



California Workers' Compensation Institute

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Workers' Compensation Appeals Board
P.O. Box 429459
San Francisco CA 94142-9459
ATTN: WCAB Forum

Subject: Forum Comments
WCAB -- Rules of Practice and Procedure – EAMS Implementation

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

Introduction

As we have stated to the DWC and the court administrator regarding the proposed regulations for EAMS implementation, the paramount rationale in the process of modernizing the information flow of the Appeals Board and the Division is the efficient and effective resolution of disputes in order to promptly deliver the appropriate benefits to injured workers. The most significant aspect of this process is, therefore, the evidentiary record of the Appeals Board. All documents necessary to fully and fairly adjudicate the entitlement to compensation benefits must be filed, served on the parties, become a part of the record of the Board's proceedings, and must be available for the judge's review in determining an award of benefits.

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

In a number of proposed regulations, the DWC is establishing new procedures for filing documents, and the material successfully loaded into the new system will or may be destroyed. In each set of proposed regulations, the Appeals

Board and the Division included procedures for documents that are filed incorrectly, but the rules are not consistent. In some cases, the incomplete documents will be reviewed and discarded, sometimes with notice to the parties, sometimes with notice if the filer has included a SASE, and sometimes without notice to the parties. Without confirmation that a document has been successfully loaded into the system, the filing party will not know what documents have become a part of the evidentiary record. Rejection without notice to the filing party will only exacerbate the confusion and taint the Board's trial record leading to flawed findings and additional litigation.

The Institute recommends that:

- The system provide a confirmation of the records successfully filed, and
- The records rejected by the Division or the Board, for whatever reason, be returned to the filing party with an explanation of the failure.

But in no event should the Division or the Board, on purely procedural grounds, reject a document intended for inclusion in the evidentiary record and discard it without notice to the parties and an opportunity to correct the defect.

EAMS Implementation by the Workers' Compensation Community

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

That comprehensive change alone will require a considerable period of adjustment in order to reprogram automated systems; revise the workflows for workers' compensation judges, law firms and claims administrators; manage the scope of the change; train judges, Board staff, claims adjusters and attorneys; and perfect the interface with the agency, whether that is an electronic interface or the filing of new OCR forms and tracking the scanning of documents. The parties will have to determine whether their representatives will require laptop computers at the Boards or whether the local EAMS interface will be sufficient for trial.

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

The members of the Institute have considerable experience with automated claims and litigation systems and they have no confidence that the necessary system revisions, training, and workflow modifications can be accomplished in less than several months from the effective date of the final regulations. Yet the Division and the Appeals Board are referencing a "go live" date of August 25.

This seems to leave little or no time to address the implementation issues that will arise for the injured workers, applicants' attorneys, defense attorneys, and claims administrators to manage this change.

The failure to allow for an adequate adjustment period for the community to learn the new system and develop automated tools to make EAMS effective invites confusion, disruption, and unacceptable delays. A chaotic implementation of new technology threatens the Board's primary function – the prompt and fair adjudication of disputed issues.

Privacy and File Security

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

Technical Comments

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

The simple, alarming truth is that if the OCR forms are not perfectly and promptly scanned, the Board's evidentiary record will be erroneous and/or incomplete. There appears to be no "back up" system available; no manual alternative if the system falters or the rate of human error is excessive; and no fail-safe system if the system fails and the HAL 9000 refuses to open the pod bay doors.

Section Comments

Section 10301

Discussion

This section does not include a definition of a "case opening document", a term used in several other sections. As the equivalent of an Application, a case opening document triggers several related procedures and should be defined in detail. This term is even relevant to invoking the WCAB's jurisdiction (Section 10403).

Section 10301(b) Adjudication File -- Consistency

Discussion

This is merely one example of the inconsistency found in the separate sets of proposed regulations. The DWC uses the term “case file,” while the WCAB uses “adjudication file” to mean the same thing and the terms appear throughout both sets of regulations. These definitions need to be synonymous and relate to both the Division’s and the Board’s files.

Other regulations address the same or similar topic but fail to mirror the language provided by related regulations. Both sets of regulations must be drafted to eliminate both significant and insignificant redundancies and inconsistencies.

Section 10301(g) Declaration of Readiness to Proceed

Recommendation

“Declaration of Readiness to Proceed” or “Declaration of Readiness” means a request for a proceeding before a trial court of the Workers’ Compensation Appeals Board at the district office with venue.”

Discussion

There are several references to requests for trial and it should be clear that this is a request for trial at the appropriate district office.

Section 10301(r) Lien Claimant

Recommendation

(r) “Lien claimant” means any person who or entity that has claimed payment under the provisions of Labor Code section 4903 or 4903.1 and has filed the documents necessary to establish the lien.

Discussion

The additional language would include medical billing agencies and others who might be filing on behalf of providers. It also imposes the statutory and regulatory requirements for securing a lien.

Section 10302 -- Workers’ Compensation Judges

Discussion

DWC regulation section 102210(gg) includes pro tempore judges appointed pursuant to California Code of Regulations, title 8, section 10350 within the definition of “Workers’ compensation administrative law judge”. For consistency, the WCAB definition should be no different.

Section 10608 Filing and Serving Medical Reports

Discussion

This proposed regulation is a significant expansion of the requirements for service, particularly with regard to lien claimants. This rule is overly expansive, in that lien claimants are only entitled to medical and medical legal records that are relevant to their liens. As written, the parties are required to serve all records on

all parties and lien claimants. Additionally, there is no express provision permitting electronic service by fax or e-mail. The service of medical records should be accomplished as efficiently as possible and the regulations should consider this.

If a lien claimant wants to review all subpoenaed records, the defendant should only be required to identify those records.

Section 10629 -- Filing and Listing of Exhibits

Discussion

The Board should include a provision for sanctions for potential technical failures that may result. For example, if documents are filed in violation of the dictates of subdivision (e), they should be returned to the filing party with the deficit noted. If the correction delays the process, then the Board can consider an appropriate sanction. In no event, should the Board discarded the exhibits or preclude documents from the record of the Board's proceedings.

Section 10785 -- Electronically Filed Decisions, Findings, Awards, and Orders

Discussion

There is no current definition in the regulations for "electronically filed" in the context of EAMS, and given the technology available to the parties, the Board should be more specific.

Section 10845 -- General Requirements for Petitions

Discussion

This section sets the procedures for filing petitions and includes the 25-page filing limitation and a 10-page limit for supplemental petitions. Because these restrictions could become burdensome for both the parties and the WCAB, the Board should provide additional procedures to permit a judicial waiver of these limits. To protect the Board's evidentiary record, the regulation should provide some flexibility, based on a showing of good cause to allow the record to be augmented.

Section 10848 -- Supplemental Petitions

Recommendation

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

Discussion

As previously discussed, the paramount concern for the WCAB should always be the integrity and completeness of its evidentiary record. To avoid eliminating

relevant evidence on purely technical grounds, the Board should use sanctions, as appropriate, rather than eliminate potentially valuable evidence without notice to the parties.

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

Sincerely,

Michael McClain
General Counsel and Vice President

MMc/pm

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