

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

INITIAL STATEMENT OF REASONS

Subject Matter of Proposed 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) proposes to amend, adopt and repeal 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 proposed amendments to its Rules of Practice and Procedure are being instituted 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 Initial Statement of Reasons and accompanying Notice of Proposed Rulemaking have been prepared to comply with the procedural requirements of section 5307.4 and for the convenience of the regulated public to assist it in analyzing and commenting on this largely non-APA rulemaking process.

The proposed 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

¹ Existing WCAB rules that are not being proposed for amendment or repeal are intended to remain in full force and effect.

² This proposed division of regulatory authority is "tentative" because: (1) 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)); (2) 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 __, __ [2008 Cal. Wrk. Comp. LEXIS 141, at pp. *11-*13] (Appeals Board en banc)); and (3) the WCAB and the Court Administrator's rules are subject to appellate review by the Courts of Appeal and the

proposing to delete certain of its current rules, the subject matter of which would be covered by certain proposed Court Administrator regulations. The Court Administrator recently submitted his initial proposed regulation package to the Office of Administrative Law.

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 Therefore, since 2004, DWC has been developing 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 DWC has announced that Phase 1 of EAMS is scheduled to “go live” on August 25, 2008. Accordingly, some of the proposed changes or additions to the existing WCAB rules result from the impending implementation of EAMS.

The Court Administrator’s proposed rules are intended to go into effect on October 15, 2008. Because, to some extent, the proposed rules of the WCAB and of the Court Administrator operate in tandem, and because there would be a regulatory void regarding some trial level procedures if some of the WCAB’s current rules were repealed before October 15, 2008, the intended effective date of the WCAB’s proposed regulations is October 15, 2008.

1. Section Amended: 10301.

Statement of Specific Purpose and Reasons for Proposed 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 this proposed regulatory action. These definitions help ensure that the meanings of the terms are clearly understood by the workers’ compensation community.

The WCAB proposes to amend Rule 10301 to change the definition of “Administrative Director” to include a “designee” of the Administrative Director. Some of the proposed new, amended, or deleted WCAB rules – and some of the WCAB’s rules that will not be 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 proposed change to the definition of “Administrative Director” gives recognition to the fact that some actions are actually performed by the AD’s designees. The proposed 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), 10113.3, 10113.5, 10113.6, 10114.3, 10115.2, 10133.54, 10225(b), 10225.1, and 10225.2.)

The WCAB proposes to amend Rule 10301 to add a definition for the term “adjudication file” (or “ADJ file”). This new definition is being proposed because DWC will utilize EAMS not only to electronically store and

Supreme Court (Lab. Code, § 5950 et seq.). Because this division of regulatory authority is merely “tentative,” nothing in this Initial 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.

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.

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”) will distinguish a WCAB case file from the files of DWC ancillary units (e.g., a “DEU file”). *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Workers’ Compensation Institute (CWCII) pointed out that the Court Administrator’s proposed rules use the term “case file,” not “adjudication file.” The WCAB acknowledges this slight inconsistency between the proposed definitions. As just observed, however, there will be several different types of case files within EAMS, including, for example, DEU files, I&A files, RU files, and RRTW files. In order to avoid confusion, therefore, the WCAB believes that using the term “adjudication file” will help distinguish its case files from other EAMS case files. Indeed, EAMS will assign an “ADJ” (i.e., adjudication) case number to all WCAB case files.]*

The WCAB proposes to amend Rule 10301 to change the definition of “Appeals Board” to include Commissioners and Deputy Commissioners “individually.” Both under the Labor Code (e.g., Lab. Code, §§ 130, 131, 134, 5701, 5808) and under 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. The new proposed definition of “Appeals Board” would recognize that it includes actions taken by individual Commissioners or Deputy Commissioners.

The WCAB proposes to amend 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 proposed Rule 10865, but it has never been defined. The proposed 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. *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the State Compensation Insurance Fund (SCIF) suggested that the WCAB add a definition of “carve-out case.” In accordance with SCIF’s suggestion, the WCAB has added this proposed definition.]*

The WCAB proposes to amend Rule 10301 to add a definition for the term “case opening document.” The term “case opening document” is used in different places in the proposed rules, but it is not elsewhere defined. In essence, “case opening document” would comprehend 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” would include, but would 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. *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the State Compensation Insurance Fund (SCIF) suggested that the WCAB add a definition of “case opening document.” In accordance with SCIF’s suggestion, the WCAB has added this proposed definition.]*

The WCAB proposes to amend 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 proposed 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 would define "Court Administrator" by using the statutory definition of "Court Administrator" contained in Labor Code section 110(f)). Proposed Rule 10301, however, also would expand 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. [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants' Attorneys Association (CAAA) suggests that the proposed definition of "Court Administrator" be amended to read "the administrator of the workers' compensation adjudicatory procedures at the trial level," which CAAA asserts would be consistent with the language of Labor Code section 5307(c). However, section 5307(c) merely describes what regulatory powers are given to the Court Administrator. It is section 110(f) that actually defines "Court Administrator."]

The WCAB proposes to amend 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) [proposed to be 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. [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment, in which the terms DOR and Expedited DOR were tentatively defined to mean "a request for a proceeding before a district office." In response to this informal web posting, the California Applicants' Attorneys Association (CAAA) stated that, given the proposed definition of a "district office" as a "location of a trial court" of the WCAB, it would be nonsensical to define a DOR or Expedited DOR to be a request for a proceeding "before a district office," because this would effectively define a DOR or Expedited DOR as being a request for a proceeding before a location of a WCAB trial court (i.e., not before a WCJ of the WCAB). In response to the comments of CAAA, the WCAB has changed its proposed DOR and Expedited DOR definitions to read "a request for a proceeding at a district office" Also, the California Workers' Compensation Institute (CWCI) suggested that the proposed definitions of DOR and Expedited DOR be amended to read "a request for a proceeding before a trial court of the Workers' Compensation Appeals Board at the district office with venue," thereby making it clear that the DOR or Expedited DOR is requesting a hearing at the district office having venue. The WCAB, however, sees no need to include a reference to "venue" because: (1) this is implicit and (2) the word "venue" is not included in the current DOR and Expedited DOR rules and, to the WCAB's knowledge, the absence of such language has never presented any problems.]

The WCAB proposes to amend Rule 10301 to add a definition for the term "district office." The term "district office" is used throughout the WCAB's current and proposed rules, yet, the term is nowhere defined. The proposal to define "district office" to mean "a location of a trial court of the Workers' Compensation Appeals Board" would give 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 would also give recognition to

the fact or 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 WCAB *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. (Oberner)* (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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) suggests that the proposed definition of “district office” be amended to read “a trial level court of the Workers’ Compensation Appeals Board.” The WCAB, however, believes that there is no significant distinction between its proposed definition of a “district office” as “a location of a trial court of the Workers’ Compensation Appeals Board” and CAAA’s suggested alternative of “a trial level court of the Workers’ Compensation Appeals Board.” Also, Presiding Judge Clifford Levy suggests that the phrase “district office” be dispensed with entirely and that the phrase “trial court” be substituted for it in Rule 10301 and throughout the rules. However, because “district office” would be defined as “a location of a trial court of the Workers’ Compensation Appeals Board,” this change appears to be unnecessary, particularly given that the Labor Code still contains some references to “district office.” (Lab. Code, §§ 5270.5(a), 5273(c), 5307(c), 5500.3.)]

The WCAB proposes to amend 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 proposed “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. [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) suggested that the tentative definition of “document” was problematic in two ways. In response to one of CAAA’s suggestions, the WCAB has substituted the word “date” for the phrase “date of service.” The WCAB agrees that the latter phrase was ambiguous because it was not clear whether the phrase related to the date of the provision of medical or other services, to the date the report or other record was served on one or more of the parties by the reporting physician or other person or entity, or to the date that the party which initially received the report or record served it on the other parties. Also, in response to CAAA’s other suggestion, the WCAB has deleted the phrase “or by a representative of a party or lien claimant on that party or lien claimant’s behalf,” because that phrase is unnecessary and because deletion of that phrase conforms the WCAB’s definition more closely to the Court Administrator’s parallel definition of “document.”]

The WCAB proposes to amend Rule 10301 to add a definition for the term “document cover sheet.” The “document cover sheet,” which is a form that is part of the proposed regulations of the Court Administrator, 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). [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants' Attorneys Association (CAAA) suggested that the tentative definition of "document cover sheet" be changed to more closely conform to the Court Administrator's parallel definition of that phrase. In response to CAAA's suggestion, the WCAB has changed its proposed definition of "document cover sheet" to specifically refer to the form adopted by the Court Administrator under section 10232.1.]

The WCAB proposes to amend Rule 10301 to add a definition for the term "document separator sheet." The "document separator sheet," which is a form that is part of the proposed regulations of the Court Administrator, 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants' Attorneys Association (CAAA) suggested that the tentative definition of "document separator sheet" be changed to more closely conform to the Court Administrator's parallel definition of that phrase. In response to CAAA's suggestions, the WCAB has changed its proposed definition of "document separator sheet" to refer to the form adopted by the Court Administrator under section 10232.2.]

The WCAB proposes to amend Rule 10301 to add a definition for the term "Electronic Adjudication Management System" (EAMS). EAMS is a computerized system that, beginning August 25, 2008, DWC will utilize 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 proposed new and amended rules and, therefore, it needs to be defined.

The WCAB proposes to amend 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 proposed 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."].) [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants' Attorneys Association (CAAA) suggested that the tentative definition of "fax" be amended to recognize that faxes can be sent by technology other than just facsimile machines. In keeping with CAAA's suggestion, the WCAB has amended the proposed definition of "fax" to cover documents sent by facsimile machine or other fax technology.]

The WCAB proposes to amend Rule 10301 to amend 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 proposed rules would 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 proposed rules would define "adjudication file" to mean "case file within the jurisdiction of the Workers' Compensation Appeals Board."

The WCAB proposes to amend Rule 10301 to amend 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). [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) suggested that the tentative definition of “hearing” be amended to add “before the Workers’ Compensation Appeals Board.” In keeping with CAAA’s suggestion, the WCAB has amended the proposed definition of “hearing” to cover proceedings “at a district office or before the Appeals Board.” The phrase “before the Workers’ Compensation Appeals Board” is not necessary because the proposed rules already define “district office” as “a location of a trial court of the Workers’ Compensation Appeals Board.”]

The WCAB proposes to amend Rule 10301 to add a 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. [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) suggested that the tentative definition of “lien claimant” be amended to add the phrase “or entity.” In keeping with CAAA’s suggestion, this change has been made. CAAA, however, has also suggested that the term “lien claimant” be defined to mean a person or entity who “has filed the documents necessary to establish the lien.” It is true that, under Labor Code section 4903.1(c) and under both current and proposed WCAB Rule 10770, a lien claimant must submit certain documents to perfect its lien. However, Labor Code section 4904(a) and case law (see, e.g., *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377, 380 (Appeals Board en banc)) suggest that, at least under some circumstances, a lien can be established – although not necessarily perfected – without certain documentation having been filed. Moreover, when a lien claim is “filed,” it is done without any review by a WCJ of whether all of the documentation specified in Labor Code section 4903.1(c) and WCAB Rule 10770 has been included. Therefore, the WCAB believes it might not be proper to limit the definition of “lien claimant” to only those persons or entities who have filed all of the documentation referenced in Labor Code section 4903.1(c) and WCAB Rule 10770. Instead, disputes regarding the validity of a lien may be more properly addressed at a hearing before a WCJ.]

The WCAB proposes to amend 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. [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) suggested that the tentative definition of “lien conference” be amended to make clear that it is a proceeding “before the Workers’ Compensation Appeals Board.” The WCAB believes that the phrase “before the Workers’ Compensation Appeals Board” is not necessary because the proposed rules already define “hearing” to include a “lien conference” and, in turn, the proposed definition of “hearing” refers to proceedings “at a district office.” And, as noted above, the term “district office” would be defined as “a location of a trial court of the Workers’ Compensation Appeals Board.” CAAA makes similar comments with respect to the proposed definitions of trial, mandatory settlement conference, rating mandatory settlement conference, status conference, and priority conference, however, the same explanation would apply.]

The WCAB proposes to amend Rule 10301 to amend 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. *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) suggested that the phrase “before the Workers’ Compensation Appeals Board” not be stricken from the definition of “mandatory settlement conference.” The WCAB believes that the phrase “before the Workers’ Compensation Appeals Board” is not necessary because the proposed rules already define “hearing” to include a “mandatory settlement conference” and, in turn, the proposed definition of “hearing” refers to proceedings “at a district office.” And, as noted above, the term “district office” would be defined as “a location of a trial court of the Workers’ Compensation Appeals Board.”]*

The WCAB proposes to amend 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 proposes to amend Rule 10301 to amend the definition of “party.” Among other things, the proposed 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 proposed amendment would also provide 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.” *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) suggests that the proposed definition of “party” is inconsistent with the definition of “applicant.” The WCAB does not see any inconsistency. The proposed definition of “party” includes “a person claiming to be an injured employee or the dependent of a deceased employee.” The definition of “applicant” is “any person asserting a right to relief under the provisions of Labor Code Section 5300.” While, in most cases, the injured employee will be the “applicant” (i.e., the party filing the application for adjudication of claim), there are instances where the “applicant” (in the legal sense) may be an employer, insurance carrier, or lien claimant. (See Lab. Code, § 5501.) Although the term “applicant” is informally used in the workers’ compensation community to refer to the injured employee, this fact cannot alter the legal definition of either “applicant” or “party.” CAAA also is concerned that the term “resolved” (as used in the phrase “the underlying case of the injured employee ... has been resolved”) is not defined. However, the phrase “underlying case ... has been resolved” tracks the language of Labor Code section 4903.6(b).]*

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

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

The WCAB proposes to make certain other amendments to Rule 10301, but the proposed 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 proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10302

The WCAB proposes to amend 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 proposes to amend 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. *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) suggested that tentative proposed rule be amended to provide that the term “workers’ compensation judge” includes pro tempore judges, consistent with proposed Court Administrator Rule 10210(gg). In keeping with CAAA’s suggestion, this change has been made.]*

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Repealed of Section 10306

The WCAB proposes to repeal Rule 10306, relating to the “Index of Cases.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10306 would be transferred to proposed Court Administrator Rule 10215 (which would make some changes to the substance of current Rule 10306 in light of EAMS).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10308

The WCAB proposes to repeal Rule 10308, relating to the “Official Address Record.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10308 would be transferred to proposed Court Administrator Rule 10217(a) (which would make some changes to the substance of current Rule 10308 in light of EAMS).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10324

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

Proposed Rule 10324(a) would be essentially identical to the first sentence of current Rule 10324, except that in accordance with other proposed changes, the reference to “Rule 10514” would be changed to “Rule 10505.”

Proposed Rule 10324(b) would essentially incorporate 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.

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

Proposed Rule 10324(d) would essentially provide 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 proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10346

The WCAB proposes to amend 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 proposed 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 proposed 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 proposed amendment.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10347

The WCAB proposes to repeal 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 will not be 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. *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on*

its web forum for informal public comment. In response to this informal web posting, the California Applicants' Attorneys Association (CAAA) stated its strong objection to the proposed repeal of Rule 10347. Although the WCAB acknowledges CAAA's concern, DWC has advised the WCAB that current Rule 10347 cannot be applied under EAMS as currently designed. Moreover, as just stated, there is no statutory or other legal requirement that an MSC judge must be different from the trial judge, and there are remedies available to the parties if problems occur.]

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10390

The WCAB proposes to repeal 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 would be transferred to proposed Court Administrator Rules 10228 and 10230.

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10391

The WCAB proposes to repeal Rule 10391, relating to the “Filing of Copies of Documents.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10391 would be transferred to proposed Court Administrator Rule 10236 (which would make substantial changes to the substance of current Rule 10391 in light of EAMS).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10392

The WCAB proposes to repeal 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 would be transferred to proposed Court Administrator Rule 10232 (which would make substantial changes to the substance of current Rule 10392 in light of EAMS).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10395

The WCAB proposes to repeal Rule 10395, relating to the “Improper Filing of Documents.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10395 would be transferred to proposed Court Administrator Rule 10235 (without any significant changes to the substance of current Rule 10395).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10396

The WCAB proposes to repeal Rule 10396, relating to the “Duty to Furnish Correct Address.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10396 would be transferred to proposed Court Administrator Rule 10217 (which would make some substantial changes to the substance of current Rule 10396 in light of EAMS).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Addition of Section 10397

The WCAB proposes to add Rule 10397, entitled “Restrictions on the Rejection for Filing of Documents Subject to a Statute of Limitations or a Jurisdictional Time Limitation.” In essence, proposed Rule 10397 would provide 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, proposed Rule 10397 would provide 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, proposed 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, proposed Rule 10397 would provide 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, proposed Rule 10397 would indicate 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 proposed for adoption 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 proposed 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 proposed rules. Moreover, these pro pers may have disability and/or transportation problems that restrict their ability to consult with an Information and Assistance Officers regarding filing requirements and the correction of filing errors.

The adoption of proposed Rule 10397 would be 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 proposed 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 proposed adoption of Rule 10397 would be 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 be 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 proposed Rule 10397 would be 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, proposed 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 proposed 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 proposed Rule 10397, which is limited to documents are filed in the face of a statute of limitations or a statutory jurisdictional limitation.

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10400

The WCAB proposes to amend Rule 10400, currently entitled “Applications,” but which would be re-titled “Filing and Service of Applications.”

In part, the proposed changes to Rule 10400 would clarify that a case opening compromise and release agreement, a case opening stipulation with requests for award, and a request for findings of fact under section 10405 (the latter of which is not specifically mentioned current Rule 10400) would all be deemed “applications” for purposes of invoking the jurisdiction of the WCAB, but, none of those documents would be deemed “applications” for purposes of attorney’s fees under Labor Code section 4064(c). *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) objects to the provisions of proposed Rule 10400(b). 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.]

Another proposed change to Rule 10400 would clarify 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 proposed changes to Rule 10400 would 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.

Finally, additional proposed changes to Rule 10400 would 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, proposed Rule 10400 would essentially take the same approach as the last sentence of current Rule 10400 and the first paragraph of current Rule 10500, except that there would be some changes in light of EAMS and some other minor changes or clarifications. Specifically:

(1) Consistent with the first paragraph of current Rule 10500, proposed Rule 10400 would provide 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 still would be required to serve a conformed copy of the application on the filing party. In these circumstances, the WCAB also still would be 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 would be 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, proposed Rule 10400 would provide that, for all other applicants, the WCAB would notify the filing party or lien claimant of the adjudication case number (for an initial application). However, the WCAB also would be 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, proposed Rule 10400 would require 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 would bring proposed Rule 10400 more clearly into compliance with Labor Code section 5501. (Similarly, for amended applications, the

WCAB also would 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 would be 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 would be required to give concurrent notification of the adjudication case number and the venue.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, State Compensation Insurance Fund (SCIF) questioned whether the conformed copy of the application that the WCAB serves under proposed Rule 10400(g)(1) will be duplicative of the conformed copy of the application served by the filing party under proposed Rule 10400(e). However, Labor Code section 5501 requires the WCAB to serve a conformed copy of the application. Moreover, even assuming that the party filing the application has in fact served all other parties with it, it is the conformed copy of the application that will notify all parties of the case number and venue.]

Specific Technologies or Equipment

The proposed 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 proposed 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 still would be true under proposed 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 proposed Rule 10400, the filing entity still would have to make a post-filing service, however, that service would now consist 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 proposed 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 proposed 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 Proposed Addition of Section 10403

The WCAB proposes to add Rule 10403, entitled “Application Required Before Jurisdiction Invoked and Before Compelled Discovery May Be Commenced.” In essence, proposed Rule 10403 would provide 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, in addition to an initial (but not an amended) Application for Adjudication of Claim, 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 proposed 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 proposed 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 proposed 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 proposed rule, however, would not preclude non-compelled pre-application medical evaluations or investigations.

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Addition of Section 10409

The WCAB proposes to add Rule 10409, entitled “Venue.” The proposed rule would provide 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 proposed rule would also establish 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) objected to the provision of tentative proposed Rule 10409(a), which would have provided that the venue designated by the applicant “may be rejected if it is inconsistent with Labor Code Section 5501.5 or if there is a timely and proper objection to venue.” In keeping with CAAA’s objection, this language has been deleted. CAAA properly points out that the current venue rule (i.e., Rule 10408, which is not being proposed for any changes) provides that “Venue shall be at the district office where the Application for Adjudication is filed pursuant to Labor Code Section 5501.5.” CAAA also correctly points out that this language was adopted following settlement of a civil action in the early 1990s, which had challenged the WCAB’s authority to designate venue among the district offices in the Los Angeles basin by ZIP code. After the lawsuit, the WCAB no longer unilaterally rejected the venue designated by an applicant. In any event, Rule 10410 will deal with objections to venue.]*

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed 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, proposed Rule 10410 would be 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.) Proposed Rule 10410, however, would provide 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.) [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).] Further, proposed Rule 10410 would provide 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) objected to the provision of tentative proposed Rule 10410 which would allow an employer or insurance carrier to object to venue within 30 days after its receipt of the adjudication case number and venue. CAAA requests that the language be changed to require that the objection be made within 30 days after the filing of the application. CAAA acknowledges that, for practical purposes, these dates may be basically the same under EAMS, but CAAA is concerned that there might be situations where there is a substantial delay between the filing of the application and EAMS’s service of the case number and venue. However, one difficulty with CAAA’s request is that Labor Code section 5501.5(c) provides that “[t]he employer shall have 30 days from receipt of the information request form to object to the selected venue site.” Although, as discussed above, 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. Arguably, provision could be made that the time for filing an objection should be 30 days from either the employer or insurance carrier’s receipt of the application served by the employee or its receipt of the case number and venue from the WCAB, whichever is earlier. One difficulty with such a provision, however, would be that if, as is one of CAAA’s concerns, EAMS has not timely generated a case number and venue, then there would be no place for a defendant to “file” any objection based on its receipt of the application because an EAMS case file would not exist. Moreover, in such a situation, then simply serving the objection on the employee’s attorney could result in various problems, many of which led to the 1993 repeal of the “information request form” and the defendant’s response to it.]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10411

The WCAB proposes to amend Rule 10411, currently entitled “Petition for Change of Venue,” but which would be re-titled “Petition for Change of Venue under Labor Code section 5501.6.” The proposed changes would 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 proposed changes also would 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. [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) has requested that Rule 10411 be amended to provide that any objection to a petition for change of venue must be filed within 30 days, not 10 days. CAAA states that such a change would make Rule 10411 consistent with the time period for a defendant to object to venue under Rule 10410. Preliminarily, the WCAB observes that the 10-day requirement for objecting to a petition for change of venue has been in Rule 10411 since it was first adopted in December 2002 (operative, January 1, 2003). To the WCAB’s knowledge, this 10-day limitation has not created any significant problems, and CAAA cites to none. Moreover, Rule 10410’s 30-day period for filing an objection to an initial venue designation based on the injured employee’s attorney’s principal place of business (i.e., Labor Code section 5501.5(a)(3)) is mandated by statute (i.e., Labor Code section 5501.5(c)). There is no statutory provision requiring that 30 days be given for filing an objection for a petition for change of venue under Labor Code section 5501.6. Further, there are significant differences between the two rules that belie any argument for parallelism between them. First, the 10-day limitation for the filing of an objection to a petition for change of venue applies to both injured employees and defendants. Second, if a defendant timely objects under Rule 10410 to a venue designation based on the injured employee’s attorney’s principal place of business under section 5501.5(a)(3), the timely objection automatically invalidates the venue designation and, ordinarily, no further proceedings result (unless there is a dispute over the timeliness of the objection). On the other hand, if an injured employee or a defendant objects to a petition for change of venue, the objection often leads to further proceedings (see Rule 10411), thereby delaying adjudication or other resolution of the underlying claim. Thus, the 10-day limitation helps move the underlying claim forward more quickly. Third, the issue of whether venue should be changed under section 5501.6 requires a showing of “good cause,” which, again, may result in further proceedings that may delay adjudication or other resolution of the underlying claim. Therefore, once more, the 10-day limitation for an objection to a change of venue helps expedite resolution of this procedural issue, so that the underlying claim can move forward. On the other hand, as just pointed out, an objection to a venue designation based on the injured employee’s attorney’s principal place of business is either timely (and, therefore, it is automatically granted) or it is not (and, therefore, it is

automatically denied). As a result, typically, no further proceedings result that would delay adjudication or other resolution of the underlying claim.]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10412

The WCAB proposes to amend Rule 10412, currently entitled “Location of File After Venue Change,” but which would be re-titled “Proceedings and Decisions After Venue Change.” The proposed change is necessary because there will be 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 proposed 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 proposed 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 proposed 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 Proposed Repeal of Sections 10414, 10415, and 10416

The WCAB proposes to repeal 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 would be transferred to proposed Court Administrator Rule 10250 (which would make some minor changes to the substance of current Rules 10414 and 10415). The WCAB also proposes to repeal Rule 10416, entitled “Objection to Declaration of Readiness.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10416 would be transferred to proposed Court Administrator Rule 10251 (which would make some minor changes to the substance of current Rule 10416). *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) has objected to the proposed repeals of Rules 10414, 10415, and 10416 regarding declarations of readiness to proceed (DORs), Expedited DORs, and objections to DORs. CAAA asserts that the repeal of these rules (which, under Labor Code section 5307(c), are being proposed for transferred to the Court Administrator under proposed Rules 10250 and 10251) constitutes an impermissible transfer of judicial authority and responsibility to the Court Administrator, which is not justified or authorized by statute. In response, the WCAB will reiterate that, as noted in the introductory “Background” to this Initial Statement of Reasons, there is some statutory ambiguity regarding what elements of the WCAB’s trial level proceedings remain within the WCAB’s jurisdiction to regulate and what elements are now within the Court Administrator’s jurisdiction. (See p.1, supra.) Nevertheless, the WCAB and the Court Administrator have reached a tentative division of regulatory authority. (See pp.1-2 & fn. 1, supra.) With respect to rules relating to DORs, Expedited DORs, and objections to DORs, this tentative division of regulatory authority is at least arguably supported by the provisions of Labor Code section 5307(c), which gives the Court Administrator the authority to adopt “rules for district office procedure regarding trial level proceedings of the workers’ compensation appeals board,” specifically including: (1) rules regarding conferences, hearings, ... and other matters deemed reasonable and necessary to expeditiously resolve disputes; and (2) rules regarding the kind and character forms to be used at all trial level proceedings. (See also, Lab. Code, § 5500.3 [“The court administrator shall establish uniform district office procedures, uniform forms, and uniform time of court settings for all district offices of the appeals board.”].) Thus, DORs and objections to DORs at least arguably relate to the expeditious setting of conferences and hearings. Similarly, the forms for DORs and objections to DORs, as well as the contents of those forms, are also at least arguably within the Court Administrator’s jurisdiction. Indeed, Labor Code section 5502(a) specifically provides that the Court Administrator shall prescribe the form for DORs.]*

Specific Technologies or Equipment

The proposed 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 proposed repeals.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repeal of Section 10417

The WCAB proposes to repeal Rule 10417, entitled “Walk-Through Calendar Setting.” Pursuant to Labor Code section 5307(c), the authority over walk-through calendar settings now falls under the jurisdiction of the Court Administrator. (See, also, Lab. Code, § 5500.3(a).) 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) stated its objection to the proposed repeal of Rule 10417. The WCAB acknowledges CAAA’s concerns. Nevertheless, its concerns should properly be addressed to the Court Administrator, who has been vested with authority over “court settings” (Lab. Code, § 5500.3(a); see, also, §§ 5307(c)(1) [giving the Court Administrator authority to adopt rules “regarding conferences, hearings, continuances, and other matters deemed reasonable and necessary to expeditiously resolve disputes”], 5502(b) & (c) [requiring the Court Administrator to establish priority calendars]). In any event, 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). Moreover, 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 proposed 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 proposed repeal.

Effect on Small Businesses

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10450

The WCAB proposes to amend Rule 10450, relating to “Petitions.” The proposed 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 proposed Court Administrator Rule 10228(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. *[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the California Applicants’ Attorneys Association (CAAA) objected to the tentative proposal to delete the references in the rule to the “Workers’ Compensation Appeals Board.” Taking into consideration CAAA’s objection, the WCAB is restoring the phrase “[a] request for action by the Workers’ Compensation Appeals Board ... shall be made by petition.” Restoring this language will make 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. 4-5, supra.) This language also will clearly distinguish petitions for action by the WCAB from petitions for action by ancillary units of DWC.]*

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10500

The WCAB proposes to amend Rule 10500, currently entitled “Service,” but which would be re-titled “Service by the Workers’ Compensation Appeals Board.” The proposed changes would 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, would be repealed and, instead, proof of service by the WCAB would be covered by proposed Rule 10500). Proposed Rule 10500 would continue 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). Proposed Rule 10500 also would continue to provide that the WCAB itself shall serve any final order on a disputed issue after submission. However, Rule 10500 would be 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 would address personal, mail, e-mail, and fax service by the WCAB (the latter two of which are new under EAMS).

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments on Rule 10500 from the American Insurance Association (AIA), the California Applicants’ Attorneys Association (CAAA), and State Compensation Insurance Fund (SCIF).

AIA suggested that, because many parties or attorneys will have elected e-mail or fax as their preferred method of service, it may be more efficient for the WCAB to electronically serve documents, rather than designating a party for service. In response to AIA’s comment, the WCAB has amended proposed Rule 10500 to provide that, in deciding whether to exercise its discretion to designate a party to make service, the WCAB may consider whether service by it would be more efficient and cost-effective because most or all of the parties, lien claimants, attorneys, or agents of record to be served have specified e-mail or fax as their preferred method of service.

CAAA recommended that Rule 10500 should continue to provide that the WCAB shall serve final decisions issued “by a workers’ compensation judge” on a disputed issue after submission. However, the reason for the deletion of this quoted language is to make it clear that this section also applies to final decisions on disputed matters issued by the Appeals Board itself, not just those issued by WCJs.

SCIF believes that the sentence of tentative subdivision (b) – providing that “[d]esignated service shall not be utilized for service of any final order, decision, or award relating to a submitted disputed issue” – is inconsistent with the provisions of subdivisions (d) and (e) regarding service of documents on parties using their designated preferred method of service. It appears that SCIF, somewhat understandably, is confusing “designated service” with “designated preferred method of service.” However, to avoid confusion by SCIF and others in the future, the WCAB has changed the language of the second sentence of subdivision (b) to read: “The Workers’ Compensation Appeals Board shall not designate a party or lien claimant, or their attorney or agent of record, to serve any final order, decision, or award relating to a submitted disputed issue.”]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10505

The WCAB proposes to amend Rule 10505, currently entitled “Service by the Parties,” but which would be re-titled “Service by the Parties or Lien Claimants.” The proposed changes would 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, would be repealed and such proof of service would be covered by proposed Rule 10505). *[NOTE: Proposed Rule 10505 would be limited to the “service” of documents by the parties and lien claimants on each other. The “filing” of documents by parties and lien claimants would be addressed by proposed Court Administrator Rules 10228 et seq.]* Proposed Rule 10505 would address 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 proposed Court Administrator Rule 10218) or using a previously agreed to alternative method of service. Proposed Rule 10505 also would address 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments on Rule 10505 from State Compensation Insurance Fund (SCIF) and from Presiding Judge Robert Kutz. SCIF believes that subdivision (h)(1) should specify whether, when a party learns that its service has failed, it can choose a method of service that the parties have not agreed to in advance and that is not the other party’s designated preferred method of service. The WCAB agrees. Therefore, subdivision (h)(1) has been changed to provide that, if service under subdivisions (d), (e), (f), or (g) has failed (i.e., service by mail, e-mail, fax, or other previously agreed-upon method of service), the server shall promptly re-serve the document using the method of service best calculated to result in valid service on the intended recipient(s), even if the intended recipient(s) did not previously designate that method as their preferred method of service. Judge Kutz suggested a change to the language of tentative Rule 10505(b), which had stated that “[e]xcept when a document is personally served, service of any document shall be made by first-class mail, unless the parties have previously agreed to some other method of service.” Judge Kutz pointed out that lien claimants, as well as parties, should be covered by the provisions of subdivision (b). The WCAB agrees, and has modified proposed subdivision (b) to read as follows: “Except when a document is personally served, service of any document shall be made by first-class mail, unless (1) the party, lien claimant, attorney, or agent being served has previously specified that a designated preferred method of service other than first-class mail may be used for any service, consistent with section 10218; or (2) the serving party, lien claimant, attorney, or agent and the receiving party, lien claimant, attorney, or agent previously agreed to some other method of service.”]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10507

The WCAB proposes to amend Rule 10507, currently entitled “Mail and Fax Service,” but which would be re-titled “Time Within Which To Act When A Document Is Served by Mail, Fax, or E-mail.” The proposed change would address 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. Proposed Rule 10507 would provide 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 will be 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., an 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 method.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Addition of Section 10508

The WCAB proposes to add Rule 10508, entitled “Extension of Time for Weekends and Holidays.” The proposed addition would simply codify 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 proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10510

The WCAB proposes to amend Rule 10510, currently entitled “Service on Attorney or Agent,” but which would be re-entitled “Service on Represented Employees or Dependents and on Attorneys or Agents.” In essence, the proposed change would 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 – would have to 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 proposed Rule 10510 would remain unchanged from current Rule 10510.

Proposed Rule 10510 would continue to provide that, even if the injured employee or dependent is represented, his or her attorney or hearing representative still must be served with all documents issued by the WCAB (including those served by a party under Rule 10500). Moreover, except for represented employees and dependents, service of WCAB documents would only be required to be made on the attorneys or other representatives of defendants or lien claimants. That is, WCAB documents would have to be served directly on defendants or lien claimants only if they are unrepresented.

Similarly, the requirement to serve an employee or dependent would be limited to service of documents issued by the WCAB. It would not apply to service by the parties or lien claimants (other than designated service under Rule 10500). That is, proposed Rule 10510 still would provide that service by the parties and lien claimants (apart from designated service) is to be made only on the attorneys or other representatives of represented applicants, defendants, or lien claimants. Applicants, defendants, and lien claimants would have to be served only if they are unrepresented.

However, nothing in proposed Rule 10510 would preclude 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 questions whether designated service, which is a pure ministerial act, would 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments on Rule 10510 from the California Applicants' Attorneys Association (CAAA). CAAA suggests that Rule 10510 be expanded to provide that any notice required by statute or rule to be served on the injured worker must be concurrently served on the worker's attorney, if he or she is represented. However, nothing in proposed Rule 10510 would eliminate the existing requirement that attorneys must be served with all notices and other WCAB documents in cases where the injured employee is represented. To the contrary, proposed Rule 10510(a)(2) still requires service on the injured worker's attorney, but proposed Rule 10510(a)(1) would now also require

service of all WCAB documents on the injured employee, even if he or she is represented. CAAA also suggests the deletion of the second sentence of proposed Rule 10510(b) – which states, “Except as provided in section 10500, or as otherwise ordered by a workers’ compensation judge or the Appeals Board, no party or lien claimant shall be required to serve any document on the injured employee or any dependent(s) of a deceased employee, if the employee or dependent is represented by an attorney or other agent of record.” CAAA believes it is inappropriate to eliminate service of documents on injured employees. However, current Rule 10510 does not require service of any documents on injured employees, if they are represented. Therefore, proposed Rule 10510 – specifically, 10510(a) – represents an expansion of service on injured workers.]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Repealed of Sections 10514 and 10520

The WCAB proposes to repeal 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 proposed Rule 10505 and the provisions relating to proof of service by the WCAB are being moved to proposed Rule 10500.

Specific Technologies or Equipment

The proposed 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 proposed repeals.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10541

The WCAB proposes to amend Rule 10541, relating to “Submission at Conference.” The proposed change would provide 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 proposed Rule 10629 regarding the listing and filing of exhibits.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Repealed of Section 10548

The WCAB proposes to repeal Rule 10548, entitled “Continuances.” Pursuant to Labor Code section 5307(c), its provisions would be transferred to proposed Court Administrator Rule 10243 (which would not make any changes to the substance of current Rule 10548).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Addition of Section 10550

The WCAB proposes to add Rule 10550, entitled “Proper Identification of the Parties and Lien Claimants.” The proposed addition would essentially provide 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 Company v. Workers’ Comp. Appeals Bd. (Capi)* (2006) 138 Cal.App.4th 373 [71 Cal. Comp. Cases 374].)

In part, proposed 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, proposed 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 proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repeal of Section 10555

The WCAB proposes to repeal 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 would be transferred to proposed Court Administrator Rule 10254 (which would not make any substantial changes to the substance of current Rule 10555).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10561

The WCAB proposes to amend Rule 10561, relating to “Sanctions.”

Among other things, the proposed amendments to Rule 10561 would 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 proposes 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, §§ 9700-1025 [AD Rules], proposed §§ 10210-10297 [proposed Court Administrator Rules]); and (2) because many of these rules directly or indirectly impact proceedings before the WCAB (see Lab. Code, § 5813).

The proposed amendments to Rule 10561 would also 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 – proposed 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 proposed amendments to Rule 10561 would 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 proposed amendments to Rule 10561 also would 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, proposed 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 proposed amendments to Rule 10561 would 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 proposed amendments to Rule 10561 also would 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 (“[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”); *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).)

Also, the proposed amendments to Rule 10561 would 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 proposed amendments to Rule 10561 would 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 10561.⁵ 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.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments on Rule 10561 from the California Applicants' Attorneys Association (CAAA), State Compensation Insurance Fund (SCIF), Presiding Judge Robert Kutz, and Richard J. Berryhill, Esq. CAAA indicates its agreement with the intent of the proposed changes to Rule 10561, but believes that the changes are not well-written and should be re-drafted. However, CAAA neither points to specific provisions of proposed Rule 10561 that it believes are confusing nor offers any suggestions for alternative language. Moreover, the WCAB would point out that, as indicated in the discussion above, much of the proposed new language for Rule 10561 comes directly from statutes, rules, and case law in the civil and/or professional discipline arenas. SCIF suggests that the language of proposed Rule 10561(b)(3) be amended to make it clear that its provisions apply only the failure to timely serve documents that are within the party or lien claimant's possession or control. The WCAB agrees, and it has amended proposed Rule 10561(b)(3). Judge Kutz suggests that the language of proposed Rule 10561(b)(4) be amended: (1) to make it clear that its provisions applied to awards, as well as orders; and (2) to make it clear that its provisions do not apply to awards or orders that are pending on reconsideration, removal, or appellate review or are subject to a timely petition for reconsideration, removal, or appellate review. The WCAB agrees, and has modified proposed Rule 10561(b)(4) accordingly. Mr. Berryhill makes three suggestions. First, he advocates that the "language or gesture" provisions of proposed Rule 10561(b)(9) should be extended to apply to "verbal" statements. However, the word "language" comprehends words used in both writing and speech, as evidenced by proposed Rule 10561(b)(9)'s references to "language ... at ... any

⁵ 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).)

*hearing” and to “language in any pleading or other document.” Second, he advocates that the “language or gesture” provisions of proposed Rule 10561(b)(9) should be extended to phone conversations, voicemails, and other oral communications between, for example, a verbally abusive pro per injured employee and a claims adjuster or attorney. Mr. Berryhill, however, cites to no authority that would permit the WCAB to sanction conduct that does not occur in the course of proceedings before it. Finally, he asserts that the language of proposed Rule 10561(b)(9)(B), relating to any language or gesture that “impugns the integrity” of the WCAB, is overbroad and potentially violates the constitutional right of free speech. However, the standard of words or conduct that “impugns the integrity” of the Court has long been applied without any apparent constitutional difficulties in contempt proceedings (see, e.g., *In re Buckley*, supra, 10 Cal.3d at p. 248; *In re Koven*, supra, 134 Cal.App.4th at p. 271) and the WCAB sees no reason why this standard could not also be constitutionally applied when sanctions are at issue.]*

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Repealed of Section 10563

The WCAB proposes to repeal Rule 10563, relating to “Appearances Required.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10563 would be transferred to proposed Court Administrator Rule 10240 (which would require lien claimants having liens of more than \$2500 to appear at a hearing, but which otherwise would not make any substantial changes to the substance of current Rule 10563).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10589

The WCAB proposes to amend Rule 10589, currently entitled “Consolidated Cases,” but which would be re-titled “Consolidation of Cases.” The proposed amendment would be 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) would be transferred to proposed Court Administrator Rule 10260, pursuant to Labor Code section 5307(c), and other issues relating to consolidated cases would be in proposed Rule 10589.

Among other things, proposed Rule 10589 would specifically set 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 would specify certain requirements for any petition for consolidation. Finally, it would specify how pleadings, exhibits, minutes, summaries of evidence, and decisions are handled in consolidated cases.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Repealed of Sections 10590, 10591, and 10592

The WCAB proposes to repeal 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 proposed Rule 10589, above, these proposed repeals would be 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) would be transferred to proposed Court Administrator Rule 10260, pursuant to Labor Code section 5307(c), but other issues relating to consolidated cases would be addressed by proposed Rule 10589. [NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments from the California Applicants' Attorneys Association (CAAA) regarding the proposed repeal of Rules 10590, 10591, and 10592 and the proposed transfer of some of their provisions to Court Administrator Rule 10260. In essence, CAAA asserts that this repeal and proposed transfer is an improper transfer of the WCAB's judicial authority to the Court Administrator. However, the portions of current Rules 10590, 10591, and 10592 that are proposed for transfer to Court Administrator Rule 10260 merely provide, in essence, that: (1) where there are multiple cases involving the same injured worker (or involving multiple injured workers whose claims have common issues of fact or law) that are assigned to different WCJs within the same district office, the PWCJ of that district office may determine how to assign those cases; (2) where there are multiple cases involving the same injured worker that are venued at different district offices, the PWCJs of those district offices may reach agreement on how to assign those cases or, failing such an agreement, the Court Administrator will make that determination; and (3) where there multiple cases involving multiple injured workers whose claims have common issues of fact or law that are venued at different district offices, the Court Administrator will determine how to assign those cases. These provisions all can be reasonably considered to fall within the Court Administrator's authority to adopt rules "regarding conferences, hearings, continuances, and other matters deemed reasonable and necessary to expeditiously resolve disputes." (Lab. Code, § 5307(c)(1).) Moreover, these provisions are in large part consistent with current Rule 10346(a), which provides in relevant part that: "the presiding workers' compensation judge has full responsibility for the assignment of cases to the workers' compensation judges of each office." Furthermore, if a party wishes to challenge any case assignment(s) by a PWCJ or the Court Administrator under proposed Court Administrator Rule 10260, the party: (1) may file a petition for removal under Labor Code section 5310 and WCAB Rule 10843, which will be determined by the Appeals Board; (2) may file a petition for disqualification under Labor Code section 5311 and WCAB Rule 10452, which will be determined by the Appeals Board; or (3) may file a petition for automatic reassignment under WCAB Rule 10453. Therefore, the questions of which WCJ(s) will hear particular cases will ultimately remain under the WCAB's judicial authority.

Specific Technologies or Equipment

The proposed 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 proposed repeals.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Addition of Section 10593

The WCAB proposes to add Rule 10593, entitled “Testimony of Judicial Quasi-Judicial Officers of the Workers’ Compensation Appeals Board or of the Division of Workers’ Compensation.” The proposed addition would essentially preclude 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.

Proposed 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).) The proposed rule is also 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).) The proposed rule also 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 proposed adoption of Rule 10593, the WCAB also proposes to repeal current Rule 10957 (limiting depositions of Rehabilitation Unit consultants). Proposed Rule 10593 would be much broader, in that it would cover all judicial and quasi-judicial officers (not just Rehabilitation Unit consultants) and it would apply to all testimony (not just depositions).

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments

regarding tentative proposed Rule 10593 from Presiding Judge Robert Kutz and the California Applicants' Attorneys Association (CAAA). Judge Kutz suggests that pro tem workers' compensation judges be included within the provisions of proposed Rule 10593 and, based on his suggestion, this change has been made. CAAA essentially asserts that the WCAB does not have the authority to immunize itself or other judicial or quasi-judicial personnel of the workers' compensation system from giving testimony regarding "any statement, conduct, decision, or ruling made by or occurring before that judicial or quasi-judicial officer" and that the adoption of any such provision would violate the due process rights of the parties. The WCAB agrees that, as written, tentative proposed Rule 10593 may have been somewhat overbroad. The WCAB, therefore, has re-drafted proposed Rule 10593 to make it clearer that a judicial or quasi-judicial officer cannot be compelled to give testimony 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 the proceedings before him or her, except where such testimony is necessary to resolve a petition for disqualification under Labor Code section 5311 (e.g., a petition alleging bias or prejudice) or is necessary to resolve an allegation of an ex parte communication. Moreover, proposed Rule 10593 still makes it clear that a judicial or quasi-judicial officer may be compelled to testify as a percipient witness to statements, conduct, or events that occurred in the proceedings before him or her. However, in order to assure that such testimony is reasonably required, and that the judicial or quasi-judicial officer will not be unnecessarily taken away from his or her duties, proposed Rule 10593 requires that, before a judicial or quasi-judicial officer may be subpoenaed to testify, the party seeking the testimony must petition for approval by a PWCJ or the Appeals Board. As to CAAA's assertion that proposed Rule 10593 would violate the parties' due process rights, the WCAB observes that Evidence Code section 703.5 has long provided that, with limited exceptions, a judicial officer shall not 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. CAAA cites to no case law suggesting that Evidence Code section 703.5 (or, indeed, any similar statute or rule in any other jurisdiction) violates due process, and the WCAB is aware of none.]

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Addition of Section 10603

The WCAB proposes to add Rule 10603, entitled "Oversized Exhibits, Diagnostic Imaging, Physical Exhibits, and Exhibits on Media." Proposed Rule 10603 would essentially provide 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. Proposed Rule 10603 would further provide 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 proposed Rule 10603 would provide that these exhibits should be filed only at the time of trial, it would further provide for access (or, if practicable, for copying) by any opposing party before or after trial.

The reason for proposed 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 proposed Court Administrator Rules 10216(a), 10229(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.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments regarding tentative proposed Rule 10603 from State Compensation Insurance Fund (SCIF). SCIF believes that the reference to “conventional photographs” in tentative proposed Rule 10593 is too vague. Accordingly, the WCAB has substituted the phrase “photographs printed on paper.”]

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10608

The WCAB proposes to amend Rule 10608, currently entitled “Filing and Service of Physicians’ Reports,” but which would be re-titled “Filing and Service of Medical Reports and Medical-Legal Reports.” The essential elements of proposed Rule 10608 are substantially similar to the essential elements of current Rule 10608.

However, the proposed amendments would 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 proposed amendments would 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 proposed amendments would 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 proposed amendments would 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 proposed amendments to Rule 10608 would 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments regarding tentative proposed Rule 10608 from the California Applicants' Attorneys Association (CAAA), the American Insurance Association (AIA), and the California Workers' Compensation Institute (CWCI).

First, CAAA criticizes the language of proposed Rule 10608(a), which provides that all medical and medical-legal reports shall be filed "in accordance with the regulations of the Court Administrator, or as otherwise provided by these rules." CAAA finds this language to be confusing, especially when read together with Court Administrator Rule 10223(a), which provides: "Except as provided by section 10603, medical reports, medical-legal reports, and medical records, and other records and documents shall be filed only in accordance with the following provisions." The WCAB does not understand the basis for the confusion. By requiring that medical and medical-legal reports be filed "in accordance with the regulations of the Court Administrator," proposed Rule 10608 is merely making it clear that the filing of medical and medical-legal reports shall comply with various proposed rules of the Court Administrator, including but not necessarily limited to proposed Rules 10228 [relating to the place of filing], 10229 [relating to the manner of filing], 10230 [relating to the time of filing], 10232(b) & (c) [relating to the use of document cover sheets and document separator sheets],⁶ 10232.1 and 10232.2 [the document cover sheet and document separator sheet forms], and 10233 [relating to the timing, sequence, and extent of the filing of medical reports in connection with declarations of readiness, expedited hearings, mandatory settlement conferences, trials, and settlements].) Moreover, by requiring that medical and medical-legal reports shall also be filed "as otherwise provided by these rules," proposed Rule 10608 is indicating that the provisions of the Court Administrator's proposed rules may be supplemented or overridden by certain provisions of the WCAB's rules, e.g., proposed Rules 10603 [relating to oversized exhibits, diagnostic imaging, etc.] and 10842 [relating to attachments to petitions reconsideration, removal, or disqualification].

Second, CAAA believes that primary responsibility for the service of medical and medical-legal reports should rest with the defendant. However, since its inception in 1972, Rule 10608 has always provided that a medical report is to be served by the party in possession or control of it. Although it is fairly commonplace for more than one party to be in possession or control of a medical or medical-legal report (e.g., because a physician has served a report on both parties or because one party has previously served a report on the other party),

⁶ It should be noted, however, that subdivision (a) of proposed Rule 10232 expressly does not apply to medical and medical-legal reports.

proposed Rule 10608 continues to require service only of reports not previously served. Nothing in proposed Rule 10608 would require a party to re-serve a report on another party that had already received the report.

*Third, CAAA believes that service of all medical and medical-legal reports on a lien claimant who requests service, regardless of the “relevance” of any given report to the lien claim, is unwarranted and, especially, it would be a burden to a pro per. AIA shares this concern about “relevance” in serving medical reports on lien claimants, which it asserts is a “significant expansion” of the service requirements of current Rule 10608. CWCI similarly asserts that lien claimants are entitled only to medical reports “relevant” to their liens. However, neither current Rule 10608 nor any other current service rule has required service only of “relevant” medical reports. The requirement has been for service of medical reports “related to the claim,” which remains in the proposed rule. The phrase “related to the claim” has nothing to do with relevancy. Rather, by requiring service of medical reports “related to the claim,” Rule 10608 (both in its current and its proposed forms) is simply making it clear that medical reports relating to a different injury claim by the same employee (or, obviously, relating to the claims of other injured employees) are not to be served. It is true that, on occasion, some opinions have framed the service requirement of Rule 10608 in terms of “relevance.” (See, e.g., *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230] (citing to Rule 10608 and stating, “The Board’s rules ... require that, when a declaration of readiness is filed, the declarant must serve all parties with copies of all relevant medical reports in his possession or under his control.” (Emphasis added).) However, these have been incautious and imprecise passing statements in dicta, and they are not reflective of the actual language of Rule 10608, which, again, requires service of medical reports “related to the claim.” Moreover, there would be significant problems associated with a requirement for service only of “relevant” reports. That is, on what basis would the party charged with serving a report determine whether the report is “relevant” to the party or lien claimant being served? If the serving party makes a too narrow assessment of “relevance,” then this could lead to significant delays in the resolution of cases or even increased litigation.*

Finally, in light of EAMS, CAAA recommends that proposed Rule 10608 encourage the service of medical and medical-legal reports by e-mail and fax. However, under proposed Court Administrator Rule 10218, the parties make their own determinations as to whether they want to designate e-mail or fax as their preferred method of service. Although, by prior agreement of the parties or lien claimants, service of medical reports and other documents can be made by any method (see proposed Rule 10500(g)), the WCAB cannot require parties or lien claimants to agree to particular methods of service.]

Specific Technologies or Equipment

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

39. Section Added: 10610.

Statement of Specific Purpose and Reasons for Proposed Addition of Section 10610

The WCAB proposes to add Rule 10610, entitled “Admissibility and Service of Reports from Non-Medical Experts.” Proposed Rule 10610 would provide 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 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 (2) 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 provide 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 provide 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.

The reason for proposed Rule 10610 is two-fold.

First, the use of non-medical experts is becoming more prevalent in workers’ compensation claims. Vocational rehabilitation experts are commonly used to address the question of whether an injured employee’s ability or inability to benefit from vocational rehabilitation services affects the determination of the employee’s level of permanent disability under former Labor Code section 4660. (See *LeBoeuf v. Workers’ Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587]; *Grupe Co. v. Workers’ Comp. Appeals Bd. (Ridgeway)* (2005) 132 Cal.App.4th 977 [70 Cal.Comp.Cases 1232]; *Gill v. Workers’ Comp. Appeals Bd.* (1985) 167 Cal.App.3d 306 [50 Cal.Comp.Cases 258].) Moreover, although vocational rehabilitation cases will soon sunset (see Lab. Code, § 139.5(l)), vocational rehabilitation consultants and economists are starting to be used with respect to the issue of an injured employee’s diminished future earning capacity under Labor Code section 4660(b)(2). (See *Costa v. Hardy Diagnostic* (2007) 72 Cal.Comp.Cases 1492 (Appeals Board en banc); *Costa v. Hardy Diagnostic* (2006) 71 Cal.Comp.Cases 1797 (Appeals Board en banc).) Non-medical experts are also used in other cases, such as claims of serious and willful misconduct of the employer. (See Lab. Code, §§ 4553, 4553.1.)

Second, Labor Code section 5703 does not expressly make the written reports of non-medical experts admissible at trial in lieu of or in addition to sworn testimony. Nevertheless, the list of admissible documents in section 5703 does not appear to be exclusive. Preliminarily, it would not conflict with any discernible legislative intent if documents other than those listed in section 5703 were also deemed to be admissible, particularly where there is no manifest reason why they should not be admitted. (See *McDonald v. Antelope Valley Community College Dist.* (2007) 151 Cal.App.4th 961, 989.) To the contrary, other provisions of the Labor Code suggest that the Legislature intended that section 5703 does *not* set forth an all-inclusive list of admissible documents. For example, Labor Code section 5708 provides in relevant part, “All hearings and investigations before the [WCAB] are governed by this division *and by the rules of practice and procedure adopted by the appeals board.* In the conduct thereof [the WCAB] shall not be bound by the common law or statutory rules of evidence and procedure, *but may make inquiry* in the manner, *through* oral testimony and *records*, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit

and provisions of this division.” (Emphasis added.) Thus, section 5708 expressly gives the WCAB the authority, through adoption of rules, to admit and consider “records” that otherwise would not be admissible under statutory rules, if their admission is calculated to ascertain the substantial rights of the parties. Similarly, Labor Code section 5709 provides, “*No order, decision, award, or rule [of the WCAB] shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.*” (Emphasis added.) More importantly, the California Constitution requires that workers’ compensation proceedings “shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character.” (Cal. Const., art. XIV, § 4.) Consistent with this constitutional mandate, the WCAB has frequently admitted in evidence the reports of vocational rehabilitation consultants and other non-medical experts, in lieu of or in addition to the experts’ testimony, to expedite trials and reduce costs. Generally, the receipt of an expert’s written report is more expeditious than the taking of the expert’s trial testimony. Therefore, admitting an expert’s report in evidence minimizes the burden on the WCAB’s overstained trial calendar – not only expediting the hearing of the particular case in question, but also expediting the hearing of other cases that are waiting in line for trial time. Moreover, there are often added expenses that attend the live testimony of an expert witness, especially when trials need to be continued or are delayed because of the WCAB’s strained calendar (which may mean that, at the cost of the parties, the expert has to appear at the WCAB on multiple occasions). Finally, the administrative adjudication provisions of the California Administrative Procedure Act (“APA”) state: “Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.” (Gov. Code, § 11513(c).)⁷ The written report of a non-medical expert can be the type of evidence “on which responsible persons are accustomed to rely in the conduct of serious affairs,” particularly if – consistent with Labor Code section 5703(a)(2) – the non-medical expert’s report contains a statement, made under penalty of perjury, that the contents of the report are true and correct to the best knowledge of the expert.

The portion of proposed Rule 10610 that would require the service of the reports of non-medical experts no later than 30 days prior to the MSC or other hearing is also consistent with the constitutional mandate to accomplish substantial justice expeditiously, inexpensively, and without incumbrance, and it is in keeping with the WCAB’s rules regarding pre-hearing service of medical and medical-legal reports. (See current and proposed Rule 10608.) Service of such non-medical expert reports prior to the MSC will apprise the opposing party that the serving party has utilized a non-medical expert and allow the opposing party to make strategic decisions regarding whether to obtain its own non-medical expert, to depose the opposing party’s non-medical expert, and/or to subpoena the opposing party’s non-medical expert to trial.

40. Section Amended: 10616.

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

The WCAB proposes to amend Rule 10616, entitled “Employer-Maintained Records.” The proposed 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 proposed rules of the Court Administrator.

Specific Technologies or Equipment

⁷ The administrative adjudication provisions of the APA, however, are not applicable to WCAB proceedings, which are governed by the provisions of the Labor Code and the WCAB’s rules. (Gov. Code, § 11410.20(a); Lab. Code, § 5708.)

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10626

The WCAB proposes to amend Rule 10626, entitled “Hospital and Physicians’ Records.” The proposed amendment would provide 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 proposed amendment also would delete 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 proposed Rule 10629 will address the designation of relevant portions of excerpted physician, hospital, and dispensary records.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments regarding tentative proposed Rule 10626 from the California Applicants’ Attorneys Association (CAAA). CAAA states that any changes to Rule 10626 should clearly provide that the parties still have the right to examine and make copies of medical records. However, nothing in proposed Rule 10626 changes this fundamental principle. To the contrary, proposed Rule 10626 still provides that parties, attorneys, agents, and physicians may “examine and copy” relevant medical records. It is true that proposed Rule 10626 contains the qualifying language, “except as otherwise provided by law.” However, this language is merely a catchall phrase that makes it clear that some medical records are not necessarily subject to examination and copying (e.g., records that are protected by federal law, such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA); records that are protected by privacy provisions of the state Constitution and various statutes; or records that were sought under a subpoena that was quashed because it was overbroad and sought records not relevant to the employee’s claim).]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Addition of Section 10629

The WCAB proposes to add Rule 10629, entitled “Filing and Listing of Exhibits.”

Proposed Rule 10629 would provide 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. Proposed Rule 10629 would further provide that, if any such hearing is continued, a new exhibit list shall be prepared and served, although certain exceptions are made. Proposed Rule 10629 also would provide 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, proposed Rule 10629 would provide 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.

Proposed Rule 10629 would require 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.

Proposed Rule 10629 would provide 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 proposed Rule 10629 would be 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 proposed 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments regarding tentative proposed Rule 10629 from the California Workers' Compensation Institute (CWCI), State Compensation Insurance Fund (SCIF), and the California Applicants' Attorneys Association (CAAA).

CWCI suggested that proposed Rule 10629 should be amended to provide for sanctions for violation of its provisions. The WCAB does not deem any such amendment necessary, however, because Rule 10561 already allows for sanctions for a violation of any of the WCAB's rules.

SCIF expressed two concerns. First, SCIF states that the proposed rule is unclear as to whether the parties will have to serve their lists of exhibits and paper/hard copy form. Because the exhibit list is to be served on the opposing parties or lien claimants at hearing, it is anticipated that, at present, the list will be in paper form. Nevertheless, as EAMS evolves to provide more and more access to external users (including, hopefully, WiFi or other access at the district offices), then it may be that it will be more convenient for the parties to exchange their lists in electronic form. Therefore, the WCAB will not change the proposed rule to provide that service of the exhibit list at the hearing must be in paper form. Second, SCIF suggests that the provision regarding service of exhibit lists by and on any parties or lien claimants that do not appear at hearing should be amended to apply to parties or lien claimants that do not appear "after proper notice."

CAAA suggested that proposed Rule 10629 be amended to require re-submission and re-service of the exhibit list only where there has been a change in the party or lien claimant's exhibit list between the initial hearing and the continued hearing. The WCAB agrees, to a certain extent. There appears to be no need to re-serve an exhibit list on the opposing parties and lien claimants if there was no change in the list from the time it was previously served. Also, there appears to be no need to re-submit an exhibit list to the WCAB if there is no change in the list and if the previous list was accepted for filing and scanned into EAMS. However, DWC has informed the WCAB that if an MSC or other hearing is continued, then the WCJs ordinarily will not be accepting exhibit lists because: (1) under Phase 1 of EAMS, the backlog of documents to scan is likely to be a significant problem at many district offices, at least initially; and (2) not accepting an exhibit list for filing when a hearing is continued will at least temporarily obviate the need to scan the exhibit list into EAMS (and the exhibit list may never need to be scanned if the case settles in the interim).]

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repeal of Section 10630

The WCAB proposes to repeal 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) would be incorporated into proposed Court Administrator Rule 10273.

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10750

The WCAB proposes to amend Rule 10750, entitled “Record of Proceedings.”

In part, the proposed amendments to Rule 10750 would 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 proposed amendments to Rule 10750 also would 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 proposed for deletion as duplicative of Rule 10750), the phrase “the arbitrator’s file, if any” will be added to proposed Rule 10750.

Finally, the proposed amendments to Rule 10750 would 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 proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10751

The WCAB proposes to amend Rule 10751, currently entitled “Legal File,” but which would be re-entitled “Adjudication File.”

In part, the proposed amendments to Rule 10751 would 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 proposed 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 proposed 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 proposed amendments to Rule 10751 also would 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 proposed Court Administrator Rule 10235(a) [which, according to the Court Administrator, may be moved to a new proposed Rule 10222], 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 proposed Rule 10750, the proposed amendments to Rule 10751 would 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 would be contained in proposed Rule 10750.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendment of Section 10753

The WCAB proposes to amend 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 proposed because, pursuant to Labor Code section 5307(c), the Court Administrator is proposing to adopt 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."

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment, in which the WCAB tentatively proposed to entirely repeal current Rule 10753, and the WCAB made reference to propose Court Administrator Rule 10271. In response to this informal web posting, the WCAB received comments from the California Applicants' Attorneys Association (CAAA). In essence, CAAA asserts that giving regulatory authority regarding the inspection of files to the Court Administrator constitutes an impermissible transfer of the WCAB's judicial authority to the Court Administrator. In light of CAAA's comments, the WCAB agrees that the inspection of its adjudication files remains at least partially in its authority. (See Lab. Code, §§ 126, 133, 5307, 5309, 5708.) Therefore, it will not repeal Rule 10271. However, the proposed amendments to Rule 10271, which essentially incorporate by reference the Court Administrator's proposed rules regarding records, is at least arguably consistent with the provisions of Labor Code section 5500.3(a), which provides in relevant part: "The court administrator shall establish uniform district office procedures." The inspection of WCAB adjudication files is largely a clerical function performed by the staff of the district offices. Occasionally, there may be issues of whether a particular record falls within the scope of the California Public Records Act, however, the determination of these issues is normally done by the Legal Unit of the Division of Workers' Compensation (which represents the Court Administrator), not by the WCAB.]

Specific Technologies or Equipment

The proposed 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 proposed amendment.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendment of Section 10754

The WCAB proposes to amend Rule 10754 entitled "Sealed Documents." In essence, proposed Rule 10754 would be amended to strike all of the provisions of current Rule 10754 and provide instead that medical reports and other records shall be sealed only in accordance with the provisions of proposed Court Administrator Rule 10272. Proposed Rule 10272 would also be entitled "Sealed Documents," but it would make significant changes to the substance of current Rule 10754.

One reason for the proposed 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.) Proposed Court Administrator Rule 10272, which proposed Rule 10754 references, is patterned on Rules 2.550 and 2.551.

Moreover, the WCAB is proposing to amend Rule 10754 to make reference to proposed 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, which 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, as noted below, the WCAB agrees that 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 proposing to keep Rule 10754, but having it refer to proposed Rule 10272.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment, including a tentative proposal to entirely repeal Rule 10754 and transfer its provisions to proposed Court Administrator Rule 10272. In response to this proposed repeal and transfer, the WCAB received comments from the California Applicants' Attorneys Association (CAAA), which asserted that giving regulatory authority regarding the sealing of records to the Court Administrator would constitute an impermissible transfer of the WCAB's judicial authority to the Court Administrator. The WCAB agrees that it should retain some regulatory authority regarding the sealing of medical reports and other records. Therefore, as discussed above, the WCAB will not entirely repeal Rule 10754.]

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendment of Section 10755

The WCAB proposes to amend Rule 10755 entitled “Destruction of Records.” In essence, proposed Rule 10755 would be amended to strike all of the provisions of current Rule 10755 and instead provide that the WCAB’s records may be destroyed in accordance with proposed Court Administrator Rule 10273, which would be entitled “Retention, Return and Destruction of Records and Exhibits.” Proposed Court Administrator Rule 10273 would combine elements of current Rules 10755, 10758, and 10762. (Rules 10758 and 10762 – entitled, respectively, “Destruction of Case Files” and “Reporter’s Notes” – are being proposed for repeal.)

Moreover, the WCAB is proposing to amend Rule 10755 to make reference to proposed 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, as noted below, the WCAB agrees that the records in question are the records of the WCAB, and that 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 proposing to keep Rule 10755, but having it refer to proposed Rule 10273.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment, including a tentative proposal to entirely repeal Rule 10755 and transfer its provisions (together with those of Rules 10758 and 10762) to proposed Court Administrator Rule 10273. In response to this proposed repeal and transfer, the WCAB received comments from the California Applicants’ Attorneys Association (CAAA), which asserted in essence that all rules relating to the destruction of files should remain with the WCAB, because, often, many of the parties’ rights and responsibilities under a WCAB award remain in effect during all or a substantial portion of an injured employee’s lifetime and that the destruction of case files (or the partial destruction of files) could have a tremendous impact on the rights and responsibilities of the parties. The WCAB agrees that it should retain some regulatory authority regarding the retention and destruction of his records, particularly in light of the language of Labor Code section 135. Section 135 provides, in relevant part: “In accordance with rules of practice and procedure that it may adopt, the appeals board may ... destroy or otherwise dispose of any file kept by it in connection with any proceeding under Division 4 (commencing with Section 3200)” Therefore, as discussed above, the WCAB will not entirely repeal Rule 10755.]

49. Sections Repealed: 10758 and 10762.

Statement of Specific Purpose and Reasons for Proposed Repealed of Sections 10758 and 10762

The WCAB proposes to repeal Rules 10758 and 10762 entitled, respectively, “Destruction of Case Files” and “Reporter’s Notes.” As discussed above, the WCAB is proposing to amend Rule 10755, entitled “Destruction of Records,” to provide that the WCAB’s records may be destroyed in accordance with the provisions of proposed Court Administrator Rule 10273. Proposed 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 proposed 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 proposed repeals.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10770

The WCAB proposes to amend Rule 10770, entitled “Lien Procedure.”

The proposed amendments would 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 proposed amendments would 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 proposed 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 proposed amendments would 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 proposed changes would make provisions for “amended” liens, including requiring the lien claimant to check a box on the OCR formed 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 proposed amendments would require notification to the WCAB and the parties within five business days after a lien has been resolved or withdrawn, and the amendments would provide that a lien claimant shall be notified of all hearings, whether or not the hearing directly involves the lien.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Addition of Section 10770.5

The WCAB proposes to add Rule 10770.5, entitled “Verification to Filing of Lien Claim or Application by Lien Claimant.” In essence, Rule 10770.5 is being proposed 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), proposed Rule 10770.5 would require that such a lien or application would have to 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, proposed Rule 10770.5 would require 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” would be 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 Labor Code section 5501.5(a)(2).

Finally, proposed Rule 10770.5 would establish 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments on proposed Rule 10770.5 from the American Insurance Association (AIA), which request that the verification include an attestation that the lien is confined to amounts payable under the applicable fee schedules or contract. However, the proposed verification requirement 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.]

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Addition of Section 10770.6

The WCAB proposes to add 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 proposed 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), proposed Rule 10770.6 would require that any such declaration of readiness 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. Proposed Rule 10770.6 would require 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” would be 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 Labor Code section 5501.5(a)(2).

Finally, proposed Rule 10770.6 would establish 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.

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10771

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

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10779

The WCAB proposes to amend Rule 10779, entitled “Disbarred and Suspended Attorneys.” The proposed amendments would make it so that 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 may no longer 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 now covered by current Rule 10779, 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, it would be questionable whether this provision of Rule 10779 should continue in effect. In the past five years, for example, the Appeals Board received only seven petitions under the Rule and, except for one petition (in which it appeared that, at the time the petition, the attorney’s temporary suspension from the State Bar had ended and, therefore, he no longer fell under the Rule), none of these petitions established sufficient “competency, qualification and moral character” to warrant granting permission to appear.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Addition of Section 10782

The WCAB proposes to add Rule 10782, entitled “Vexatious Litigants.”

Under proposed Rule 10782, a “vexatious litigant” would be 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 proposed 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 proposed 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 proposed 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) 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 proposed 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, proposed Rule 10782 would also allow 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, proposed 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 proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Addition of Section 10785

The WCAB proposes to add Rule 10785, entitled “Electronically Filed Decisions, Findings, Awards, and Orders.” This proposed 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 proposed rule is necessary in light of EAMS.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to its proposed adoption of Rule 10785, the WCAB received comments from the California Applicants’ Attorneys Association (CAAA), which asserted in essence that “electronically filed” is not defined in Rule 10301 and, “given the technology available to the parties,” the rule should be more specific. However, proposed Rule 10785 does not relate to electronic filing by the parties. It applies only to the WCAB’s filing of its own decisions, findings, awards, orders, or other documents. Moreover, the WCAB believes that the term “electronically filed” is self-explanatory, however, proposed Rule 10785 has been amended to make it clear that applies to decisions, findings, awards, orders and other documents that are filed electronically within EAMS, either by preparing the document in paper form and then scanning it into EAMS or by preparing the document directly within EAMS.

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10840

The WCAB proposes to amend Rule 10840, presently entitled “Filing Petitions for Reconsideration and Answers,” but which would be re-entitled “Filing Petitions for Reconsideration, Removal, Disqualification and Answers.” Proposed Rule 10840 would provide 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 would provide 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.

Proposed Rule 10840 would repeal 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: Proposed Rule 10840 also would not incorporate the general provision of current Rule 10390, which is now proposed for repeal, that petitions submitted in violation of Rule 10840 could be discarded.]*

The reasons for the proposed 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. (See proposed Court Administrator Rules 10216(a) and 10229(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 crime nor expense will be at issue. Accordingly, the reasons underlying current Rule 10840 longer exist.

While the Appeals Board recognizes that this may be a real problem, a 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 a petition submitted to the wrong district office – or improperly submitted to the Appeals Board – will not be accepted for filing or deemed filed and could be discarded without the knowledge of the party who submitted it. (See current Rule 10390 [proposed for repeal].) Thus, as it now stands, 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 proposed 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 proposed amendment of Rule 10840 would also obviate 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]).

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment, including a tentative proposal to amend Rule 10840. The tentative proposal would have kept the provisions of current Rule 10840 that petitions for reconsideration must be filed with the district office from which the challenged decision issued (if the decision was issued by a WCJ) or with the Appeals Board (if the decision was issued by the Appeals Board), and that petitions submitted in violation of the rule would not be accepted for filing or deemed filed for any purpose. Also, the tentative proposal would have incorporated the provision of current Rule 10390, providing that petitions not submitted to the correct district office (or, as applicable, to the Appeals Board) could be discarded. Both the California Applicants' Attorneys Association (CAAA) and the American Insurance Association (AIA) submitted comments in response to the tentative proposal to amend Rule 10840. Both CAAA and AIA objected to the proposed provision that misfiled documents "may be discarded." CAAA believes that simply discarding misfiled documents may violate due process, particularly if the documents are discarded by mistake or if the party submitting the documents can establish a reasonable excuse for misfiling. CAAA suggests that, at a minimum, the WCAB should add a provision that misfiled documents will be returned if the filer includes a self-addressed stamped envelope. AIA similarly "strongly urges" that if the WCAB discards documents, the filing party should be notified so that corrective action may be taken. In consideration of these comments, the WCAB, as discussed above, now proposes to amend Rule 10840 so as to provide that petitions may be filed with any office of the WCAB, which

eliminates both the “misfiling” and “discarding” issues. (Although, under proposed Court Administrator Rules 10216(a) and 10229(b), a petition – like any other document – will be discarded once it is scanned into EAMS, an electronic version of the document will exist within EAMS.)]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10842

The WCAB proposes to amend Rule 10842, currently entitled “Contents of Petition for Reconsideration and Answer,” but which would be re-entitled “Contents of Petitions for Reconsideration, Removal, and Disqualification and Answers.”

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

Second, proposed Rule 10842 would provide 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 would also provide 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 would provide that evidentiary statements shall be supported by references that state with specificity (as set forth in the proposed 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 are also 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, proposed Rule 10842 would provide 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 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 proposed Court Administrator Rules 10216(a) and 10229(b)) and increased data storage costs.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10843

The WCAB proposes to amend Rule 10843, currently entitled “Petitions to Remove,” but which would be re-entitled “Petitions for Removal and Answers.”

First, for the reasons stated in the discussion of proposed Rule 10840, proposed Rule 10843 would repeal 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, proposed Rule 10843 would provide 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 proposed 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 proposed 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 proposed 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 Proposed Addition of Section 10844

The WCAB proposes to add Rule 10844, entitled “Petitions for Disqualification and Answers.” This proposed rule would require 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 would 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 proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Addition of Section 10845

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

Proposed Rule 10845 would require 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 proposed Court Administrator Rules 10228, 10229, 10230, 10232, 10235, and 10236. These provisions are necessary in light of EAMS.

Also, although proposed Rule 10845 would specifically require compliance with the 25-page limitation of Court Administrator Rule 10232(a)(6), it would further provide 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 would allow the Appeals Board to make exceptions 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, consistent with current Rule 10391 (which is being proposed for repeal), proposed Rule 10845 would provide 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.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments regarding tentative proposed Rule 10845 from the California Applicants’ Attorneys Association (CAAA), the American Insurance Association (AIA), and the California Workers’ Compensation Institute (CWCI).

CAAA objects to the page limitation provisions. It sees no reason for them, especially because documents will be stored electronically. It also states that, if some limitation is required, it should be a word limitation

rather than a page limitation. However, as discussed above, there is a good reason for the length limitations. The Appeals Board receives many hundreds of petitions and answers each month, and its resources are strained by overly long and unfocused petitions. Thus, contrary to CAAA's implication, the length limitation is not directly related to the question of storage (although there are costs associated with storing electronic data and, therefore, reasonable limitations on the length of an electronically scanned petition are appropriate). Moreover, a page limitation, rather than a word limitation, is easier to enforce, especially because the imposition of a word limitation would require the adoption of an additional rule requiring certification, under penalty of perjury, of the filer's computer's word count.

AIA suggests that proposed Rule 10845 be amended to provide that document separator sheets may be used to set off any pages in excess of the 25/10-page limitations, and to provide that the WCAB may authorize the filing of petitions, answers, and supplemental petitions in excess of the 25-page/10-page limits.

CWCI similarly suggest that there should be a procedure to permit judicial waiver of the 25-page/10-page limitations, such as allowing documents in excess of the page limitations to be filed for "good cause."

The WCAB does not find workable AIA's suggestion regarding inserting document separator sheets in front of any portion of a petition, answer, or supplemental petition that exceeds the page limitations. Such a provision could simply encourage parties to file overly long petitions, answers, or supplemental petitions with the hope that they are excess pages would be considered.

The WCAB agrees, however, with the suggestions by AIA and CWCI that there be express provision for the WCAB to allow the filing of a non-compliant petition, answer, or supplemental petition that exceeds the page limitations (or, indeed, violates any other provisions of proposed Rule 10845). Such a provision has now been added to proposed Rule 10845.]

Specific Technologies or Equipment

The proposed 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 proposed addition.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10846

The WCAB proposes to amend 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. Proposed Rule 10846 would also extend these provisions to skeletal petitions for removal and disqualification, and would also allow all three types of petitions (reconsideration, removal, and disqualification) to be “dismissed,” not merely denied. These proposed amendments would 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,” would be 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 proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10848

The WCAB proposes to amend 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 proposed amendment to Rule 10848 would extend these provisions to petitions for removal or disqualification. The proposed 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: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments regarding tentative proposed Rule 10848 from the California Applicants' Attorneys Association (CAAA), which objects to the provision that supplemental petitions or answers filed in violation of the rule "shall not be acknowledged to return to the filing party." CAAA suggest that this language be changed to "and shall be returned to the filing party." Preliminarily, this language of proposed Rule 10848 does not change the language of existing Rule 10848 (except that it extends these provisions to cases pending before the Appeals Board on petitions for removal or disqualification, in addition to petitions 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 proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10850

The WCAB proposes to amend Rule 10850, entitled "Proof of Service." The chief aspect of the proposed amendment to Rule 10850 is it would specifically require that service of petitions for reconsideration, removal, and disqualification be made "in accordance with [proposed amended] Rule 10505." Proposed 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. Proposed Rule 10850 would also make clear that it applies to answers to petitions for reconsideration, removal, and disqualification.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10860

The WCAB proposes to amend Rule 10860, entitled “Report of Workers’ Compensation Judge.” All the proposed amendment would do is to provide that, instead of having a WCJ “send” a Report on a petition for reconsideration, removal, or disqualification to the Appeals Board, the WCJ would 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.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment. In response to this informal web posting, the WCAB received comments regarding tentative proposed Rule 10860 from the California Applicants’ Attorneys Association (CAAA). CAAA states: “This rule appears to be based on the theory that the litigation file will be available to the Board through EAMS. While we certainly hope that the EAMS introduction is smooth, we believe the Board should look at the situation realistically and plan that there will be some minor, and some not so minor, disruptions in a fully implemented EAMS system. Therefore we strongly urge that these rules also provide for some back-up procedures should the electronic filing system be unavailable for a period of time.” These comments by CAAA appear not to relate specifically to proposed Rule 10860, but rather appear to reflect a more general concern regarding the implementation of EAMS.]

The WCAB understands that the switch from a paper-based file system to a paperless file system might not be entirely seamless or problem-free. However, the WCAB has been advised by DWC that there will be backup 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, proposed 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.]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10865

The WCAB proposes to amend Rule 10865, currently entitled “Reconsideration--Labor Code Sections 3201.5 and 3201.7,” but which would be re-entitled “Reconsideration of Arbitration Decisions Made Pursuant To Labor Code Sections 3201.5 and 3201.7.”

The proposed amendment to Rule 10865 would continue 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 would further clarify 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 the 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, proposed Rule 10865 would provide 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

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).)

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. As discussed in the “Note” below, made in response to informal comments regarding the WCAB’s web posting of its tentative rules, this requirement is consistent with the current provisions of the WCAB/DWC Policy and Procedure Manual, Section 1.60.

The proposed amendment to Rule 10865 also would provide 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, date of birth and social security number; 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 proposed amendment to Rule 10865 would provide 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 would 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 proposed Rule 10865, the arbitrator would be 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 would be 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 would have been 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 will be scanned into EAMS and then destroyed. (See proposed Court Administrator Rules 10216(a), 10229(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.

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment, including a tentative proposal to amend Rule 10865, which would have included a provision that misfiled carve-out petitions for reconsideration “may be discarded,” without notice of the defect to the filing party. As discussed in greater detail under proposed Rule 10840, both the California Applicants’ Attorneys Association (CAAA) and the American Insurance Association (AIA) submitted comments objecting to any language providing that misfiled petitions “may be discarded.” CAAA also suggests that, at a minimum, the WCAB should add a provision that misfiled documents be returned if the filer includes a self-addressed stamped envelope. AIA similarly “strongly urges” that if the WCAB discards documents, the filing party should be notified so that corrective action may be taken. In consideration of these comments, the WCAB now proposes to amend Rule 10865 so as to provide that any carve-out petitions for reconsideration that are misfiled with any district office shall be returned to the petitioner with a letter referencing Rule 10865, 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. Such a

provision is consistent with the current WCAB/DWC Policy and Procedures Manual, Section 1.60, entitled “Procedures for Petitions for Reconsideration.” Section 1.60, which relates to current Rule 10840, provides that if a petition for reconsideration is submitted to the wrong office of the WCAB, “the petition shall be returned to the petitioner with a letter referencing WCAB Rule 10840, noting that the petition was not filed at the correct district office, and indicating that the petition should be filed consistent with the rule.”]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10866

The WCAB proposes to amend Rule 10866, currently entitled “Reconsideration of Arbitrator’s Decisions or Awards,” but which would be 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 proposed amendment to Rule 10866 would provide 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 proposed 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, proposed Rule 10866 would still require 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 our 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 proposed Rule 10866, however, the arbitrator would be submitting 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 would then be scanned into EAMS and destroyed. (See proposed Court Administrator Rules 10216(a), 10229(b), 10236(a).) But, proposed Rule 10866 would provide 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, proposed Rule 10866 would incorporate the provisions of current Rule 10867 relating to the arbitrator's Report and the arbitrator's file. (As seen below, current Rule 10867 is proposed for deletion.)

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

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment, including a tentative proposal to amend Rule 10866, which would have continued the existing requirement (through Rule 10866's reference to Rule 10840) that petitions for reconsideration from arbitration decisions made pursuant to Labor Code sections 5270 through 5275 would have to be filed with the district office having venue. Moreover, tentative Rule 10866 order provided that misfiled petitions "may be discarded," without notice of the defect to the filing party. As discussed in greater detail under proposed Rule 10840, both the California Applicants' Attorneys Association (CAAA) and the American Insurance Association (AIA) submitted comments objecting to any language providing that misfiled petitions "may be discarded." CAAA also suggests that, at a minimum, the WCAB should add a provision that misfiled documents be returned if the filer includes a self-addressed stamped envelope. AIA similarly "strongly urges" that if the WCAB discards documents, the filing party should be notified so that corrective action may be taken. In consideration of these comments, the WCAB now proposes to amend Rule 10866 so as to provide that petitions for reconsideration from arbitration decisions made pursuant to Labor Code sections 5270 through 5275 may be filed with any district office or with the office of the Appeals Board in San Francisco. This change eliminates both the "misfiling" and "discarding" issues. (Although, under proposed Court Administrator Rules 10216(a) and 10229(b), a petition – like any other document – will be discarded once it is scanned into EAMS, an electronic version of the document will exist within EAMS.)]

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Repealed of Section 10867

The WCAB proposes to repeal Rule 10867, relating to “Report of Arbitrator.” As pointed out above, the provisions of current Rule 10867 would be merged into the provisions of proposed Rule 10866.

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10890

The WCAB proposes to repeal Rule 10890, relating to “Walk-Through Documents.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10890 would be transferred to proposed Court Administrator Rule 10280 (which would make some changes to the substance of current Rule 10890).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10946

The WCAB proposes to amend Rule 10946, currently entitled “Medical Reports,” but which would be re-entitled “Medical Reports in Subsequent Injuries Benefits Trust Fund Cases.” Some of the proposed changes would substitute “Subsequent Injuries Benefits Trust Fund” for “Subsequent Injuries Fund,” consistent with statutory changes. (See Lab. Code, § 62.5(d)(1) & (2).)

Also, proposed Rule 10946 would require 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 SIF often was not being served with medical reports until the date of the MSC. This 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 proposed 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 proposed 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 proposed 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 Proposed Amendments to Section 10950

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

The proposed amendments to Rule 10950 would 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, proposed Rule 10950 would provide 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 proposed 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 proposed 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). Therefore, the provisions of current Rule 10950 would be transferred to proposed Court Administrator Rule 10290 (which would make some changes to the substance of current Rule 10950).

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Repealed of Section 10952

The WCAB proposes to repeal Rule 10952, entitled “Appeal of Notice of Compensation Due.” Pursuant to Labor Code section 5307(c), the provisions of current Rule 10952 would be transferred to proposed Court Administrator Rule 10291 (which would make some changes to the substance of current Rule 10952).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Amendments to Section 10953

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

The chief proposed amendment to Rule 10953 would be that petitions appealing audit penalty assessments by the Administrative Director (AD) under Labor Code section 129.5 would *not* be filed with a district office of the WCAB and be initially determined by a WCJ, subject to a petition for reconsideration to the Appeals Board. Instead, petitions appealing section 129.5 audit penalty assessments would 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 may 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 would be made in light of the EAMS. Specifically, the petition appealing a Labor Code section 129.5(g) penalty assessment would have to 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 would have to be submitted, which the WCAB would then scan into EAMS and discard.

Finally, proposed Rule 10953 would expressly provide that the AD's record of proceedings would be deemed part of the WCAB's record under section 10750.

Specific Technologies or Equipment

The proposed 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 proposed 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 proposed 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 Proposed Repealed of Section 10955

The WCAB proposes to repeal Rule 10955, entitled "Rehabilitation Appeals." Pursuant to Labor Code section 5307(c), the provisions of current Rule 10955 would be transferred to proposed Court Administrator Rule 10293 (which would make some changes to the substance of current Rule 10955).

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Section 10957

The WCAB proposes to repeal 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) will be addressed by proposed Rule 10593.

Specific Technologies or Equipment

The proposed 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 proposed repeal.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

The proposed 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 Proposed Repealed of Sections 10995 and 10996

The WCAB proposes to repeal 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 would be transferred to proposed Court Administrator Rules 10295 and 10296 (which would make some minor changes to the substance of current Rules 10995 and 10996).

[NOTE: From April 8 to April 28, 2008, the WCAB posted a tentative version of its proposed rules on its web forum for informal public comment, including a tentative proposal to repeal current Rules 10995 and 10996. The California Applicants’ Attorneys Association (CAAA) objected to the tentative proposed repeal of Rules 10995 and 10996 as being an impermissible transfer of “judicial” authority to the Court Administrator. The WCAB disagrees. The Court Administrator oversees trial level proceedings at the district office. (See Lab. Code, §§ 5307(c), 5500.3(a).) The list of arbitrators are created by the presiding workers’ compensation judges of each district office (Lab. Code, § 5270.5(a)) and the arbitrators are selected or assigned from this list. (Lab. Code, § 5271.) Moreover, although, for the most part, arbitrators have the same duties and responsibilities as a WCJ (Lab. Code, § 5272), the actual arbitration proceedings are conducted outside the ordinary workers’ compensation adjudicatory system and they are not proceedings of the WCAB. (See Lab. Code, §§ 5275(b) & (e), 5276.)]

Specific Technologies or Equipment

The proposed 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 proposed repeals.

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

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