearances Required.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10563 are transferred to Court Administrator Rule 10240 (which makes several changes to the substance of current Rule 10563, particularly with respect to lien claimants).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule (as opposed to the Court Administrator’s adoption of Rule 10240) will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

35. Section Amended: 10589.

Statement of Specific Purpose and Reasons for the Amendments to Section 10589

The WCAB amends Rule 10589, currently entitled “Consolidated Cases,” but which is re-titled “Consolidation of Cases.” This amendment is part of a proposed reorganization of all of the consolidation rules (i.e., current Rules 10589 through 10592) so that issues relating to the assignment of consolidated cases (i.e., which district office and which WCJ will hear the consolidated cases) are transferred to Court Administrator Rule 10260, pursuant to Labor Code section 5307(c), and other issues relating to consolidated cases are in Rule 10589.

Among other things, Rule 10589 specifically sets forth some of the factors the WCAB may consider in determining whether to consolidate two or more related cases (involving either the same injured employee or multiple injured employees). Also, it specifies certain requirements for any petition for consolidation. Finally, it specifies how pleadings, exhibits, minutes, summaries of evidence, and decisions are handled in consolidated cases.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

36. Sections Repealed: 10590, 10591, and 10592.

Statement of Specific Purpose and Reasons for the Repeals of Sections 10590, 10591, and 10592

The WCAB repeals Rules 10590, 10591, and 10592, entitled, respectively, “Consolidated Cases-Same Injured Worker,” “Consolidating Cases-Multiple Injured Workers,” and “Pleadings in Consolidated Cases.” As noted in the discussion of Rule 10589, above, these repeals would be part of a reorganization of all of the consolidation rules (i.e., current Rules 10589 through 10592) so that issues relating to the assignment of consolidated cases (i.e., which district office and which WCJ will hear the consolidated cases) are transferred to Court Administrator Rule 10260, pursuant to Labor Code section 5307(c), but other issues relating to consolidated cases are addressed by Rule 10589.

Specific Technologies or Equipment

The repeal of these rules does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeals.

Effect on Small Businesses

The repeal of these rules will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of these rules will not have a significant economic impact on California business enterprises and individuals.

37. Section Added: 10593.

Statement of Specific Purpose and Reasons for the Addition of Section 10593

The WCAB adds Rule 10593, entitled “Testimony of Judicial Quasi-Judicial Officers of the Workers’ Compensation Appeals Board or of the Division of Workers’ Compensation.” This new rule essentially precludes Commissioners, Deputy Commissioners, PWCJs, WCJs, pro tem WCJs, special masters appointed by the WCAB, the Administrative Director (and his or her designees), the Court Administrator (and his or her designees), consultants of the Rehabilitation Unit or of the Retraining and Return to Work Unit, and arbitrators or mediators from being subpoenaed or ordered to testify in WCAB proceedings (or in discovery relating to WCAB proceedings) regarding either (1) the reasons for or basis of any decision or ruling he or she has made or (2) his or her *opinion* of any statements, conduct, or events occurring in proceedings before him or her. The exceptions are that, following the filing of a petition to compel and upon the terms and conditions ordered by the PWCJ of the district office having venue (or by the Appeals Board, if the petition relates to a pending or impending petition for disqualification), the judicial or quasi-judicial officer may be subpoenaed or ordered to testify: (1) as a percipient witness to events that occurred in the proceedings before him or her, to the same extent as any other percipient witness; (2) on an issue of disqualification under Labor Code section 5311 and Code of Civil Procedure section 641; or (3) where his or her testimony is necessary on an issue of an alleged ex parte communication. Various requirements for a petition to compel are set out, including specificity, verification, and service. Also, procedures for the determination of a petition to compel are established.

Rule 10593 is consistent with the general principle that “[n]o person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding” (Evid. Code, § 703.5; *Eisendrath v. Superior Court (Rogers)* (2003) 109 Cal.App.4th 351, 365-366 (mediator incompetent to testify); *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 883 (error for judge to testify as an opinion witness with respect to matters that had come before him in his judicial capacity).) Rule 10593 also is consistent with the general exception that such testimony is allowed where the judicial or quasi-judicial officer’s statements or conducts could give rise to judicial disqualification. (Evid. Code, § 703.5; *Betz v. Pankow* (1993) 16 Cal.App.4th 919 (court could consider the testimony of one of the arbitrators from a three-member arbitration panel whose decision was being challenged on the grounds of bias, but could only consider the portion of the arbitrator’s testimony which addressed the charge of bias; therefore, the manner in which the arbitration panel weighed the evidence and the mental processes of the arbitrators in reaching their decision could not be considered); *Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518 (court had the power to consider those statements in an arbitrator’s declaration which went to the issue of his bias or lack of bias, but it could not consider those portions of the arbitrator’s declaration purporting to explain the reasons for his decision or the merits of the controversy as he saw them).) And Rule 10593 is consistent with the general exception that a judicial or quasi-judicial officer may be called to testify as a percipient witness. (*People v. McGhee* (1987) 193 Cal.App.3d 1333, 1347; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1155, abrogated on other grounds by *Calderon v. Coleman* (1998) 525 U.S. 141, 147 [119 S.Ct. 500, 142 L.Ed.2d 521] (under Evid. Code, § 703.5, a judge is barred from testifying at subsequent civil proceedings as an *expert* about matters before him or her, but it does not preclude a judge from testifying as a *fact* witness).)

In light of the adoption of Rule 10593, the WCAB is repealing current Rule 10957 (limiting depositions of Rehabilitation Unit consultants). This is because Rule 10593 is much broader, in that it covers all judicial and quasi-judicial officers (not just Rehabilitation Unit consultants) and it applies to all testimony (not just depositions).

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

38. Section Added: 10603.

Statement of Specific Purpose and Reasons for the Addition of Section 10603

The WCAB adds Rule 10603, entitled “Oversized Exhibits, Diagnostic Imaging, Physical Exhibits, and Exhibits on Media.” Rule 10603 essentially provides that certain exhibits – i.e., oversized documents, diagnostic imaging, permanent business/office records, physical objects, electronic media (e.g., CDs and DVDs) and photographs – should be filed only at the time of trial. Rule 10603 further provides that, unless otherwise ordered by the WCAB, these exhibits would have to be retained by the offering party until the later of either: (1) five years after the filing of the initial application or (2) six months after all appeals have been exhausted (or the time for seeking appellate review has expired) with respect to the issues on which the exhibit was offered.

Although Rule 10603 provides that these exhibits should be filed only at the time of trial, it further provides for access (or, if practicable, for copying) by any opposing party before or after trial.

The reason for Rule 10603 is that, under EAMS, adjudication files will be maintained electronically. Therefore, EAMS will not be able to accommodate exhibits that either cannot be scanned (e.g., physical objects) or are too large to be scanned (e.g., oversized documents). Also, although electronic media (e.g., CDs and DVDs) could be stored in EAMS, electronic storage is not free and electronic media involve inordinately large quantities of data. Finally, under EAMS, most business or office records (e.g., wage statements, personnel files) will be filed as photocopies and then destroyed. (See Court Administrator Rules 10216(a), 10228(b), 10236.) Although *original* business or office records may on occasion be introduced in evidence (e.g., because of issues relating to the legibility or authenticity of photocopies), the offering party will need to maintain the original record.

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

39. Section Amended: 10608.

Statement of Specific Purpose and Reasons for the Amendments to Section 10608

The WCAB amends Rule 10608, currently entitled “Filing and Service of Physicians’ Reports,” but which is re-titled “Filing and Service of Medical Reports and Medical-Legal Reports.” The essential elements of new Rule 10608 are substantially similar to the essential elements of current Rule 10608. However, the new amendments make it clear that, after the filing of an application, a request may be made to a lien claimant (i.e., not just to a party) to serve copies of medical and medical-legal reports in its possession or control. Also, the amendments make it clear that, when any declaration of readiness (DOR) is filed, all previously unserved medical and medical-legal reports in the declarant’s possession or control shall be served on all other parties (whether or not they had previously requested service) and on all lien claimants who have requested service. Further, the amendments make it clear that, within six days after the filing of any DOR (and whether or not any objection to the DOR has been filed), all other parties and lien claimants shall serve all previously unserved medical and medical-legal reports on all other parties (whether or not they had previously requested service) and on all lien claimants who have requested service. Additionally, the amendments provide that, at any time after the post-DOR service described in the two preceding sentences, a lien claimant may initiate a request for service. In each of these situations, there is a continuing duty to serve subsequently received medical and medical-legal reports within six days of receipt. Finally, the amendments to Rule 10608 provide that all medical and medical-legal reports that have not been previously served shall be served on all other parties and lien claimants upon the filing of a compromise and release or stipulations with request for award, unless the rights and/or liabilities of those parties or lien claimants were previously fully resolved.

[NOTE: In its written comments e-mailed on September 11, 2008 [but dated September 12, 2008] and in testimony presented at the September 12, 2008 public hearing, the California Applicants’ Attorneys Association (CAAA) objected to the provision of Rule 10608(a) that all medical and medical-legal reports filed with the WCAB “shall be filed in accordance with the regulations of the Court Administrator, or as otherwise provided

by these rules.” (Emphasis added.) CAAA believes that this language means that the provisions of the Court Administrator’s rules “may be supplemented or overridden” by the WCAB’s rules. Preliminarily, the WCAB observes that CAAA points to no actual conflict between the WCAB’s rules and those of the Court Administrator with respect to the filing of medical and medical-legal reports. Moreover, CAAA misconstrues the language of Rule 10608(a). Current Rule 10608 addresses both the filing and service of medical reports. However, new Rule 10608 deals primarily with the service of medical reports. Nevertheless, new Rule 10608 makes it expressly clear that, for the most part, the filing provisions of the Court Administrator’s rules apply to all WCAB proceedings, including but not limited to those before the Appeals Board. This needs to be made express because the Court Administrator has no authority to establish when, how, and where medical reports shall be filed with the Appeals Board in connection with petitions for reconsideration, petitions for removal, or other Appeals Board proceedings – e.g., when the Appeals Board directs the taking of additional medical evidence (see Lab. Code, § 5906) or when a party submits evidence on reconsideration that is alleged to be newly discovered (see Cal. Code Regs., tit. 8, § 10856). Therefore, in some instances, the Appeals Board has or has adopted specific provisions relating to the filing of medical reports (and other documents) that are not covered by the Court Administrator’s rules. These include, for example, Rule 10842 (precluding the filing of medical reports and other documents on reconsideration, removal, or disqualification, where such reports or documents are already part of the adjudication file), Rule 10865 (establishing when and how medical reports and other documents are to be filed in connection with carve-out petitions for reconsideration), and Rule 10953 (establishing when and how medical reports and other documents are to be filed in connection with Labor Code section 129.5(g) audit penalty appeals).]

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

39. Section NOT Added: 10610.

Statement of Reasons for **Not** Adding Proposed Section 10610

For the reasons that follow, the WCAB has chosen not to proceed with proposed Rule 10610 and it hereby withdraws it. (Cf., Gov. Code, § 11347.)

In its formal notice and public comment rulemaking proceedings, the WCAB had proposed to add Rule 10610, entitled “Admissibility and Service of Reports from Non-Medical Experts.” Proposed Rule 10610 had not been included in the tentative rules that the WCAB had previously posted on its Web forum for informal public comment.

Proposed Rule 10610 would have provided that, absent an alternative basis for its exclusion, the written report of a non-medical expert may be admitted in evidence, in lieu of or in addition to the expert’s sworn testimony at hearing, if: (1) the author of the report qualified as an expert; (2) the body of the report contains various statements, made under penalty of perjury, that, in essence, declare that the contents of the report are true and correct to the best knowledge of the non-medical expert, declare that (with certain limited exceptions) no one other than the non-medical expert participated in the non-clerical preparation of the report, and set forth the

qualifications of the non-medical expert; and (3) the report is the sort of evidence on which responsible persons are accustomed to rely in the conduct of their serious affairs. Further, proposed Rule 10610 would have provided that reports of non-medical experts shall be served in the manner and timeframes established for service of medical and medical-legal reports. Absent a showing of good cause, the failure to timely serve the report may result in its exclusion from evidence. Also, proposed Rule 10610 would have provided that, regardless of whether a non-medical expert's report is or is not admitted in evidence, this section shall have no bearing on whether any of the costs associated with the report and/or its preparation are allowable under Labor Code section 5811 or under any other provision of law.

However, there were numerous and significant objections to proposed Rule 10610 in the public comments, summarized below, which have prompted the WCAB to retract the proposed rule.

Nothing in the WCAB's decision to withdraw proposed Rule 10610 shall preclude it from proposing and adopting a similar or identical rule in the future, after appropriate notice and public comment. (Cf., Gov. Code, § 11347(b).)

[NOTE: As discussed above, the WCAB received several comments regarding proposed Rule 10610.

In its written comments e-mailed on September 11, 2008 [but dated September 12, 2008] and in testimony presented at the September 12, 2008 public hearing, the California Applicants' Attorneys Association (CAAA) stated that, although it generally agreed that written reports of non-medical experts should be admissible at trial in lieu of or in addition to sworn testimony, it had several concerns regarding proposed Rule 10610.

First, CAAA objected to the provisions of proposed Rule 10610(d) regarding the timely service of the reports of non-medical experts. CAAA stated that to require service of such reports more than 30 days prior to the mandatory settlement conference (MSC) or other hearing would be inappropriate. For example, a non-medical expert's report on an injured employee's diminished future earning capacity (DFEC) cannot be prepared until an evaluating physician has determined that the employee has reached maximum medical improvement (MMI). Therefore, either the MSC would have to be delayed for weeks or months until the DFEC report could be obtained, or the DFEC report would have to be skipped and the non-medical expert would have to testify at trial, thereby effectively defeating the purpose of the rule. Also, requiring service of reports from non-medical experts 30 days prior to the MSC could generate significant unnecessary costs, because many cases settle before or at the MSC.

Second, CAAA objected to the provision of proposed Rule 10610(e) that a written report may be excluded from evidence if the author of the report does not qualify as an expert. CAAA stated that this provision would effectively nullify the purpose of proposed Rule 10610, because it would be necessary to have the non-medical expert appear at trial in every case to either qualify himself or herself as an expert or to testify in case he or she did not qualify.

In its written comments dated September 12, 2008, Boehm & Associates (Boehm) expressed a concern that proposed Rule 10610 is ambiguous and that it will violate the due process rights of parties and lien claimants. Specifically, Boehm objects to the language of proposed Rule 10610(a)(2) that the written report of a non-medical expert may be admitted in evidence if the report "is the sort of evidence on which responsible persons are accustomed to rely in the conduct of their serious affairs." Boehm believes that the definitions of "responsible persons" and "serious affairs" are subject to broad interpretation and would leave the door wide open for misrepresentations of expertise that would not be subject to challenge through cross-examination either at trial or by deposition. Essentially, Boehm is concerned that virtually anyone in any field that might touch on an issue in a workers' compensation case could be deemed a non-medical "expert." Although Boehm gave several examples of fields in which people might be deemed "non-medical experts," Boehm's focus appears to be on medical bill reviewers in a lien controversy.

In its written comments dated September 12, 2008, State Compensation Insurance Fund (SCIF) similarly objects to the "responsible persons" and "serious affairs" language of proposed Rule 10610(a)(2). SCIF believes that such "undefined terminology ... may lead to increased litigation as to the meaning and purpose of this subsection." SCIF also objects to proposed Rule 10610(a)(2) on the ground it should require that a written report of a non-medical expert shall address and be relevant to the issues presented. Alternatively, SCIF

asserts that the WCAB should be able to determine that a non-medical expert's written report is not relevant and, therefore, not admissible and not payable as a cost under Labor Code section 5811.

In testimony presented at the September 12, 2008 public hearing, the 4600 Group expressed its concerns that proposed Rule 10610 (1) does not establish what level of expertise is necessary to qualify a person as a non-medical "expert"; and (2) does not establish when the determination of whether a person is an "expert" would be made, i.e., at the MSC or at trial. In particular, the 4600 Group was concerned about the reports of bill reviewers, who review medical bills to determine whether they are consistent with the Official Medical Fee Schedule or with contractual provisions, such as silent PPO agreements. The 4600 Group questioned whether a bill reviewer could be deemed an "expert" based on a curriculum vitae attached to his or her report, thereby obviating the need of the bill reviewer to appear at trial to explain the validity of his or her bill review. Moreover, if such bill reviewers are considered to be "experts," then medical lien claimants would either have to depose the bill reviewers or subpoena them to appear at trial, which would be costly or problematic – particularly if the bill reviewer is from out of state.]

40. Section Amended: 10616.

Statement of Specific Purpose and Reasons for the Amendments to Section 10616

The WCAB amends Rule 10616, entitled "Employer-Maintained Records." The amendment is very simple, i.e., it provides that employer-maintained medical records shall be "served" in accordance with WCAB Rules 10608 and 10615, rather than "filed and served" in accordance with those rules. This change is being proposed because, pursuant to Labor Code section 5307(c), the provisions relating to the "filing" of such records would be transferred to rules of the Court Administrator.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

41. Section Amended: 10626.

Statement of Specific Purpose and Reasons for the Amendments to Section 10626

The WCAB amends Rule 10626, entitled "Hospital and Physicians' Records." The amendment provides that, subject to Labor Code section 3762 and except as otherwise provided by law, parties, attorneys, agents, and physicians may examine and copy relevant medical records. The amendment also deletes the aspect of Rule 10626 which now provides that a party proposing to offer such medical records in evidence shall designate the relevant portion or portions, preferably in writing before the hearing. This is because amended Rule 10629 now addresses the designation of relevant portions of excerpted physician, hospital, and dispensary records.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

42. Section Added: 10629.

Statement of Specific Purpose and Reasons for the Addition of Section 10629

The WCAB adds Rule 10629, entitled “Filing and Listing of Exhibits.”

Rule 10629 provides that at every mandatory settlement conference (MSC), regular or expedited trial, and conference at which any issue will be submitted for decision, the parties and lien claimants shall submit to the WCAB, and shall personally serve on each other, a list of the exhibits that the party or lien claimant proposes to offer in evidence. For 10629 further provides that, if any such hearing is continued, a new exhibit list shall be prepared and served, although certain exceptions are made. Rule 10629 also provides that, if a list of exhibits is being submitted after an initial MSC, the list shall separately identify the exhibits listed at the time of the initial MSC and those not then listed. Additionally, Rule 10629 provides that, if a party or lien claimant with a currently pending issue fails to appear at a hearing where exhibits are required to be listed, the non-appearing party or lien claimant shall forthwith file and serve its exhibit list, but consideration of its exhibits shall be subject to the limitations or evidentiary sanctions set forth in Rule 10562. Also, the appearing party(ies) or lien claimant(s) would be required to serve their exhibit list(s) on the non-appearing party or lien claimant.

Rule 10629 requires that each exhibit listed: (1) must have a specified exhibit number or initial; and (2) must be clearly identified by author/provider, date, and title or type. In general, each medical report, medical-legal report, medical record, or other paper or record having a different author/provider and/or a different date of service would have to be listed as a separate exhibit. Nevertheless, unless otherwise ordered by the WCAB, excerpted portions of physician, hospital or dispensary records – and excerpted portions of personnel records, wage records and statements, job descriptions, and other business records – could be listed as a single exhibit, provided that these excerpted records are properly designated and are relevant.

Rule 10629 provides that injured employees, dependents or uninsured employers who are unrepresented may be referred to the Information and Assistance Office to help prepare the exhibit list.

One purpose of Rule 10629 is to help expedite hearings, and to help ensure a clear and accurate record of proceedings, by requiring that parties and lien claimants have detailed exhibit lists prepared at the time of any MSCs or trials. Also, the requirement that, when an MSC is continued, the parties and lien claimants shall separately identify evidence listed at the initial MSC and evidence not listed at the initial MSC will assist in clarifying and/or resolving issues regarding admissibility under Labor Code section 5502(e)(3).

Another purpose of Rule 10629 is to help create a clear and accurate record for purposes of listing exhibits in EAMS (as well as helping to reduce the chance of duplicate listings). Unlike a paper record, where it is possible to “flip” through a file to help clarify any potential uncertainties regarding ambiguously identified exhibits, electronic documents residing in EAMS must be clearly and specifically listed to be easily identified and located.

[NOTE: In its written comments e-mailed on September 11, 2008 [but dated September 12, 2008], the California Applicants' Attorneys Association (CAAA) suggests that Rule 10629(d) be amended so that the following two groups of documents may be listed as a single exhibit, rather than multiple separate exhibits: (1) multiple denial letters regarding a single medical treatment request; and (2) multiple letters providing an Explanation of Benefits (EOB). In light of these comments, the WCAB has made a post-public hearing amendment to Rule 10629(d) that adopts CAAA's second suggestion, but not its first. The date and contents of individual treatment denial letters can have great relevance in determining, for example, whether a defendant timely and properly completed utilization review (UR) and whether an injured employee timely objected to a UR denial. (See Lab. Code, §§ 4610(g), 4061.) Requiring that each treatment denial letter be listed separately facilitates identifying and locating a particular denial letter within EAMS quickly and easily. Moreover, requiring that each denial letter be listed separately helps keep parties and their attorneys focused on relevant evidence, and deters the practice of "dumping" a pile of documents into a single exhibit without regard to how probative each document might be to the issues being presented. On the other hand, individual EOB letters are less likely to have issue-determinative effect. Therefore, it is generally less important that they be listed individually.]

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

43. Section Repealed: 10630.

Statement of Specific Purpose and Reasons for the Repeal of Section 10630

The WCAB repeals Rule 10630, entitled "Return of Exhibits." Pursuant to Labor Code section 5307(c), the provisions of current Rule 10630 (along with provisions of Rules 10755 and 10758) are being incorporated into Court Administrator Rule 10273.

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

44. Section Amended: 10750.

Statement of Specific Purpose and Reasons for the Amendments to Section 10750

The WCAB amends Rule 10750, entitled “Record of Proceedings.”

In part, the amendments to Rule 10750 clarify that, although adjudication files are to be electronically stored and maintained in EAMS by the Division of Workers’ Compensation (DWC), the adjudication files are nonetheless files of the WCAB. In this regard, it is the “Workers’ Compensation Appeals Board” that the Legislature has vested with “judicial powers.” (Lab. Code, § 111(a).) Thus, although the WCAB may delegate its judicial powers to the WCJs (Lab. Code, §§ 5309, 5310), who are employed and supervised by DWC (see, generally, Lab. Code, §§ 110(f), 111(a), 123.5(a), 123.6(a), 123.7, 5310, 5311.5), it is the WCAB alone that possesses original “judicial” authority (i.e., original jurisdiction) over workers’ compensation claims. This is further evidenced by a plethora of provisions of the Labor Code, including, but certainly not limited to, the foundational jurisdictional statutes for workers’ compensation proceedings. That is, Labor Code section 5300 states, in relevant part: “All the following proceedings shall be instituted *before the appeals board* and not elsewhere ... : (a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto. ...” (Emphasis added.) Similarly, Labor Code section 5301 states, in relevant part: that it is “[t]he *appeals board*” which “is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300” (Emphasis added.) Therefore, adjudication files maintained in EAMS are the files of the WCAB.

The amendments to Rule 10750 also clarify, in light of EAMS, that all of the documents listed in the rule are part of the record of proceedings, whether maintained in paper or electronic form. Further, consistent with the definition of “record of proceedings” in current Rule 10301(p) (which is being deleted as duplicative of Rule 10750), the phrase “the arbitrator’s file, if any” is added to Rule 10750.

Finally, the amendments to Rule 10750 provide that, upon approval of a compromise and release or stipulations with request for award, all medical reports filed as of the date of approval shall be deemed to have been admitted in evidence and shall be deemed to have been transferred to the record of proceedings. A similar provision is in current Rule 10751, but this provision is more appropriately placed in the rule on “Record of Proceedings.”

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

45. Section Amended: 10751.

Statement of Specific Purpose and Reasons for the Amendments to Section 10751

The WCAB amends Rule 10751, currently entitled “Legal File,” but which is re-entitled “Adjudication File.”

In part, the amendments to Rule 10751 clarify that the WCAB’s adjudication file includes all findings, orders, decisions, awards and correspondence issued by the WCAB, *except* for documents that, under the Court Administrator’s rules, are not available for inspection by *any* person. Therefore, under Court Administrator Rule 10271(b), this exception would include, for example, decisions and other documents that are in the process of preparation, permanent disability ratings that have not yet been served, and the deliberation records of Commissioners and WCJs. However, this exception would *not* include documents that have been sealed under Court Administrator Rule 10272, because sealed records, although not generally subject to *public* inspection, are available for inspection by some persons, i.e., the parties to the case.

In part, the amendments to Rule 10751 also clarify that the WCAB’s adjudication file includes all documents filed by any party or lien claimant, *except* for documents that, under the Court Administrator’s rules, are not supposed to be filed, unless otherwise ordered by the WCAB. Therefore, under Court Administrator Rule 10222(b), the following documents, for example, ordinarily would not be part of the WCAB’s adjudication file: letters to opposing parties or counsel, subpoenas, medical appointment letters, and copies of any federal or state court opinion – or an opinion of the WCAB or a WCJ – unless the opinion is not readily available.

Finally, as noted under the discussion of Rule 10750, the amendments to Rule 10751 delete the provision that all medical reports are deemed transferred to the legal file after a compromise and release agreement or a stipulations with request for award has been approved. Instead, a similar provision is now contained in amended Rule 10750.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

46. Section Amended: 10753.

Statement of Specific Purpose and Reasons for the Amendment of Section 10753

The WCAB amends Rule 10753 entitled “Inspection of Files,” to read: “Except as provided by sections 10754, 10271, and 10272, or as ordered by a workers’ compensation judge or the Appeals Board, the adjudication case files of the Workers’ Compensation Appeals Board may be inspected in accordance with the provisions of section 10270.” These changes are being made because, pursuant to Labor Code section 5307(c), the Court Administrator is adopting new Rule 10270, relating to “Access to and Viewing Electronic Case Files,” new Rule 10271, relating to “Inspection of Paper Case Files,” and new Rule 10272, relating to “Sealing Documents.”

Specific Technologies or Equipment

The amendment of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendment.

Effect on Small Businesses

The amendment of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendment of this rule will not have a significant economic impact on California business enterprises and individuals.

47. Section Amended: 10754.

Statement of Specific Purpose and Reasons for the Amendment of Section 10754

The WCAB amends Rule 10754 entitled “Sealed Documents.” In essence, Rule 10754 strikes all of the provisions of current Rule 10754 and provides instead that medical reports and other records shall be sealed only in accordance with the provisions of Court Administrator Rule 10272. Rule 10272 is also entitled “Sealed Documents,” but it makes significant changes to the substance of current Rule 10754.

One reason for the amendment of Rule 10754 is that current Rule 10754 may not be fully consistent with legal principles pertaining to the sealing of records and public access to records. For example, in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, the California Supreme Court made it clear that records cannot be sealed unless a court has held a hearing and has expressly found that: (1) there exists an overriding interest supporting sealing; (2) there is a substantial probability that the interest will be prejudiced absent sealing; (3) the proposed sealing is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means of achieving the overriding interest. Consistent with *NBC Subsidiary*, the California Rules of Court regarding the sealing of records have been substantially amended. (See Rules 2.550 and 2.551.) Court Administrator Rule 10272, which Rule 10754 now references, is patterned on Rules 2.550 and 2.551.

Moreover, the WCAB is amending Rule 10754 so that it refers to Court Administrator Rule 10272 (rather than just re-drafting current Rule 10754, consistent with *NBC Subsidiary* and California Rules of Court, Rules 2.550 and 2.551) because: (1) it is the Court Administrator who maintains the WCAB’s adjudication files and controls public access to them; and (2) it is the Legal Unit of the of the Division of Workers’ Compensation, which represents the Court Administrator, that will be handling any legal challenges under the Public Records Act to the sealing of particular records. The WCAB, at least for the most part, will not be directly involved in any such challenges.

Nevertheless, substantive judicial determinations are made in determining whether or not a particular medical record or other document should be sealed, as reflected by *NBC Subsidiary*. Therefore, it is appropriate for the WCAB to retain some authority over the sealing of records, which it is doing by keeping Rule 10754, but having it refer to Rule 10272.

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

48. Section Amended: 10755.

Statement of Specific Purpose and Reasons for the Amendment of Section 10755

The WCAB amends Rule 10755 entitled “Destruction of Records.” In essence, new Rule 10755 strikes all of the provisions of current Rule 10755. Instead, new Rule 10755 now provides that the WCAB’s records may be destroyed in accordance with Court Administrator Rule 10273, which is entitled “Retention, Return and Destruction of Records and Exhibits.” Court Administrator Rule 10273 combines elements of current Rules 10755, 10758, and 10762. (Rules 10758 and 10762 – entitled, respectively, “Destruction of Case Files” and “Reporter’s Notes” – are being repealed.)

Moreover, the WCAB is amending Rule 10755 to make reference to Court Administrator Rule 10273 (rather than just re-drafting current Rule 10755) because it is the Court Administrator who maintains the WCAB’s adjudication files and who ultimately will destroy them.

Nevertheless, the records in question are the records of the WCAB, and these records may be relevant in determining the rights and responsibilities of the parties over an injured employee’s lifetime. Therefore, it is appropriate for the WCAB to retain some authority over the sealing of records, which is doing by keeping (and not deleting) Rule 10755, but having it refer to Rule 10273.

49. Sections Repealed: 10758 and 10762.

Statement of Specific Purpose and Reasons for the Repeal of Sections 10758 and 10762

The WCAB repeals Rules 10758 and 10762 entitled, respectively, “Destruction of Case Files” and “Reporter’s Notes.” As discussed above, the WCAB is amending Rule 10755, entitled “Destruction of Records,” to provide that the WCAB’s records may be destroyed in accordance with the provisions of Court Administrator Rule 10273. Court Administrator Rule 10273 would combine elements of current Rules 10758 and 10762. Therefore, Rules 10758 and 10762 are no longer necessary.

Specific Technologies or Equipment

The repeal of these rules does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeals.

Effect on Small Businesses

The repeal of these rules will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of these rules will not have a significant economic impact on California business enterprises and individuals.

50. Section Amended: 10770.

Statement of Specific Purpose and Reasons for the Amendments to Section 10770

The WCAB amends Rule 10770, entitled “Lien Procedure.”

The amendments require most lien claimants to submit their liens using optical character recognition (OCR) forms. The use of OCR forms will allow the EAMS software to recognize and digitize the printed or handwritten information on the lien forms. Printed or handwritten information entered in certain fields (i.e., lines or boxes) on the OCR forms will be extracted and entered into the corresponding data fields within EAMS.

The amendments also require that all liens, together with their supporting documentation (i.e., a full statement or itemized voucher justifying the right to reimbursement) must be concurrently served on all parties at the time of filing, except:

(1) the injured worker (or a deceased worker’s dependent(s)) need not be served if: (A) he or she is represented and service is made upon the attorney or agent of record; or (B) the underlying case of the worker or dependent has been resolved. The underlying case will be deemed to have been resolved if: (i) in a stipulated findings and award or in a compromise and release agreement, a defendant has agreed to hold the worker or dependent(s) harmless from the specific lien claim being filed and has agreed to pay, adjust, or litigate that lien; (ii) a defendant had written notice of the lien in accordance with Labor Code section 4904(a) before the lien was filed and, in a stipulated findings and award or in a compromise and release agreement, that defendant has agreed to hold the worker or dependent harmless from all lien claims and has agreed to pay, adjust, or litigate all liens; (iii) the application for adjudication of claim filed by the worker or the dependent(s) has been dismissed, and the lien claimant is filing or has filed a new application; or (iv) the worker or the dependent(s) choose(s) not to proceed with his, her, or their case.

(2) a defendant need not be served if it is represented in service is made upon its attorney or agent of record.

These service requirements will help ensure that all necessary parties are aware of the lien and its supporting documentation at the time of filing.

Also, the amendments provide that the WCAB will not accept a lien for filing that does not list an adjudication case number, unless the lien claimant is also filing an initial (case opening) application in accordance with section 10770.5.

Further, the amendments include certain provisions regarding “amended” liens, including requiring the lien claimant to check a box on the OCR form to indicate that it is an “amended” lien. An “amended” lien would be defined to include: (1) a lien that is for or includes additional services or charges for the same injured employee for the same date or dates of injury; (2) a lien that reflects a change in the amount of the lien based on payments made by the defendant; or (3) a lien that has been corrected for clerical or mathematical error. Also, a subsequent lien claim that adds an additional adjudication case number or numbers is an “amended” lien with respect to the adjudication case number(s) originally listed.

Finally, the amendments require notification to the WCAB and the parties within five business days after a lien has been resolved or withdrawn, and the amendments provide that a lien claimant shall be notified of all hearings, whether or not the hearing directly involves the lien.

[NOTE: In its written comments e-mailed on September 11, 2008 [but dated September 12, 2008], the California Applicants’ Attorneys Association (CAAA) suggests that Rule 10770 be amended so as to delete subdivision (c)(1)(A). That subdivision provides in substance that liens and their supporting documentation need not be served on an injured employee if he or she is represented by an attorney or other agent of record. (Under Rule 10510(b), the liens would have to be served on the attorney or other agent.) CAAA’s reasoning for

its suggested amendment is the same as its reasoning for its suggested amendment to Rule 10610. The WCAB declines to accept CAAA's suggestion for the reasons set forth in the WCAB's discussion of Rule 10610.]

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

51. Section Added: 10770.5.

Statement of Specific Purpose and Reasons for the Addition of Section 10770.5

The WCAB adds Rule 10770.5, entitled "Verification to Filing of Lien Claim or Application by Lien Claimant." In essence, Rule 10770.5 is being adopted in response to the recent enactment of subdivision (a) of Labor Code section 4903.6, which sets out time frames for the filing of lien claims and applications for adjudication by lien claimants seeking reimbursement for medical or medical-legal expenses under section 4903(b). Labor Code section 4903.6(c) requires the Appeals Board to adopt a rule to ensure compliance with section 4903.6(a).

Consistent with Labor Code section 4903.6(a), Rule 10770.5 requires that such a lien or application must include a verification under penalty of perjury statement specifying in detail the facts establishing that one of the following has occurred: (1) sixty days have elapsed since the date of acceptance or rejection of liability for the claim, or the time provided for investigation of liability pursuant to Labor Code section 5402(b) has elapsed, whichever is earlier; (2) the time provided for payment of medical treatment bills pursuant to Labor Code section 4603.2 has elapsed; or (3) the time provided for payment of medical-legal expenses pursuant to Labor Code section 4622 has elapsed.

Further, Rule 10770.5 requires that, if the lien claimant is filing an application, its verification under penalty of perjury also shall contain: (1) a statement specifying in detail the facts establishing that venue in the district office being designated is proper pursuant to Labor Code section 5501.5(a)(1) or Labor Code section 5501.5(a)(2); and (2) a statement specifying in detail the facts establishing that the filing lien claimant has made a diligent search and has determined that no adjudication case number exists for the same injured worker and same date of injury at any district office. A "diligent search" is deemed to include contacting the injured worker, contacting the employer or carrier, or inquiring at the district office with appropriate venue pursuant to Labor Code section 5501.5(a)(1) or (a)(2).

Finally, Rule 10770.5 establishes a format for the verification under penalty of perjury and it would provide that a failure to attach the verification – or an incorrect verification – may be a basis for sanctions.

[NOTE: In its September 12, 2008 written public comments on Rule 10770.5, the American Insurance Association (AIA) states that many medical treatment or medical-legal liens "are filed for portions of payments that are in excess of what is due." Therefore, AIA recommends that "the verification also contain an attestation that the lien is confined to amounts payable" under the applicable fee schedules or contract. However, the verification requirement of Rule 10770.5 is predicated on Labor Code section 4903.6, and there is nothing in

that section which suggests that a lien claim (or an application relating to lien claim) may be filed only when the lien claimant has declared under penalty of perjury that the lien is confined to amounts payable under the applicable fee schedules or contract. Moreover, the WCAB believes that the question of whether a lien includes only amounts payable under the applicable fee schedules or contract is a complex one, not readily amenable to an attestation of fact made under penalty of perjury. Instead, issues regarding whether a lien includes only amounts payable under the applicable fee schedules or contract are properly the subject of judicial resolution, if the lien claimant and the allegedly liable party cannot informally resolve or compromise their dispute.

In its September 12, 2008 written public comments on Rule 10770.5, the California Workers' Compensation Institute (CWCI) similarly suggests that "the lien verification should include an attestation that the lien is being asserted only for amounts payable" under the applicable fee schedules or contract. The WCAB's response to CWCI's comments is the same as its response to AIA's comments.]

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

52. Section Added: 10770.6.

Statement of Specific Purpose and Reasons for the Addition of Section 10770.6

The WCAB adds Rule 10770.6, entitled "Verification to Filing of Declaration of Readiness By or On Behalf of Lien Claimant." In essence, Rule 10770.6 is being added in response to the recent enactment of subdivision (b) of Labor Code section 4903.6, which provides that, until the underlying case has been resolved or where the applicant chooses not to proceed with his or her case, no declaration of readiness to proceed shall be filed with respect to a lien claim that seeks reimbursement for medical or medical-legal expenses under section 4903(b). Labor Code section 4903.6(c) requires the Appeals Board to adopt a rule to ensure compliance with section 4903.6(b).

Consistent with Labor Code section 4903.6(b), Rule 10770.6 requires that any such declaration of readiness shall be accompanied by a verification under penalty of perjury certifying either (1) that the underlying case has been resolved or (2) that at least six months have elapsed from the date of injury and the injured worker has chosen not to proceed with his or her case. Rule 10770.6 requires the declarant to make a diligent search to determine that the injured worker has chosen not to proceed with his or her case and the verification shall specify the efforts made in conducting the diligent search. A "diligent search" is deemed to include contacting the injured worker, contacting the employer or carrier, or inquiring at the district office with appropriate venue pursuant to Labor Code section 5501.5(a)(1) or (a)(2).

Finally, Rule 10770.6 establishes a format for the verification under penalty of perjury and it provides that a failure to attach the verification – or an incorrect verification – may be a basis for sanctions.

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

53. Section Repealed: 10771.

Statement of Specific Purpose and Reasons for the Repeal of Section 10771

The WCAB repeals Rule 10771, relating to “Medical-Legal Expenses.” The provisions of current Rule 10771, which relate to when medical-legal lien claims may be filed, have become unnecessary with the adoption of Rule 10770.5, which more extensively covers the same subject.

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

54. Section Amended: 10779.

Statement of Specific Purpose and Reasons for the Amendments to Section 10779

The WCAB adds Rule 10779, entitled “Disbarred and Suspended Attorneys.” The amendments eliminates the provision that had allowed attorneys who have been disbarred or suspended for reasons other than nonpayment of State Bar fees, who have been placed on involuntary inactive status by the State Bar, or who have resigned while disciplinary action is pending to petition the Appeals Board for permission to appear in WCAB proceedings.

Under the principle of stare decisis, the WCAB is ordinarily constrained to follow a published opinion of a Court of Appeal. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455-456; *Brannen v. Workers’ Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377, 384, fn. 5 [61 Cal.Comp.Cases 554]; *Ryerson Concrete Co. v. Workmen’s Comp. Appeals Bd. (Pena)* (1973) 34 Cal.App.3d 685, 688 [38 Cal.Comp.Cases 649].) The only exception to this rule is that, if there is a conflict between two or more published opinions of different Courts of

Appeal, then the WCAB may choose between the conflicting lines of authority until either the Supreme Court resolves the conflict or the Legislature clears up the uncertainty by legislation. (*Auto Equity Sales*, *supra*, 57 Cal.2d at p. 456; *People v. Hunter* (2005) 133 Cal.App.4th 371, 382; *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4; *Maples v. Aetna Cas. & Surety Co.* (1978) 83 Cal.App.3d 641, 650, fn. 5.)

In *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61 (rehg. den., 2006 Cal. App. LEXIS 198; rev. den., 2006 Cal. LEXIS 4780), the Court of Appeal held in substance that “defrocked” lawyers cannot practice law under any circumstances. (*Benninghoff*, at pp. 65, 67-70.) *Benninghoff* defined “defrocked” lawyers to be the very same group of lawyers covered by Rule 10779 before its amendment, i.e., disbarred lawyers, suspended lawyers, involuntarily inactive lawyers, and lawyers who have resigned from the State Bar with disciplinary charges pending. (*Benninghoff*, at p. 68, fn. 5.)

Benninghoff then went on to hold that appearances before state administrative agencies constitute the practice of law. (*Benninghoff*, at pp. 65, 67-70.) Moreover, although true laypeople may practice law where authorized by statute or court rule (*Benninghoff*, at p. 69; see also Bus. & Prof. Code, § 6126(a)), the law distinguishes between true laypeople and defrocked lawyers, because the latter cannot practice law without exception. (*Benninghoff*, at p. 69; see also Bus. & Prof. Code, § 6126(b).)

In the more than two years since *Benninghoff*, there have been no published appellate decisions that reject its conclusions. Therefore, as discussed above, the WCAB is bound to follow it.

Moreover, appearances before the WCAB specifically constitute the practice of law. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 335-336 [46 Cal.Comp.Cases 1284]; *Eagle Indemnity Co. v. Industrial Acc. Com.* (Hernandez) (1933) 217 Cal. 244, 248 [19 I.A.C. 150]; *Benninghoff*, at p. 70; *In re Hoffman* (2006) 71 Cal.Comp.Cases 609, 617-618 & fn. 9 (Significant Panel Decision).) Although, as a general rule, persons not licensed to practice law may practice before the WCAB (Lab. Code, §§ 5501, 5700; see discussion at *In re Hoffman*, *supra*, 71 Cal.Comp.Cases at p. 614), *Benninghoff* makes clear (as discussed above) that this exception applies only to true laypeople, not to “defrocked” lawyers.

Therefore, under the Court of Appeal’s binding decision in *Benninghoff*, “defrocked” attorneys can no longer petition the Appeals Board for permission to appear in WCAB proceedings.

Even absent *Benninghoff*, however, there is no compelling reason to keep intact the provision of Rule 10779 allowing “defrocked” attorneys to petition for permission to appear before the WCAB. In the past five years, for example, the Appeals Board received only seven petitions under the Rule and all except for one petition failed to establish sufficient “competency, qualification and moral character” to warrant granting permission to appear. Moreover, in the one exception, the attorney’s temporary suspension from the State Bar had already ended at the time of his petition and, therefore, he no longer fell under the Rule.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

55. Section Added: 10782.

Statement of Specific Purpose and Reasons for the Addition of Section 10782

The WCAB adds Rule 10782, entitled “Vexatious Litigants.”

Under Rule 10782, a “vexatious litigant” is defined to mean: (1) a party or lien claimant who, while acting in propria persona in proceedings before the WCAB, repeatedly relitigates – or attempts to relitigate – an issue of law or fact that has been finally determined against that party or lien claimant by the WCAB or by an appellate court; (2) a party or lien claimant who, while acting in propria persona in proceedings before the WCAB, repeatedly files unmeritorious motions, pleadings, or other papers, repeatedly conducts or attempts to conduct unnecessary discovery, or repeatedly engages in other tactics that are in bad faith, are frivolous, or are solely intended to cause harassment or unnecessary delay; or (3) a party or lien claimant who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction(s), or occurrence(s) that are the subject, in whole or in substantial part, of the party or lien claimant’s workers’ compensation case.

Under Rule 10782, upon the petition of a party or lien claimant, or upon the motion of any workers’ compensation judge or the Appeals Board, a presiding workers’ compensation judge of a district office having venue, or the Appeals Board, may declare a party or lien claimant as a vexatious litigant, after giving notice and an opportunity to be heard. If a hearing is requested, the PWCJ or the Appeals Board, in his, her or its discretion, either may take and consider both oral and documentary evidence or may take and consider solely documentary evidence (including affidavits or other written declarations of fact made under penalty of perjury).

Under Rule 10782, if a party or lien claimant is declared to be a vexatious litigant, the PWCJ or the Appeals Board may enter a “prefiling order,” i.e., an order which prohibits the vexatious litigant from filing, in propria persona, any Application for Adjudication of Claim, Declaration of Readiness, petition, or other request for action by the WCAB without first obtaining leave of the presiding workers’ compensation judge (PWCJ) of the district office where the request for action is proposed to be filed – or, if the matter is pending before the Appeals Board on a petition for reconsideration, removal, or disqualification, without first obtaining leave from the Appeals Board. For purposes of this rule, a “petition” shall include, but not be limited to, a petition to reopen under Labor Code sections 5410, 5803, and 5804, a petition to enforce a medical treatment award, a penalty petition, or any other petition seeking to enforce or expand the vexatious litigant’s previously determined rights.

Under Rule 10782, however, if a vexatious litigant proposes to file, in propria persona, any Application for Adjudication of Claim, Declaration of Readiness, petition, or other request for action by the WCAB, the request for action shall be conditionally filed. Thereafter, the PWCJ – or the Appeals Board, if the petition is for reconsideration, removal, or disqualification – shall deem the request for action to have been properly filed only if it appears that the request for action has merit and has not been filed for the purposes of harassment or delay. In determining whether the vexatious litigant’s request for action has merit and has not been filed for the purposes of harassment or delay, the PWCJ, or the Appeals Board, shall consider the contents of the request for action and the WCAB’s existing record of proceedings, as well as any other documentation that, in its discretion, the WCAB asks to be submitted. Among the factors that the WCAB may consider is whether there has been a significant change in circumstances (such as new or newly discovered evidence or a change in the law) that might materially affect an issue of fact or law that was previously finally determined against the vexatious litigant.

There is a compelling need for a vexatious litigant rule for workers’ compensation proceedings to address the problem of self-represented injured employees, lien claimants, and others who persistently or obsessively attempt to relitigate an issue of law or fact that has been finally determined against them. As in the civil courts, these vexatious litigants unreasonably or frivolously tie up the time and resources of the WCAB, thereby delaying the cases of other litigants, and they impose serious financial burdens on the unfortunate objects of their attacks; therefore, there is a need to restrain their misuse of the workers’ compensation adjudication system. (See generally, e.g., *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 970-971; *Luckett v. Keylee* (2007) 147 Cal.App.4th 919, 924; *Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 Cal.App.4th 1494, 1504; *Wolfe v. George* (9th Cir. 2007) 486 F.3d 1120, 1126.)

However, unlike civil courts, the nature of workers' compensation is that there can be multiple proceedings relating to the same case. For example, even an issue that has been finally determined (in the sense that all appeals have been exhausted or the time for seeking appellate review has expired) nevertheless can be reopened by a timely petition to reopen. (See Lab. Code, §§ 5410, 5803, 5804.) Such a petition to reopen can be based on a change in the employee's condition, newly discovered evidence, a change in the law, or other factors. Moreover, many cases are tried or decided piecemeal (with certain issues not being raised by the parties or being deferred by the WCAB) or there may be supplemental proceedings on issues such as the enforcement of a medical treatment award or a claim of penalties. Therefore, the focus of the vexatious litigant rule is on the self-represented party or lien claimant who repeatedly relitigates, or attempts to relitigate, an issue of law or fact that has been finally determined against that party or lien claimant by the WCAB or an appellate court and either the time for reopening under Labor Code sections 5410 or 5803 and 5804 has passed or, although the time for reopening under those sections has not passed, there is no good faith and non-frivolous basis for reopening.

Moreover, consistent with Code of Civil Procedure section 391, Rule 10782 also allows a party or lien claimant to be declared a vexatious litigant if: (1) while acting in propria persona in proceedings before the WCAB, he or she repeatedly files unmeritorious motions, pleadings, or other papers, repeatedly conducts or attempts to conduct unnecessary discovery, or repeatedly engages in other tactics that are in bad faith, are frivolous, or are solely intended to cause harassment or unnecessary delay; (2) he or she has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence that are the subject, in whole or in substantial part, of the party or lien claimant's worker's compensation case.

Finally, consistent with the requirements of due process, Rule 10782 requires that, before a party or lien claimant is declared a vexatious litigant, he or she must be given notice and an opportunity to be heard. However, the PWCJ or the Appeals Board (in his, her, or its discretion) may limit the opportunity to be heard to the presentation of documentary evidence. This is consistent with the principle that, to satisfy due process, the hearing that is required is "only one appropriate to the nature of the case," i.e., the right to be heard "is flexible and [only] calls for such procedural protections as the particular situation demands." (*Smith v. Organization of Foster Families for Equality and Reform* (1977) 431 U.S. 816, 848 [97 S.Ct. 2094, 53 L.Ed.2d 14].) Because it is the substance of the hearing (and not the particular form of the hearing) that is vital, it is not necessary that the full panoply of judicial procedures be utilized in every case. (*Mathews v. Eldridge* (1976) 424 U.S. 319 [96 S.Ct. 893, 47 L.Ed.2d 18].) Accordingly, due process does not require a formal trial-type hearing where the presentation of argument and evidence can be fairly accomplished by other means. (*Mathews v. Eldridge, supra*; see also, *Federal Deposit Ins. Corp. v. Maller* (1988) 486 U.S. 230, 247 [108 S.Ct. 1780, 100 L.Ed.2d 265] (due process does not guarantee an opportunity to present oral testimony; due process is satisfied where party entitled to submit written materials); *State of Pennsylvania v. Riley* (3d Cir. 1996) 84 F.3d 125, 130 (evidentiary hearing not required where there are no disputed material issues of fact or where dispute can be adequately resolved from the paper record).)

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

56. Section Added: 10785.

Statement of Specific Purpose and Reasons for the Addition of Section 10785

The WCAB adds Rule 10785, entitled “Electronically Filed Decisions, Findings, Awards, and Orders.” This rule simply provides that the Appeals Board or a WCJ may electronically file any decision, findings, award, order or other document within EAMS and that any such electronically filed document shall have the same legal effect as a document filed in paper form. This rule is necessary in light of EAMS.

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

57. Section Amended: 10840.

Statement of Specific Purpose and Reasons for the Amendments to Section 10840

The WCAB amends Rule 10840, presently entitled “Filing Petitions for Reconsideration and Answers,” but which is re-entitled “Filing Petitions for Reconsideration, Removal, Disqualification and Answers.” Rule 10840 provides that petitions for reconsideration, removal, and disqualification (and answers) may be filed with *any* district office or with the office of the Appeals Board in San Francisco (however, where a petition has been filed with a district office, duplicate copies of the petition shall not be filed with any other district office or with the Appeals Board). It also provides that individuals or entities who, as part of the Division of Workers’ Compensation’s electronic filing trial group, have been issued individual or organizational logins, may file petitions for reconsideration, removal, and disqualification (and answers) electronically within EAMS.

Rule 10840 repeals the provisions of current Rule 10840 that: (1) if a petition seeks reconsideration of a decision of a workers’ compensation judge (WCJ), then the petition must be filed at the district office from which the decision issued; (2) if a petition seeks reconsideration of a decision issued by the Appeals Board itself, then the petition must be filed directly with the Appeals Board; and (3) petitions filed not correctly submitted to a district office or to the Appeals Board are not to be accepted for filing or deemed filed. [*NOTE: Rule 10840 also does not incorporate the general provision of current Rule 10390, which is being repealed, that petitions submitted in violation of Rule 10840 could be discarded.*]

The reasons for the amendments to Rule 10840 relate back, in part, to the reasons why current Rule 10840 was adopted.

Current Rule 10840 was adopted for two major reasons.

First, by statute, the WCAB must act on a petition for reconsideration within 60 days of its filing. (Lab. Code, § 5909.) Moreover, by rule, the WCJ who issued the must issue a report and recommendation on the petition within 15 days after the petition is filed. (Cal. Code Regs., tit. 8, § 10860.) Normally, it is only after a WCJ has

issued his or her report and recommendation that the WCAB's file is sent to the Appeals Board. Therefore, the Appeals Board often would not receive the WCAB file until 20 or 30 days or more of its statutory time period for acting had elapsed. If, however, a petition for reconsideration was not filed at the district office from which the WCJ's decision issued, then the petition would have to be forwarded to the correct district office before the WCJ could issue the report and recommendation. This commonly would result in delays in the issuance of the WCJ's report, which in turn would further cut into the WCAB's 60-day time period for acting on the petition. Therefore, by requiring that petitions from WCJ decisions be filed directly with the district office from which the decision issued, Rule 10840 helped ensure that the Appeals Board would have a significant portion of its 60-day statutory time limit within which to review the petition and the WCAB file.

Second, when a petition was filed at a district office other than the one from which the decision issued, the WCAB's clerical staff would have to spend time re-routing the petition to the correct office and the WCAB would have to expend money to have the petition mailed or delivered to the correct office. Therefore, this practice was both inefficient and costly.

Under EAMS, however, a petition – regardless of where it is submitted – will be scanned into EAMS and discarded. (Court Administrator Rules 10216(a) and 10228(b).) Once a petition is scanned, then the “case owner” (i.e., the WCJ assigned to the case, or the Appeals Board if the petition relates to a decision issued by it) will receive essentially immediate notification that the petition was filed and will be able to access the petition through EAMS. Therefore, there will be no significant delays in a WCJ issuing his or her report (Cal. Code Regs., tit. 8, § 10860) or in the Appeals Board's ability to act on the petition within 60 days. (Lab. Code, § 5909.) Moreover, because the petition (being within EAMS) will not have to be re-routed to the correct district office, then neither clerical time nor expense will be at issue. Accordingly, the reasons underlying current Rule 10840 longer exist.

The provision allowing petitions for reconsideration, removal, and disqualification (and answers thereto) to be filed anywhere will not have a significant adverse impact because, on average, there are normally no more than 250 to 400 such petitions filed per month throughout the entire state and, in all likelihood, a significant percentage of these petitions will still be filed with the district office having venue.

On the other hand, retaining the provisions of current Rule 10840 could have a significant adverse impact on the parties because, if a petition were improperly submitted to the wrong district office – or improperly submitted to the Appeals Board – it ordinarily would not be accepted for filing and would be discarded without the knowledge of the party who submitted it. (See current Rule 10390 [being repealed].) Thus, if the provisions of current Rule 10840 remained in place, an unwary or somewhat careless practitioner, or a self-represented injured worker who is not familiar with the WCAB's rules, could have his or her petition rejected without ever knowing it and, as a result, may lose any chance to timely correct the filing defect.

Therefore, the Appeals Board believes that, in weighing the benefits of amending Rule 10840 against the fairly nominal scanning burdens that its amendment might entail, the balance tips in favor of amending proposed Rule 10840.

Moreover, the amendment of Rule 10840 also obviates the confusion sometimes caused by the provisions of current Rule 10840, which requires that a petition seeking reconsideration of a decision issued by a WCJ of the San Francisco district office must be filed with that district office (which is on the Second Floor of the State Building at 455 Golden Gate Avenue), but a petition seeking reconsideration of a decision issued by the Appeals Board must be filed with the Appeals Board (which is on the Ninth Floor of the State Building at 455 Golden Gate Avenue). This problem has recently been criticized by two Courts of Appeal. (See *County of Orange v. Workers' Comp. Appeals Bd. (Lean)* (2008) 73 Cal.Comp.Cases 1 [unpublished opinion not citable in judicial proceedings] and *Scott Pontiac GMC v. Workers' Comp. Appeals Bd. (Olsen)* (2007) 72 Cal.Comp.Cases 346 [unpublished opinion not citable in judicial proceedings].)

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

58. Section Amended: 10842.

Statement of Specific Purpose and Reasons for the Amendments to Section 10842

The WCAB amends Rule 10842, currently entitled “Contents of Petition for Reconsideration and Answer,” but which is re-entitled “Contents of Petitions for Reconsideration, Removal, and Disqualification and Answers.”

First, Rule 10842 deletes the reference to current Rule 10392 (i.e., “Form and Size Requirements for Filed Documents”) because that rule is being transferred to Court Administrator Rule 10232. Moreover, new Rule 10845 now sets out the general requirements for petitions for reconsideration, removal, and disqualification, including a requirement for compliance with Court Administrator Rule 10232.

Second, Rule 10842 provides that petitions for removal and disqualification (in addition to petitions for reconsideration) shall fairly state all of the material evidence and shall separately state and clearly set forth each contention. It also provides that a failure to state all of the material evidence may be a basis for denying a petition for reconsideration, removal, and disqualification. Additionally, it provides that evidentiary statements shall be supported by references that state with specificity (as set forth in the Rule) the place in the record where the evidentiary statement appears. These provisions are necessary to help ensure the accuracy of evidentiary statements and to assist the Appeals Board in reviewing the record. The provisions are consistent with the Rules of Court for appellate briefs. (See Cal. Rules of Court, Rule 8.204(a)(1)(C) (“Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. If any part of the record is submitted in an electronic format, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears.”).) They also are consistent with the general principle that it is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations; there is no duty for a court or other judicial body to search the record for evidence and a court may disregard any factual contention not supported by a proper citation to the record. (E.g., *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379; see also 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627 (“The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel.”); *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal.App.3d 218, 228 (where a party provides a brief “without argument, citation of authority or record references establishing that the points were made below,” the court may “treat the points as waived, or meritless, and pass them without further consideration.”); *Nielsen v. Workers’ Comp. Appeals Bd.* (1985) 164 Cal. App. 3d 918, 923 [50 Cal.Comp.Cases 104] (“Instead of a fair and sincere effort to show that the trial court was wrong, appellant’s brief ... is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner.” [internal quotations and citations omitted].))

Third, Rule 10842 provides that documents that are already in evidence or that otherwise are already part of the adjudication file may not be attached to petitions for removal and disqualification (in addition to petitions for reconsideration). This provision is needed because, if such attachments were allowed, it would unnecessarily result both in increased scanning of duplicate documents into EAMS (see Court Administrator Rules 10216(a) and 10228(b)) and increased data storage costs.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

59. Section Amended: 10843.

Statement of Specific Purpose and Reasons for the Amendments to Section 10843

The WCAB amends Rule 10843, currently entitled “Petitions to Remove,” but which is re-entitled “Petitions for Removal and Answers.”

First, for the reasons stated in the discussion of Rule 10840, new Rule 10843 repeals the provisions of current Rule 10843 that a petition for removal must be filed with the district office of the WCAB from which relief is sought, and that a petition for removal filed with any other district office or with the Appeals Board will not be accepted for filing, will not be deemed filed, and may be discarded.

Second, Rule 10843 provides that petitions for removal and answers thereto must be verified under penalty of perjury. Although there is a statutory requirement for verification of petitions for reconsideration and answers to them (Lab. Code, §§ 5902, 5905), there is currently no requirement for verification of petitions for removal and answers to them. A verification requirement for petitions for removal and answers to them is particularly important because such petitions and answers are often filed at the stage of proceedings where there is no evidentiary record and, therefore, there often is no way to independently confirm the allegations of the petitions or answers.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

60. Section Added: 10844.

Statement of Specific Purpose and Reasons for the Addition of Section 10844

The WCAB adds Rule 10844, entitled “Petitions for Disqualification and Answers.” This rule requires that any petition for disqualification (and any answer thereto) must be verified under penalty of perjury. Although there is a statutory requirement for verification of petitions for reconsideration and answers to them (Lab. Code, §§ 5902, 5905), there is currently no requirement for verification of petitions for disqualification and answers to them. This verification requirement will help ensure the integrity and accuracy of allegations of fact regarding alleged bias, prejudice, prejudgment, etc., relating to the WCJ sought to be disqualified. It is also necessary because many of the allegations may relate to alleged statements or actions by the challenged WCJ that are not reflected in the WCAB’s record.

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

61. Section Added: 10845.

Statement of Specific Purpose and Reasons for the Addition of Section 10845

The WCAB adds Rule 10845, entitled “General Requirements for Petitions for Reconsideration, Removal, and Disqualification, and for Answers and Other Documents.”

Rule 10845 requires that, except as otherwise provided by sections 10840 or 10865, all documents filed in connection with any petition for reconsideration, petition for removal, petition for disqualification or any other matter pending before the Appeals Board shall comply with the requirements of Court Administrator Rules 10227, 10228, 10230, 10232, 10235, and 10236. These provisions are necessary in light of EAMS.

Also, although Rule 10845 specifically requires compliance with the 25-page limitation of Court Administrator Rule 10232(a)(6), it further requires that any supplemental petition or answer submitted under Rule 10848 shall not exceed ten pages. However, any verification, proof of service, exhibit, or document cover sheet filed with the petition or answer would not be counted in determining the page limitation. (Moreover, Rule 10845 allows the Appeals Board to make exceptions, either on its own motion or on a clear and convincing showing of good cause.) These limitations are necessary so that neither the Appeals Board nor EAMS is overburdened with overly long and unfocused petitions. These length limitations are also consistent with provisions of the Rules of Court that impose length limitations. (See, e.g., Cal. Rules of Court, Rule 3.1113(d) (Except in a summary judgment or summary adjudication motions, no opening or responding memorandum of points and authorities may exceed 15 pages and no reply or closing memorandum may exceed 10 pages. The page limit does not include exhibits, declarations, attachments, the table of contents, the table of authorities, or the proof of service.), Rule 8.204(c) (appellate brief produced on a computer must not exceed 14,000 words, including footnotes).)

Finally, because current Rule 10391 has been repealed, new Rule 10845 provides that a document sent directly to the Appeals Board by fax or e-mail will not be accepted for filing, unless otherwise ordered by the Appeals Board.

Specific Technologies or Equipment

The addition of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the addition.

Effect on Small Businesses

The addition of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The addition of this rule will not have a significant economic impact on California business enterprises and individuals.

62. Section Amended: 10846.

Statement of Specific Purpose and Reasons for the Amendments to Section 10846

The WCAB amends Rule 10846, entitled “Skeletal Petitions.” Current Rule 10846 allows a petition for reconsideration to be denied if it is unsupported by specific references to the record and to the principles of law involved. New Rule 10846 now also extends these provisions to skeletal petitions for removal and disqualification, and also allows all three types of petitions (reconsideration, removal, and disqualification) to be “dismissed,” not merely denied. These amendments also allow the Appeals Board to summarily dispense with petitions that fail to make any significant effort to set forth the relevant facts or law, without placing the burden on the Board to discover any factual or legal errors without any assistance from the petitioner. (Cf. *Nielsen v. Workers’ Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923 [50 Cal.Comp.Cases 104].)

Also, the provision of current Rule 10846, which allows for the denial of a petition for reconsideration “if it contains no more than allegations of the statutory grounds for reconsideration,” has been deleted because: (1) this language is superfluous, given that a petition for reconsideration which “contains no more than allegations of the statutory grounds” is necessarily skeletal; and (2) there are no specific statutory grounds for removal or disqualification.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

63. Section Amended: 10848.

Statement of Specific Purpose and Reasons for the Amendments to Section 10848

The WCAB amends Rule 10848, entitled “Supplemental Petitions.” Current Rule 10848 provides that, when a petition for reconsideration has been filed: (1) supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board; and (2) supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party. The amendments to Rule 10848 extend these provisions to petitions for removal or disqualification. The amendments are necessary because all workers’ compensation proceedings (including those relating to petitions for removal or disqualification) should be expeditious, while accomplishing substantial justice. (Cal. Const., art. XIV, § 4.) Allowing for supplemental pleadings relating to petitions for removal or disqualification (such as a reply to an answer or a WCJ’s Report, or a response to a reply to an answer or a WCJ’s Report) delays the resolution of these petitions. Moreover, “substantial justice” ordinarily can be accomplished without the supplemental pleadings. However, where the Appeals Board deems that supplemental pleadings would be helpful or necessary, it can request them or approve a party’s request to file them.

[NOTE: In their September 12, 2008 written public comments, both the American Insurance Association (AIA) and the California Workers’ Compensation Institute (CWC) recommend that Rule 10848 be amended such that supplemental pleadings filed in violation of its provisions nevertheless “shall be returned to the filing party.” Preliminarily, since its inception, Rule 10848 has stated that supplemental pleadings filed in violation of its provisions “shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party.” The amendments to Rule 10848 have nothing to do with this language, except to extend it to cases pending before the Appeals Board on petitions for removal or disqualification, in addition to petitions for reconsideration. Moreover, supplemental petitions and answers do not implicate any statutory or jurisdictional time limitations; therefore, the provision that supplemental petitions and answers shall not be acknowledged or returned to the filing party does not significantly prejudice the filing party.]

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

64. Section Amended: 10850.

Statement of Specific Purpose and Reasons for the Amendments to Section 10850

The WCAB amends Rule 10850, entitled “Proof of Service.” The chief amendment is that Rule 10850 now specifically requires that service of petitions for reconsideration, removal, and disqualification be made “in accordance with Rule 10505.” Rule 10505 applies to service by parties and lien claimants, and it sets out proof

of service standards for personal service, service by mail, service by e-mail, and service by fax. New Rule 10850 also makes it clear that its proof of service provisions apply to answers to petitions for reconsideration, removal, and disqualification.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

65. Section Amended: 10860.

Statement of Specific Purpose and Reasons for the Amendments to Section 10860

The WCAB amends Rule 10860, entitled “Report of Workers’ Compensation Judge.” The amendment is very simple. All it does is provide that, instead of having a WCJ “send” a Report on a petition for reconsideration, removal, or disqualification to the Appeals Board, the WCJ will instead “submit” the Report to the Appeals Board. This language change gives recognition to the fact that the Reports of the WCJs will be electronically filed within EAMS, and will no longer be mailed or physically delivered to the Appeals Board.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The proposed amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

66. Section Amended: 10865.

Statement of Specific Purpose and Reasons for the Amendments to Section 10865

The WCAB amends Rule 10865, currently entitled “Reconsideration--Labor Code Sections 3201.5 and 3201.7,” but which is re-entitled “Reconsideration of Arbitration Decisions Made Pursuant To Labor Code Sections 3201.5 and 3201.7.”

The amendment to Rule 10865 continues to provide that a petition for reconsideration from an arbitration decision made pursuant to Labor Code Section 3201.5(a)(1) or Section 3201.7(a)(1) (known as “carve-out” cases) is to be filed directly with the office of the Appeals Board in San Francisco, however, it specifically emphasizes that a carve-out petition for reconsideration is not to be submitted to any district office, including the San Francisco district office. There are several reasons why a carve-out petition for reconsideration must be filed directly with the Appeals Board in San Francisco, and not with a district office. First, only the Appeals Board itself (and not a WCJ at a district office) may act on a carve-out petition for reconsideration. (Lab. Code, §§ 3201.5(a)(1), 3201.7(a)(3)(A).) Second, because the very nature of a carve-out case is that it has been handled through an alternative dispute resolution (ADR) system that is completely outside the ordinary workers’ compensation adjudication process, the carve-out petition for reconsideration ordinarily will constitute the initiation of any proceedings before the WCAB. (Id.)⁸ Therefore, in general, there will be neither an adjudication case number nor an adjudication case file within EAMS. Because there generally will not be an adjudication case number or file for a carve-out case, and because only the Appeals Board itself can review carve-out cases, it is appropriate to require that a carve-out petition for reconsideration be filed directly with the Appeals Board to create an adjudication case number and to create an EAMS case file (by scanning a photocopy of the carve-out arbitration file, as discussed below).

Additionally, Rule 10865 provides that if a carve-out petition for reconsideration is submitted to a district office in violation of this rule, the petition shall be returned to the petitioner with a letter referencing this rule, noting that the petition was improperly submitted to a district office and has been rejected, and indicating that the petition should be filed directly with the Appeals Board in San Francisco consistent with this rule. Thus, a party who failed to properly file a carve-out petition for reconsideration directly with the Appeals Board in San Francisco would be notified of the filing defect and, therefore, might have some opportunity to cure it. This requirement is consistent with the current provisions of the WCAB/DWC Policy and Procedure Manual, Section 1.60.

The amendment to Rule 10865 also provides that a petition for reconsideration in a carve-out case shall include a completed application for adjudication of claim (but without the venue designation), that is appended to the petition under a document separator sheet. The sole purpose of this requirement is to obtain the information set forth in an application (e.g., the injured employee’s date(s) of injury and date of birth; the names and mailing addresses of the parties). This information is necessary because, as discussed above, the very nature of a carve-out case is that it has been handled through an alternative dispute resolution (ADR) system that is completely outside the ordinary workers’ compensation adjudication process. Therefore, this information ordinarily would not have been contained within an adjudication case file or within EAMS. Moreover, the information contained in an application can be captured by EAMS, thereby obviating the need for the filing of a separate document containing this information (which would then have to be manually inputted into EAMS). Because a completed application for adjudication of claim submitted with a carve-out petition for reconsideration is for informational purposes only, it will not be deemed an application for purposes of Labor Code section 4064(c).

Additionally, the amendment to Rule 10865 provides that, after the filing of the carve-out petition for reconsideration and the document cover sheet, a WCAB adjudication file will be created and an adjudication case number will be assigned, if there is no existing adjudication case number. Any new adjudication case number will then be served by the Appeals Board on the parties and attorneys, and on the arbitrator or board of arbitrators, the addresses listed on the proof of service to the carve-out petition.

Also, under Rule 10865, the arbitrator is required to submit a photocopy of the complete arbitration record to the Appeals Board within 15 days after receipt of the petition for reconsideration, and the arbitrator is required to prepare a Report on the petition consistent with Rule 10860. The need for a copy of the arbitration record is necessary because, once again, all of the ADR proceedings are entirely outside of the ordinary workers’ compensation adjudication system and, therefore, the WCAB will not have any paper or electronic record of those proceedings. A photocopy of the arbitration record is required, and not the original, because the record

⁸ The only exception is where a carve-out case had originally come before the WCAB on the sole issue of whether an application should be dismissed because the employee’s injury was subject to carve-out ADR. (See *Kaiser v. Cal. Electric* (1998) 63 Cal.Comp.Cases 1391 (Significant Panel Decision); *Becerra v. Eastside Reservoir Project* (1997) 62 Cal.Comp.Cases 937 (Significant Panel Decision).)

will be scanned into EAMS and then destroyed. (See proposed Court Administrator Rules 10216(a), 10228(b), 10236(a).) The arbitrator's Report is needed to assist the Appeals Board in gaining a full understanding of the proceedings and issues and to enable the Board, if it deems it appropriate, to deny reconsideration by adopting and incorporating the arbitrator's Report.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

67. Section Amended: 10866.

Statement of Specific Purpose and Reasons for the Amendments to Section 10866

The WCAB amends Rule 10866, currently entitled "Reconsideration of Arbitrator's Decisions or Awards," but which is re-entitled "Reconsideration of Arbitrator's Decisions or Awards Made Pursuant To the Mandatory or Voluntary Arbitration Provisions of Labor Code Sections 5270 through 5275." The title change is being made to make clear that this rule applies only to mandatory or voluntary arbitrations under section 5270 et seq. (i.e., non-carve-out arbitrations), and not to carve-out arbitrations under sections 3201.5 and 3201.7.

The amendment to Rule 10866 provides that a petition for reconsideration from an arbitration decision made pursuant to sections 5270 through 5275 may be filed with any district office or with the office of the Appeals Board in San Francisco (however, where a petition has been filed with a district office, duplicate copies of the petition shall not be filed with any other district office or with the Appeals Board). As detailed more specifically in the discussion of Rule 10840, the creation and implementation of EAMS eliminates the problem of the district offices functioning, in essence, as "post offices" or "clearinghouses" for the parties, which entailed significant utilization of clerical time and significant costs in re-routing documents to the appropriate district offices.

However, Rule 10866 still requires the arbitrator to submit his or her file – and his or her report and recommendation on the petition – to the district office having venue. One reason for this is that, typically, arbitrators in non-carve-out are local attorneys who routinely appear at that district office. Indeed, many arbitrators are selected from a list created by the PWCJs of each district office. (See Lab. Code, §§ 5270.5(a), 5271; current Rules 10995 and 10996.) Therefore, it is relatively easy for an arbitrator to bring his or her arbitration file to the local district office. For the same reason, it is relatively easy for the PWCJ to have the arbitrator take care of any omissions from the arbitrator's file.

Under Rule 10866, however, the arbitrator is to submit a *photocopy* of the arbitration file to the PWCJ of the district office having venue, rather than the original arbitration file. The photocopied arbitration file is then scanned into EAMS and destroyed. (See Court Administrator Rules 10216(a), 10228(b), 10236(a).) But, Rule 10866 provides that the costs of photocopying the arbitration file shall be reimbursed to the arbitrator in accordance with the provisions of Labor Code section 5273, within 30 days after the liable party or parties receives the arbitrator's billing for those costs.

Further, in order to avoid having two separate rules relating to petitions for reconsideration from arbitrators' decisions under sections 5270 through 5275, Rule 10866 incorporates the provisions of current Rule 10867 relating to the arbitrator's Report and the arbitrator's file. (As seen below, current Rule 10867 is being deleted.)

Finally, consistent with Rule 10750, Rule 10866 expressly provides that the petition for reconsideration, any answer, and the arbitration record shall be deemed part of the WCAB's record of proceedings.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

68. Section Repealed: 10867.

Statement of Specific Purpose and Reasons for the Repeal of Section 10867

The WCAB repeals Rule 10867, relating to "Report of Arbitrator." As pointed out above, the provisions of current Rule 10867 are being merged into the provisions of Rule 10866.

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

69. Section Repealed: 10890.

Statement of Specific Purpose and Reasons for the Repeal of Section 10890

The WCAB repeals Rule 10890, relating to "Walk-Through Documents." Pursuant to Labor Code section 5307(c), the provisions of current Rule 10890 are transferred to Court Administrator Rule 10280 (which makes some changes to the substance of current Rule 10890).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

70. Section Amended: 10946.

Statement of Specific Purpose and Reasons for the Amendments to Section 10946

The WCAB amends Rule 10946, currently entitled “Medical Reports,” but which is re-entitled “Medical Reports in Subsequent Injuries Benefits Trust Fund Cases.”

Some of the amendments simply substitute “Subsequent Injuries Benefits Trust Fund” for “Subsequent Injuries Fund,” consistent with statutory changes. (See Lab. Code, § 62.5(d)(1) & (2).)

Also, Rule 10946 requires that medical reports shall be served on the Subsequent Injuries Benefits Trust Fund (SIF) no later than thirty (30) days prior to the mandatory settlement conference (MSC) or other hearing – rather than no later than the MSC – unless service is waived by SIF. This 30-day service requirement reverts to the version of Rule 10946 that was amended in 1983. The problem with the 1983 deletion of the 30-day service requirement is that, often, SIF did not receive service of the medical reports until the date of the MSC. Such late service has not been conducive to having a meaningful settlement conference in SIF cases, which defeats one of the principal purposes of an MSC. (See Lab. Code, § 5502(e)(2); *County of Sacramento v. Workers’ Comp. Appeals Bd. (Estrada)* (1999) 68 Cal.App.4th 1429, 1432 [64 Cal.Comp.Cases 26] (one purpose of an MSC “is to guarantee a productive dialogue either leading to the resolution of the dispute or thoroughly and accurately framing the stipulations and issues for hearing”).) When SIF is first served with the medical reports at the MSC, it cannot effectively evaluate settlement or effectively frame stipulations and issues.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

71. Section Amended: 10950.

Statement of Specific Purpose and Reasons for the Amendments to Section 10950

The WCAB amends Rule 10950, currently entitled “Appeal from Order Granting or Denying Petition for Order Requiring Employee to Select Employer-Designated Physician,” but which is re-entitled “Petitions Appealing Orders Issued by the Administrative Director.”

The amendments to Rule 10950 delete all of the provisions relating to appeals from orders of the Administrative Director (AD) granting or denying a defendant’s petition for a change of treating physician. (See Lab. Code, § 4603; Cal. Code Regs., tit. 8, §§ 9786-9787.)

Instead, Rule 10950 provides that, except for petitions appealing audit penalty assessments issued by the AD pursuant to Labor Code section 129.5(g), all petitions appealing orders issued by the AD are to be filed in accordance with the provisions of Article 9 (section 10290 et seq.) of the rules of the Court Administrator. Then, when a workers’ compensation judge has determined such an appeal, any aggrieved party may file a petition for reconsideration with the Appeals Board in accordance with the provisions of Labor Code section 5900 et seq. and WCAB Rules 10840 et seq.

The reason for these amendments is that, except for petitions appealing audit penalty assessments, all the rules relating to petitions appealing decisions of the AD are being transferred to the Court Administrator pursuant to Labor Code section 5307(c). As a result, the provisions of current Rule 10950 are being transferred to Court Administrator Rule 10290 (which makes some changes to the substance of current Rule 10950).

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

72. Section Repealed: 10952.

Statement of Specific Purpose and Reasons for the Repeal of Section 10952

The WCAB repeals Rule 10952, entitled “Appeal of Notice of Compensation Due.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10952 are being transferred to Court Administrator Rule 10291 (which makes some changes to the substance of current Rule 10952).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

73. Section Amended: 10953.

Statement of Specific Purpose and Reasons for the Amendments to Section 10953

The WCAB amends Rule 10953, entitled “Petition Appealing Audit Penalty Assessment – Labor Code Section 129.5(g).”

The chief amendment to Rule 10953 is that petitions appealing audit penalty assessments by the Administrative Director (AD) under Labor Code section 129.5 are *not* to be filed with a district office of the WCAB and initially determined by a WCJ, subject to a petition for reconsideration to the Appeals Board. Instead, petitions appealing section 129.5 audit penalty assessments are to be filed directly with (and determined by) the Appeals Board. This is because, for such audit penalty assessments, there ordinarily will have already been a prehearing conference before a WCJ (akin to a mandatory settlement conference) and then a hearing before a WCJ, at which witnesses and documentary evidence may be presented. (Cal. Code Regs., tit. 8, §§ 10113.3-10114.4.) Therefore, the Appeals Board will be able to determine the petition using the record created by the WCJ, pursuant to the delegation by the AD. *[NOTE: Audit penalty assessments under section 129.5 are based on audits of multiple files of an insurance carrier, self-insured employer, or third party administrator. Unlike audits under Labor Code section 129, they are not are not related to workers’ compensation claims or files of specific individual employees or dependents.]*

Some additional amendments to Rule 10953 are being made in light of the EAMS. Specifically, the petition appealing a Labor Code section 129.5(g) penalty assessment must be accompanied by a completed document cover sheet. Moreover, after the filing of the petition, an EAMS adjudication case will be created and an EAMS adjudication case number will be assigned, which will be served by the WCAB on the AD and on the parties and attorneys listed on the proof of service to the petition. Furthermore, a certified photocopy of the AD’s record of proceedings will have to be submitted, which the WCAB will then scan into EAMS and discard.

Finally, Rule 10953 expressly provides that the AD’s record of proceedings is deemed part of the WCAB’s record under Rule 10750.

Specific Technologies or Equipment

The amendments to this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the amendments.

Effect on Small Businesses

The amendments to this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

74. Section Repealed: 10955.

Statement of Specific Purpose and Reasons for the Repeal of Section 10955

The WCAB repeals Rule 10955, entitled “Rehabilitation Appeals.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10955 are transferred to Court Administrator Rule 10293 (which makes some changes to the substance of current Rule 10955).

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

75. Section Repealed: 10957.

Statement of Specific Purpose and Reasons for the Repeal of Section 10957

The WCAB repeals Rule 10957, entitled “Deposition of Rehabilitation Consultants.” The depositions (as well as the trial testimony) of Rehabilitation Consultants (as well as other judicial and quasi-judicial officers in workers’ compensation matters) are now addressed by Rule 10593.

Specific Technologies or Equipment

The repeal of this rule does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeal.

Effect on Small Businesses

The repeal of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of this rule will not have a significant economic impact on California business enterprises and individuals.

76. Sections Repealed: 10995 and 10996.

Statement of Specific Purpose and Reasons for the Repeal of Sections 10995 and 10996

The WCAB repeals Rules 10995 and 10996 entitled, respectively, “Mandatory Arbitration” and “Voluntary Arbitration.” Pursuant to Labor Code section 5307(c), the provisions of current Rules 10995 and 10996 are transferred to Court Administrator Rules 10295 and 10296 (which make some minor changes to the substance of current Rules 10995 and 10996).

Specific Technologies or Equipment

The repeal of these rules does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the repeals.

Effect on Small Businesses

The repeal of these rules will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The repeal of these rules will not have a significant economic impact on California business enterprises and individuals.

RESPONSES TO GENERAL COMMENTS NOT DIRECTED AT ANY PARTICULAR RULE:

In its September 12, 2008 written comments, the American Insurance Association (AIA) made several “general comments” that do not specifically pertain to any one WCAB Rule.

First, AIA requests that the WCAB’s Rules “address the security of private health information that is transmitted electronically [through EAMS].” However, it is the Division of Workers’ Compensation (DWC) that has been responsible for the development and implementation of EAMS, including how medical reports and other private health information are to be electronically transmitted and stored. Therefore, this request by AIA should properly be directed to DWC and the Court Administrator.

Second, AIA requests that the WCAB’s Rules should “state what back-up measures are in place should EAMS become inoperable or crash at any time.” Again, however, it is DWC that has been responsible for the development and implementation of EAMS, including the creation of back-up measures. Therefore, this request by AIA also should be directed to DWC and the Court Administrator. Nevertheless, the WCAB has been advised by DWC that there are back-up procedures for EAMS. First, each night (except for Sunday night), there is an incremental backup of new EAMS data from that day, which is stored on on-site media. Second, cloned tapes of these incremental backups are made on a daily basis (except for Sunday), and these daily backup tapes are sent off-site. Third, once a week, there is a full backup of all EAMS data, with the backup data both stored on-site and sent off-site. According to the WCAB’s understanding, all of the on-site and on-site backup data (both the daily incremental backups and the weekly full backups) are retained for 30 days, providing a dual source of system data for the purpose of disaster recovery. Also, Court Administrator Rule 10225(b)(2) provides that, if EAMS is unavailable for any reason for more than 24 hours, then the Court Administrator may declare that files may be maintained in temporary paper form.

Third, AIA states that the WCAB’s Rules “must ensure that processing, technical and system-related errors do not find their way to the evidentiary record and do not create delays in the adjudication of claims.” Once more, it is DWC that has been responsible for the development and implementation of EAMS, including how documents are processed and electronically entered into the adjudication case file, whether offered or received into evidence or not. Therefore, this request by AIA should be directed to DWC and the Court Administrator.

It should be observed, however, that it is the “Workers’ Compensation Appeals Board” which the Legislature has vested with “judicial powers.” (Lab. Code, § 111(a); see also, e.g., see also, *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355-356 (the WCAB has “been legislatively endowed with judicial powers pursuant to a specific constitutional authorization”).) Moreover, pursuant to Labor Code sections 5309 and 5310, the Appeals Board delegates its judicial powers to the WCJs of the district offices. Therefore, if any processing, technical and system-related errors caused by EAMS result in errors in the evidentiary record, the Appeals Board and WCJs will have the power to correct them. Additionally, under Rule 10223, the Court Administrator may perform corrective measures on documents within EAMS, including substituting a correct document for an incorrect document, repairing a mis-scanned document, and moving a mis-filed document to the correct adjudication file.

Fourth, AIA is concerned that, with the October 15, 2008 effective date of the WCAB’s Rules that was proposed at the time its Rules were submitted for public comment [*NOTE: the new effective date will be November 17, 2008*], “there will be no time for implementation issues such as necessary re-programming, development of automated tools for use, first with the OCR forms and a later transition to e-reporting, development of new workflows, and training of staff.” Once more, however, these concerns should be directed to DWC and the Court Administrator. It was DWC which made the determination of when EAMS would go “live” and how much lead time and training the workers’ compensation community would have to help their transition to the new paperless adjudication system. Moreover, the OCR forms and the e-forms were almost exclusively developed by DWC, in large part because DWC was responsible for developing the programming that would extract the information entered in the various lines and boxes on the forms and transfer that information into the corresponding data fields within EAMS. Further, for the most part, the Legislature gave to the Court Administrator the authority to adopt rules regarding “[t]he kind in character of forms to be used at all trial level proceedings.” (Lab. Code, § 5307(c)(2).) Only the application, answer, and lien forms specifically remain under the WCAB’s authority. (Lab. Code, §§ 5500, 4903.1(c).) Finally, the effective date of the WCAB’s Rules (which was initially anticipated to be October 15, 2008, but which will now be November 17, 2008) is tied to the effective date of the Court Administrator’s Rules. This is because the WCAB is deleting certain of its current rules, the subject matter of which will be covered by certain proposed Court Administrator regulations. Thus, if the WCAB’s Rules were to have a later effective date, then there would be a period when there would at least be duplication between the rules and, maybe, a conflict between them. Any such scenario should be avoided.

Lastly, AIA states that the new Compromise and Release Agreement form and the new Stipulated Findings and Award form created by Court Administrator Rule 10214 are “flawed.” Yet again, however, this complaint should be directed to the Court Administrator. As just indicated, the Court Administrator adopted these forms under his authority to adopt rules regarding “[t]he kind and character of forms to be used at all trial level proceedings.” (Lab. Code, § 5307(c)(2).) This does not necessarily mean, however, that the Court Administrator’s rules would never be subject to review. The WCAB is vested with the authority to conduct initial judicial review of any challenges to regulations promulgated by DWC, including those of the Court Administrator; such regulations are *not* subject to initial judicial review by the Superior Courts. (Lab. Code, § 5300(f); Gov. Code, §§ 11351(a) & (c); see also *Boughner v. CompUSA, Inc.* (2008) 73 Cal.Comp.Cases 854, 859 (Appeals Board en banc).) Moreover, any regulation promulgated by DWC in contradiction to statute may be deemed invalid. (*Boehm & Assocs. v. Workers’ Comp. Appeals Bd. (Lopez)* (1999) 76 Cal.App.4th 513, 518-519 [64 Cal. Comp. Cas 1350, 1354]; *Krueger v. Republic Indemnity Co. of America* (2000) 28 Cal. Workers’ Comp. Rptr. 44 (Appeals Board panel decision).) Similarly, forms utilized in workers’ compensation proceedings can be invalidated if they are not sufficiently clear and non-technical, such that an injured worker can understand them. (*Sumner v. Workers’ Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 967 [48 Cal.Comp.Cases 369]; *Johnson v. Workers’ Comp. Appeals Bd.* (1970) 2 Cal.3d 964, 973-974 [35 Cal.Comp.Cases 362].)

In its September 12, 2008 written comments, the California Workers’ Compensation Institute (CWCI) made several “introductory comments” that do not specifically pertain to any one WCAB Rule.

First, CWCI correctly observes that the WCAB is constitutionally mandated to accomplish substantial justice expeditiously, inexpensively, and without encumbrance of any kind. (Cal. Const., art. XIV, § 4.) CWCI goes on to state that, therefore, the WCAB must “ensure that its procedural rules are fair and cause no undue delay in the adjudication of disputed claims” and that, “[i]n order to avoid exalting form over substance, the procedural regulations creating the information flow for EAMS must ensure that the material essential to a timely

adjudication of a claim is part of the Board's evidentiary file – one way or another.” The WCAB has no general disagreement with these statements. Because they do not pertain to any particular rule or rules, however, these comments will not be discussed further.

Second, CWCI suggest that the WCAB should “[s]pecifically state in [its] regulations that, in the case of a conflict, the WCAB regulations will supersede the rules of the court administrator.” Preliminarily, the WCAB observes that CWCI does not point to any actual conflict between the WCAB's rules and the Court Administrator's rules. Moreover, even assuming that the WCAB might have the authority, through its rule-making power, to declare that its rules trump those of the Court Administrator – and even assuming that a conflict between the rules might exist – there appears to be no need for the WCAB to adopt the kind of rule that CWCI suggests. That is, any potential conflict between the WCAB and Court Administrator's rules may be resolved through the adjudication process. As previously observed, both the WCAB's rules and those of the Court Administrator are exclusively subject to initial judicial review by the WCAB (Lab. Code, § 5300(f); Gov. Code, §§ 11351(a) & (c); see also *Boughner v. CompUSA, Inc.* (2008) 73 Cal.Comp.Cases 854, 859 (Appeals Board en banc)) and then they are subject to appellate review by the Courts of Appeal and the Supreme Court (Lab. Code, § 5950 et seq.).

Third, CWCI recommends that the effective date of the WCAB's regulations “be at least 90 days after the date that the proposed regulations are adopted.” CWCI states that this “90-day period is needed for the workers' compensation community to learn the new [EAMS] system, to develop the necessary tools to make EAMS effective, and train staff on the final EAMS product.” However, these comments regarding EAMS should be directed to DWC and the Court Administrator, who are responsible for developing and implementing EAMS. (Indeed, EAMS already has been implemented, having gone “live” in late August.) Moreover, the difficulty with having the WCAB's Rules go into effect at least 90 days after their effective date recommendation is that, as discussed above, the effective date of the WCAB's Rules is tied to the effective date of the Court Administrator's Rules. This is because the WCAB is deleting certain of its current rules, the subject matter of which will be covered by certain proposed Court Administrator regulations. Thus, if the WCAB's Rules were to have a later effective date, then there would be a period when there would at least be duplication between the rules and, maybe, a conflict between them. Any such scenario should be avoided.

Fourth, CWCI “recommends that the WCAB develop an internal monitoring system and an enforcement process within the district offices to achieve the uniformity and internal consistency necessary to implement EAMS effectively.” However, once again, it is DWC and the Court Administrator who are responsible for implementing EAMS. Also, it is the Court Administrator who has been given the authority to “adopt reasonable, proper, and uniform rules for district office procedure regarding trial level proceedings of the [WCAB].” (Lab. Code, § 5307(c); see also, § 5500.3(a) “[t]he court administrator shall establish uniform district office procedures ... for all district offices of the appeals board”].)

Fifth, CWCI “recommends that the Board specify in its regulations the systems created to ensure that privacy rights are maintained and that WCAB files are secure within [EAMS].” Once more, though, it is DWC and the Court Administrator who are responsible for developing and implementing EAMS, so these comments should properly be directed to them.

Sixth, CWCI recommends that the WCAB “[p]rovide in the regulations and alternate plan of operation to guard against the disruption that system failure [of EAMS] may cause.” Again, these comments should be directed at DWC and the Court Administrator. Nevertheless, in its discussion above of AIA's general comments, the WCAB has essentially addressed CWCI's concerns.

Seventh, CWCI notes that Court Administrator Rule 10214 contains new forms for compromise and release agreements and for stipulated Findings and Awards. CWCI states that “[t]hese settlement forms are defective and must be revised in order for the Board to conduct an adequate review under [WCAB Rule] 10870 and to meet its statutory and constitutional obligations.” As stated in response to AIA's similar concerns, however, these complaints should be directed to the Court Administrator, who has been given the authority to adopt rules regarding “[t]he kind and character of forms to be used at all trial level proceedings.” (Lab. Code, § 5307(c)(2).) Yet, as noted in the WCAB's response to AIA's comments, issues regarding the validity or clarity of forms adopted by the Court Administrator pursuant to regulation may be reviewed by the WCAB in the course of the adjudication of specific claims.

At the public hearing of September 12, 2008, Richard Brophy noted that, under the Court Administrator's Rules, all documents filed for scanning into EAMS will be destroyed after 30 days, making the electronic record of the document the "official" record. Mr. Brophy was questioned how, once a document has been scanned and destroyed, it can be determined whether the person who validated the document caught all of the scanning errors. He also questioned how he would have access to the electronic record to determine whether it has been incorrectly validated. He acknowledged, however, that he was not sure whether these questions fall within the jurisdiction of the WCAB or the jurisdiction of the Court Administrator. Mr. Brophy's comments properly should be directed to the Court Administrator. It is the Court Administrator who has adopted the rules providing that documents scanned into EAMS shall be destroyed after 30 days (Rules 10216(a) & 10228(b)). It is also the Court Administrator who has adopted rules regarding the correction of scanning errors (Rule 10223) and regarding public access to documents within EAMS (Rule 10270).