

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

NOTICE OF PROPOSED RULEMAKING

RULES OF PRACTICE AND PROCEDURE

TITLE 8, CALIFORNIA CODE OF REGULATIONS, SECTIONS 10300 THROUGH 10999

NOTICE IS HEREBY GIVEN that the Workers' Compensation Appeals Board (hereafter, "WCAB") by the authority vested in it under Labor Code section 5307 (see also, Lab. Code, §§ 133, 5309, 5708), proposes to amend, adopt, and repeal 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.

PUBLIC HEARING:

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the above noted subject on the following date:

Date: Friday, September 12, 2008
Time: 10:00 a.m. to 5:00 p.m. or Conclusion of Business
Place: Hearing Room 9
Hiram Johnson Building
San Francisco Civic Center Complex
Conference Center - Basement Level
455 Golden Gate Avenue
San Francisco, CA 94102

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation. If public comment concludes before the Noon recess, no afternoon session will be held. The WCAB requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments.

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

AUTHORITY AND REFERENCE:

The WCAB is undertaking this regulatory action pursuant to the authority vested in it by Labor Code section 5307(a), as well as sections 133, 5309 and 5708, to adopt regulations to implement, interpret and make specific various sections of the Labor Code.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW:

The WCAB proposes to add, amend, and repeal specific sections of its Rules of Practice and Procedure as set forth below.

Although there are a number of reasons for the changes to the WCAB's Rules, two major reasons stand out.

First, in 2002, the Legislature created the position of "Court Administrator" within the Division of Workers' Compensation (hereafter, "DWC") and 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).) Therefore, the WCAB is proposing to delete certain of its current rules, the subject matter of which would be covered by certain proposed Court Administrator regulations.

Second, the Budget Act of 2004 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].) Therefore, since 2004, DWC has been developing the Electronic Adjudication Management System (hereafter, "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. 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.

Section Amended: 10301.

Various subdivisions of section 10301 are renumbered so that the definitions remain in alphabetical order.

The definition of "Administrative Director" is amended to include a "designee" of the Administrative Director (hereafter, "AD"). This proposed change gives recognition to the fact that some actions performed under the AD's authority are actually performed by the AD's designees. The proposed change is consistent with numerous existing regulations regarding delegation of the AD's authority to his or her designees.

A definition of "adjudication file" (or "ADJ file") is added. This new definition is being proposed because DWC will utilize EAMS not only to electronically store and maintain WCAB case files, but also to electronically store and maintain the files of ancillary units of DWC. The term "adjudication file" (or "ADJ file") will distinguish WCAB case file from the files of DWC ancillary units, such as those of the Disability Evaluation Unit (i.e., a "DEU file").

The definition of "Appeals Board" is amended to include the WCAB's Commissioners and Deputy Commissioners "individually," in recognition of the fact that, under both the Labor Code and the WCAB's current rules, some actions by the WCAB may be taken by a single Commissioner or Deputy Commissioner.

A definition "carve-out case" is added. The proposed definition is consistent with the provisions of Labor Code sections 3201.5 through 3201.9 relating 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, but it has never been formally defined.

A definition of the term “case opening document” is added. “Case opening document” is used in different places in the WCAB’s proposed rules, but it is not elsewhere defined. A “case opening document” is any document that creates an adjudication case and invokes the WCAB’s jurisdiction for the first time.

A definition of “Court Administrator” is added. “Court Administrator” is used in different places in the WCAB’s proposed rules, but it is not elsewhere defined. The proposed definition tracks the statutory definition of “Court Administrator” contained in Labor Code section 110(f)). However, the proposed definition would also include any “designee” of the Court Administrator, in recognition of the fact that some Court Administrator actions are actually performed by his or her designees.

The definitions of “Declaration of Readiness to Proceed” (DOR) and of “Declaration of Readiness to Proceed to Expedited Hearing” are amended. The proposed amendments strike the phrase “before the Workers’ Compensation Appeals Board” from both definitions and instead substitute the phrase “at a district office.” This is because “Workers’ Compensation Appeals Board” is currently defined to include the Appeals Board, the Commissioners and the Deputy Commissioners. 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 (hereafter, “WCJ”) at a district office of the WCAB.

A definition of “district office” is added. “District office” is used throughout the WCAB’s rules, yet, it is nowhere defined. The proposal to define “district office” to mean “a location of a trial court of the Workers’ Compensation Appeals Board” gives recognition to the facts: (1) that the WCAB exercises judicial powers and, in legal effect, is a court; and (2) the “district offices” conduct trial level proceedings of the WCAB.

A definition for “document” is added. In light of EAMS, “document” needs to be defined to include an electronically filed document or an electronically scanned version of a paper document. Also, in light of EAMS, it needs to be emphasized that each separate medical report or other record “having a different author and/or a different date” is a different “document.” This is so that, when individual “documents” are scanned or otherwise inputted into EAMS, they can be separately identified by author and date and, therefore, they can be easily located.

A definition for “document cover sheet” is added. The “document cover sheet” is a Court Administrator form, used for EAMS, that will be placed on top of a document or set of documents being filed at one time in a specific case. The “document cover sheet” will identify the adjudication case(s) to which the document or documents relate, so that when the documents are scanned or otherwise inputted into EAMS, they are routed to the correct adjudication file(s).

A definition for “document separator sheet” is added. The “document separator sheet” is a Court Administrator form, used for EAMS, that will 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” will identify the title, the author, the date, and the type of each document and each attachment being filed. Thus, the “document separator sheet” will help ensure that, when individual documents are scanned into EAMS, they can be separately identified (and, therefore, easily located) within the EAMS adjudication file.

A definition for “Electronic Adjudication Management System” (EAMS) is added. 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.

A definition for “fax” is added. Although this is a term commonly used by the general public, the definition that a “fax” is a document that has been “electronically served” helps to highlight the fact that documents are not to be “filed” with the WCAB by fax.

The definition of “[to] file” is amended. The proposed amendments change the phrase “case file” to “adjudication file,” consistent with the discussion of the phrase “adjudication file,” above. The proposed amendments also would (1) strike the phrase “Workers’ Compensation Appeals Board district office” and simply substitute the phrase “district office” and (2) strike the phrase “Workers’ Compensation Appeals Board adjudication file” and simply substitute the phrase “adjudication file.” The former phrase is redundant because “district office” will now be defined to mean “a location of the Workers’ Compensation Appeals Board.” The latter phrase is redundant because “adjudication file” will now be defined to mean “a case file within the jurisdiction of the Workers’ Compensation Appeals Board.”

The definition of “hearing” is amended. First, “lien conference” is added to the list of hearings, having been inadvertently omitted from the current definition (even though it is used in the current rules). Second, “hearing” is defined to mean various proceedings “at a district office or before the Appeals Board.” Although most “hearings” do take place before a WCJ at a district office of the WCAB, some hearings do take place directly before the Appeals Board.

The definition of “lien claimant” is amended 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.

A definition for “lien conference” is added. Even though “lien conference” is used in the current rules, it is not currently defined. It would be defined to 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.

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

A definition of “optical character recognition form” (OCR form). This term is used in the new rules, but it is not elsewhere defined. 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 definition of “party” is amended. The amendment clarifies that “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., the person or entity filing the application for adjudication of claim). The amendment also provides that a “lien claimant” may become a “party” when the underlying case of the injured employee (or any dependent(s) of a deceased employee) has been “resolved” (which is somewhat broader than the current provision that the underlying case has been “settled by way of a compromise and release”).

The definition of “record of proceedings” is deleted because it is essentially duplicative of current Rule 10750 (and amended Rule 10750).

A definition of “venue.” “Venue” is used in various places in the current and proposed rules, but it is nowhere defined. It is now defined to mean the district office, as established by Labor Code section 5501.5 or 5501.6, at which any trial level proceedings will be conducted and from which any trial level orders, decisions, or awards will be issued.

Other amendments are made, but they involve only very minor non-substantive changes to currently existing definitions (i.e., the definitions of “priority conference” and “status conference”).

Section Amended: 10302.

Section 10302 is amended to substitute “workers’ compensation administrative law judges” and “presiding workers’ compensation administrative law judges” (hereafter, “PWCJs”) for, respectively, “referees” and “referees in charge,” which are no longer in use. The amendment also provides that WCJs and PWCJs may informally 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. Finally, the amendment establishes that pro tempore WCJs are included within the definition of WCJs.

Section Repealed: 10306.

Rule 10306, relating to the “Index of Cases,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of current Rule 10306 would be transferred to proposed Court Administrator Rule 10215.

Section Amended: 10308.

Rule 10308, relating to the “Official Address Record,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of current Rule 10308 would be transferred to proposed Court Administrator Rule 10217(a).

Section Amended: 10324.

Rule 10324, relating to “Ex Parte Communications,” is amended. Subdivision (a) is essentially identical to the first sentence of current Rule 10324. Subdivision (b) provides that, when the WCAB receives an ex parte letter or other ex parte document, it shall serve the letter or document on all other parties, with an explanation that the letter or document was received ex parte. Subdivision (c) is identical to the second sentence of current Rule 10324. Subdivision (d) provides that, where a physician has been appointed by the WCAB, any communications by the parties to the appointed physician shall be made through the WCAB.

Section Amended: 10346.

Rule 10346, entitled “Assignment or Transfer of Cases,” is amended. It now provides that a PWCJ may utilize EAMS to assign cases. However, the provision that a PWCJ “may” utilize EAMS to assign cases makes it clear that this is a discretionary act, not a mandatory one.

Section Repealed: 10347.

Rule 10347, entitled “Assignment of Judges,” is repealed. Rule 10347 currently provides that, where practical, the WCJ assigned for trial should be different than any WCJ who conducted an MSC in the case. The current rule will not be workable under EAMS.

Section Repealed: 10390.

Rule 10390, relating to the “Place and Time of Filing Documents,” is repealed. 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.

Section Repealed: 10391.

Rule 10391, relating to the “Filing of Copies of Documents,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of current Rule 10391 would be transferred to proposed Court Administrator Rule 10236.

Section Repealed: 10392.

Rule 10392, relating to the “Form and Size Requirements for Filed Documents,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of current Rule 10392 would be transferred to proposed Court Administrator Rule 10232

Section Repealed: 10395.

Rule 10395, relating to the “Improper Filing of Documents,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of current Rule 10395 would be transferred to proposed Court Administrator Rule 10235.

Section Repealed: 10396.

Rule 10396, relating to the “Duty to Furnish Correct Address,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of current Rule 10395 would be transferred to proposed Court Administrator Rule 10217.

Section Added: 10397.

Rule 10397, entitled “Restrictions on the Rejection for Filing of Documents Subject to a Statute of Limitations or a Jurisdictional Time Limitation,” is added. Rule 10397 provides that an application for adjudication of claim, a petition for reconsideration, a petition to reopen, or any other petition or other document that is subject to a statute of limitations or a jurisdictional time limitation shall not be rejected for filing solely on the basis that: (1) the document is not filed in the proper office of the WCAB; (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. However, such a document *may* be rejected for filing if it does not contain a combination of information sufficient to establish the case or cases to which the document relates or, if it is a case opening document, sufficient information to open an adjudication file. If the document is rejected under such circumstances, however, the Court Administrator will return the document to the filing party, notify the filing party of the discrepancy(ies), and give the filing party 15 days after service of the notice to correct the defect(s). If timely corrected, the document will be deemed filed as of the date it was originally submitted. Finally, proposed Rule 10397 would indicate that its provisions do not excuse non-compliance with the WCAB and the Court Administrator’s rules and will not preclude the imposition of sanctions under Labor Code section 5813 and Rule 10561. Rule 10397 is necessary so that documents subject to a statute of limitations or a jurisdictional time limitation are not rejected solely because of a systems requirement of EAMS.

Section Amended: 10400.

Rule 10400, currently entitled “Applications,” is amended. It is re-titled “Filing and Service of Applications.” Substantively, Rule 10400 specifies 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 are all “applications”

for purposes of invoking the jurisdiction of the WCAB, however, none of those documents would be deemed “applications” for purposes of attorney’s fees under Labor Code section 4064(c). Also, Rule 10400 provides 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. Further, Rule 10400 provides that, when an amended application is filed, the applicant shall indicate (in the appropriate box on the application form) that it is an “amended” application. Moreover, certain of the application filing provisions of current Rule 10500 into Rule 10400, so that these related provisions are consolidated in a single section. Finally, with respect to these application filing provisions, Rule 10400 essentially takes the same approach as the last sentence of current Rule 10400 and the first paragraph of current Rule 10500, except there are some changes in light of EAMS and some other minor changes or clarifications.

Section Added: 10403.

Rule 10403, entitled “Application Required Before Jurisdiction Invoked and Before Compelled Discovery May Be Commenced,” is added. In essence, new Rule 10403 provides that the jurisdiction of the WCAB is invoked only by the filing of an application or other case opening document. Therefore, 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); 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. Rule 10403, however, does not preclude non-compelled pre-application medical evaluations or investigations.

Section Added: 10409.

Rule 10409, entitled “Venue,” is added. It provides that any person or entity filing an initial application (or other case opening document) must designate venue, in accordance with the provisions of Labor Code section 5501.5. It also establishes venue for the workers’ compensation claims of DWC employees.

Section Amended: 10410.

Rule 10410, currently entitled “Objection to Venue,” is amended. It is re-titled “Objection to Venue under Labor Code Section 5501.5(c).” Also, Rule 10410 makes it clear that it applies only to objections, made under Labor Code section 5501.5(c), to initial venue selections based on the applicant’s attorney’s principal place of business, made under Labor Code section 5501.5(c). Rule 10410 also provides, consistent with the language of Labor Code section 5501.5(c), 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. Further, Rule 10410 provides that if a defendant objects to venue, it must declare under penalty of perjury when it received notice of the adjudication case number and venue.

Section Amended: 10411.

Rule 10411, currently entitled “Petition for Change of Venue,” is amended. It is re-titled “Petition for Change of Venue under Labor Code section 5501.6.” Rule 10411 clarifies 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. Rule 10411 also clarifies that a petition for change of venue is decided by the PWCJ (or the designee of the PWCJ) of the district office having venue, i.e., the petition is not decided by the PWCJ of the district office to which venue is sought to be changed.

Section Amended: 10412.

Rule 10412, currently entitled “Location of File After Venue Change,” is amended. It is re-titled “Proceedings and Decisions After Venue Change.” Rule 10412 provides that, when an order changing venue is issued, all further trial level proceedings shall be conducted at, and all further trial level orders, decisions, and awards shall be issued by, the district office to which venue was changed. The amendment 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 and 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).

Sections Repealed: 10414, 10415, and 10416.

Rules 10414, 10415 and 10416 – entitled, respectively, “Declaration of Readiness to Proceed,” “Declaration of Readiness to Proceed to Expedited Hearing,” and “Objection to Declaration of Readiness” – are repealed. Pursuant to Labor Code section 5307(c), their provisions are transferred to Court Administrator Rules 10250 and 10251.

Section Repealed: 10417.

Rule 10417, entitled “Walk-Through Calendar Setting,” is repealed. 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.

Section Amended: 10450.

Rule 10450 is amended to make minor changes, 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.

Section Amended: 10500.

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

Section Amended: 10505.

Rule 10505, currently entitled “Service by the Parties,” is amended. It is re-titled “Service by the Parties or Lien Claimants.” Rule 10505 now puts all of the service provisions relating to parties and lien claimants into a single rule (i.e., current Rule 10514 would be repealed). Rule 10505 addresses personal, mail, e-mail, and fax service by the parties and lien claimants (the latter two types of service being new under EAMS), including service on another party or lien claimant using its designated preferred method of service (see Court Administrator Rule 10218) or using a previously agreed to alternative method of service. Rule 10505 also

addresses the duty to re-serve a document, when the serving party or lien claimant receives notice that its service on another party or lien claimant has failed.

Section Amended: 10507.

Rule 10507, currently entitled “Mail and Fax Service,” is amended. It is re-titled “Time Within Which To Act When A Document Is Served by Mail, Fax, or E-mail.” Rule 10507 addresses the time requirements for a party or lien claimant to act or respond when a document is served on it by mail, fax, e-mail, or any method other than personal service. Rule 10507 provides that, for all non-personal service (either by the WCAB or by the parties or lien claimants), the time for the party or lien claimant being served to act or respond is extended by five calendar days from the date of service if its physical address is within California, by ten calendar days if its physical address is outside California but within the United States, and by twenty calendar days if its physical address is outside the United States. The term “physical address” is defined to mean the street address or Post Office Box of record of the party or lien claimant being served, even if the service is made on a non-physical address (e.g., and e-mail address or a fax number).

Section Added: 10508.

Rule 10508, entitled “Extension of Time for Weekends and Holidays,” is added. Rule 10508 simply codifies the principle that, if the last day to exercise a right or to perform a duty falls on a weekend or on a holiday, the act may be performed or exercised on the next business day.

Section Amended: 10510.

Rule 10510, currently entitled “Service on Attorney or Agent,” is amended. It is re-entitled “Service on Represented Employees or Dependents and on Attorneys or Agents.” Rule 10510, as amended, now requires that all documents issued by the WCAB (including decisions, orders, minutes, and notices) – whether served by the WCAB itself or by a party designated to serve under Rule 10500 – must be served on the injured employee (or the dependent of a deceased employee), even if the employee (or dependent) is represented. Otherwise, the provisions of Rule 10510 are unchanged from current Rule 10510. That is, 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 designated service by a party under Rule 10500). Moreover, WCAB documents are served directly on defendants or lien claimants only if they are unrepresented. Similarly, the requirement to serve an employee or dependent would not apply to service by the parties and lien claimants (other than designated service under Rule 10500). That is, Rule 10510 still provides that service by the parties and lien claimants (apart from designated service) must be made only on the attorneys or other representatives of represented applicants, defendants, or lien claimants. Applicants, defendants, and lien claimants would have to be served only if they are unrepresented.

Sections Repealed: 10514 and 10520.

Rule 10514, entitled “Proof of Service by Parties and Lien Claimants,” and Rule 10520, entitled “Proof of Service by Workers’ Compensation Appeals Board,” are repealed. Their provisions are moved to Rule 10505 and Rule 10500, respectively.

Section Amended: 10541.

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

Section Repealed: 10548.

Rule 10548, entitled “Continuances,” is repealed. Pursuant to Labor Code section 5307(c), its provisions are transferred to Court Administrator Rule 10243.

Section Added: 10550.

Rule 10550, entitled “Proper Identification of the Parties and Lien Claimants,” is added. Rule 10550 provides that whenever a party or lien claimant (or an attorney or other representative for a party or lien claimant) appears in any WCAB proceeding – either (i) by filing any application, answer, settlement, lien, petition, or other pleading or (ii) by appearing at any hearing – the following requirements must be met: (1) the full legal name of the party or lien claimant must be set forth; (2) the attorney or hearing representative must identify which party or parties he or she is representing; (3) when a claims administrator appears, it must identify which party or parties (i.e., an employer, an insurance carrier, or both) it is representing and, if it is representing an insurance carrier, the claims administrator must state whether the policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity or entities actually liable for the payment of compensation; (4) when insurance carrier appears, it must identify whether it is solely representing itself, or also representing an employer, and it must state whether its policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity or entities actually liable for the payment of compensation; and (5) a lien claimant must state whether is the original owner of the alleged that or whether it purchased the alleged debt from the original owner or some subsequent purchaser.

Section Repealed: 10555.

Rule 10555, relating to the “Priority Conference Calendar,” is repealed. Pursuant to Labor Code sections 5307(c) and 5502(b) & (c), the provisions of current Rule 10555 are transferred to proposed Court Administrator Rule 10254.

Section Amended: 10561.

Rule 10561, entitled “Sanctions,” is amended. The amendments are extensive and detailed, but in essence they provide that:

- (1) 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 AD and Court Administrator;
- (2) 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;
- (3) unless a reasonable excuse is offered or the offending party has not demonstrated a pattern of such conduct, 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;
- (4) unless a reasonable excuse is offered or the offending party has not demonstrated a pattern of such conduct, 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;²

- (5) unless a reasonable excuse is offered or the offending party has demonstrated a pattern of such conduct, sanctions may be imposed for asserting a position that misstates or substantially misstates the law; and
- (6) 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.

Also, Rule 10561 makes it clear that, for purposes of imposing sanctions: (1) a lien claimant may be deemed a “party” at any stage of the proceedings before the WCAB; and (2) a lay representative is an “attorney.”

Section Repealed: 10563.

Rule 10563, relating to “Appearances Required,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of current Rule 10563 are transferred to Court Administrator Rule 10240.

Section Amended: 10589.

Rule 10589, currently entitled “Consolidated Cases,” is amended. It is re-titled “Consolidation of Cases.” Rule 10589 specifically sets forth some of the factors the WCAB may consider in determining whether to consolidate two or more related cases (involving either the same injured employee or multiple injured employees). Also, it specifies certain requirements for any petition for consolidation. Finally, it specifies how pleadings, exhibits, minutes, summaries of evidence, and decisions are handled in consolidated cases. Pursuant to Labor Code section 5307(c), portions of current Rule 10589 relating to the assignment of consolidated cases are transferred to Court Administrator Rule 10260.

Sections Repealed: 10590, 10591, and 10592.

Rules 10590, 10591, and 10592 – entitled, respectively, “Consolidated Cases-Same Injured Worker,” “Consolidating Cases-Multiple Injured Workers,” and “Pleadings in Consolidated Cases” – are repealed. Pursuant to Labor Code section 5307(c), issues relating to the assignment of consolidated cases are transferred to proposed Court Administrator Rule 10260. All other issues relating to consolidated cases are addressed by Rule 10589.

Section Added: 10593.

Rule 10593, entitled “Testimony of Judicial Quasi-Judicial Officers of the Workers’ Compensation Appeals Board or of the Division of Workers’ Compensation,” is added. Rule 10593 essentially precludes Commissioners, Deputy Commissioners, PWCJs, WCJs, pro tem WCJs, special masters appointed by the WCAB, the AD (and her or his 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)

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

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 PW CJ of the district office having venue (or by the Appeals Board, if the petition relates to a pending or impending petition for reconsideration, removal, or 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.

Section Added: 10603.

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

Section Amended: 10608.

Rule 10608, currently entitled “Filing and Service of Physicians’ Reports,” is amended. It is re-titled “Filing and Service of Medical Reports and Medical-Legal Reports.” The essential elements of Rule 10608 are substantially similar to the essential elements of current Rule 10608. However, new Rule 10608 makes 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, new Rule 10608 makes 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, new Rule 10608 makes 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. Also, new Rule 10608 provides 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, new Rule 10608 provides 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.

Section Added: 10610.

Rule 10610, entitled “Admissibility and Service of Reports from Non-Medical Experts,” is added. Rule 10610 provides 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, Rule 10610 provides that reports of non-medical experts shall be served in the same time and manner as required for the 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, Rule 10610 provides 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.

Section Amended: 10616.

Rule 10616, entitled “Employer-Maintained Records,” is amended. The amendment 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 made because, pursuant to Labor Code section 5307(c), the provisions relating to the “filing” of such records are transferred to various rules of the Court Administrator.

Section Amended: 10626.

Rule 10626, entitled “Hospital and Physicians’ Records,” is amended. Rule 10626 provides that, subject to Labor Code section 3762 and except as otherwise provided by law, parties, attorneys, agents, and physicians may examine and copy relevant medical records. Also, Rule 10626 deletes the aspect of current Rule 10626 providing 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 provision is deleted because Rule 10629 now addresses the designation of relevant portions of excerpted physician, hospital, and dispensary records.

Section Added: 10629.

Rule 10629, entitled “Filing and Listing of Exhibits,” is added. It requires that, at every hearing 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. Rule 10629 also provides that, if any such hearing is continued, a new exhibit list shall be prepared and served, although certain exceptions are made. Further, Rule 10629 sets forth various requirements regarding the listing of exhibits. Finally, Rule 10629 provides that injured employees, dependents or uninsured employers who are unrepresented may be referred to the Information and Assistance Office to help prepare the exhibit list..

Section Repealed: 10630.

Rule 10630, entitled “Return of Exhibits,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of current Rule 10630 (along with provisions of Rules 10755 and 10758) are incorporated into Court Administrator Rule 10273.

Section Amended: 10750.

Rule 10750, entitled “Record of Proceedings,” is amended. In part, Rule 10750 clarifies that, although adjudication files are to be electronically stored and maintained in EAMS by DWC, the adjudication files are nonetheless files of the WCAB. Rule 10750 also clarifies, in light of EAMS, that all of the documents listed in the rule (which now also include “the arbitrator’s file, if any”) are part of the record of proceedings, whether maintained in paper or electronic form. Rule 10750 further provides 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.”)

Section Amended: 10751.

Rule 10751, currently entitled “Legal File,” is amended. It is re-entitled “Adjudication File.” Rule 10751 clarifies 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. 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. Finally, Rule 10751 deletes 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. A similar provision is now contained in Rule 10750.

Section Amended: 10753.

Rule 10753, entitled “Inspection of Files,” is amended. It states that, except as provided by sections 10754, 10271, and 10272, or as ordered by a WCJ or the Appeals Board, the adjudication case files of the WCAB may be inspected in accordance with the provisions of section 10270. These changes have been made because, pursuant to Labor Code section 5307(c), the Court Administrator has adopted 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.”

Section Amended: 10754.

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

Section Amended: 10755.

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

Sections Repealed: 10758 and 10762.

Rules 10758 and 10762 – entitled, respectively, “Destruction of Case Files” and “Reporter’s Notes” – are repealed. Rule 10755, entitled “Destruction of Records,” is amended to provide that the WCAB’s records may be destroyed in accordance with Court Administrator Rule 10273. Because Court Administrator Rule 10273 combines elements of current Rules 10758 and 10762, these rules are no longer necessary.

Section Amended: 10770.

Rule 10770, entitled “Lien Procedure,” is amended. Rule 10770 requires most lien claimants to submit their liens using optical character recognition (OCR) forms. Rule 10770 also requires 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, with certain specified exceptions. Further, Rule 10770 provides 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 Rule 10770.5. Additionally, Rule 10770 makes provisions for “amended” liens, which are defined. Rule 10770 next requires lien claimants to notify the WCAB and the parties within five business days after a lien has been resolved or withdrawn. Finally, capital 10770 provides that a lien claimant shall be notified of all hearings, whether or not the hearing directly involves the lien.

Section Added: 10770.5.

Rule 10770.5, entitled “Verification to Filing of Lien Claim or Application by Lien Claimant,” is added. It requires that lien claims and applications for adjudication by lien claimants seeking reimbursement for medical or medical-legal expenses would have to include a verification under penalty of perjury specifying that one of the time limit set forth in Labor Code section 49 of 3.6 has been met. Further, Rule 10770.5 requires that, if the lien claimant is filing an application, its verification under penalty of perjury also shall contain: (1) a statement specifying in detail the facts establishing that venue in the district office being designated is proper pursuant to Labor Code section 5501.5(a)(1) or Labor Code section 5501.5(a)(2); and (2) a statement specifying in detail the facts establishing that the filing lien claimant has made a diligent search and has determined that no adjudication case number exists for the same injured worker and same date of injury at any district office. A “diligent search” is defined. Finally, Rule 10770.5 establishes the format for the verification under penalty of perjury and it provides that a failure to attach the verification – or an incorrect verification – may be a basis for sanctions.

Section Added: 10770.6.

Rule 10770.6, entitled “Verification to Filing of Declaration of Readiness By or On Behalf of Lien Claimant,” is added. Consistent with Labor Code section 4903.6(b), Rule 10770.6 requires that no declaration of readiness to proceed shall be filed with respect to a lien claim that seeks reimbursement for medical or medical-legal expenses, unless accompanied by a verification under penalty of perjury certifying either (1) that the underlying case has been resolved or (2) that at least six months have elapsed from the date of injury and the injured worker has chosen not to proceed with his or her case. Rule 10770.6 requires the declarant to make a “diligent search” to determine that the injured worker has chosen not to proceed with his or her case and requires that the verification specify the efforts made in conducting the diligent search. A “diligent search” is defined. Finally, Rule 10770.6 establishes the format for the verification under penalty of perjury and it provides that a failure to attach the verification – or an incorrect verification – may be a basis for sanctions.

Section Repealed: 10771.

Rule 10771, relating to “Medical-Legal Expenses,” is repealed. It is unnecessary in light of the adoption of Rule 10770.5, which more extensively covers the same subject.

Section Amended: 10779.

Rule 10779, entitled “Disbarred and Suspended Attorneys,” is amended. Rule 10779 now provides 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 cannot petition the Appeals Board for permission to appear in WCAB proceedings.

Section Added: 10782.

Rule 10782, entitled “Vexatious Litigants,” is added. Rule 10782 defines “vexatious litigant,” which includes 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. Rule 10782 sets forth the procedure for how a self-represented party or lien claimant may be declared a “vexatious litigant” and it establishes the legal effect of being declared a “vexatious litigant.” However, Rule 10782 recognizes that, 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 Rule 10782 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.

Section Added: 10785.

Rule 10785, entitled “Electronically Filed Decisions, Findings, Awards, and Orders,” is added. This rule 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.

Section Amended: 10840.

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

Section Amended: 10842.

Rule 10842, entitled “Contents of Petition for Reconsideration and Answer,” is amended. It is re-entitled “Contents of Petitions for Reconsideration, Removal, and Disqualification and Answers.” Rule 10842 provides that petitions for reconsideration, removal and disqualification (and answers thereto) shall fairly state all of the material evidence and shall separately state and clearly set forth each contention. Rule 10842 also provides that

a failure to state all of the material evidence may be a basis for denying a petition for reconsideration, removal, and disqualification. Rule 10842 additionally requires that evidentiary statements shall be supported by references that state with specificity the place in the record where the evidentiary statement appears. These requirements are set out in Rule 10842. Rule 10842 finally provides that documents that are already in evidence or are otherwise already part of the adjudication file may not be attached to petitions for reconsideration, removal, and disqualification (and answers thereto).

Section Amended: 10843.

Rule 10843, currently entitled “Petitions to Remove,” is amended. It is re-entitled “Petitions for Removal and Answers” and it imposes a new requirement that petitions for removal and answers thereto must be verified under penalty of perjury.

Section Added: 10844.

Rule 10844, entitled “Petitions for Disqualification and Answers,” is added. It requires that any petition for disqualification (and any answer thereto) must be verified under penalty of perjury.

Section Added: 10845.

Rule 10845, entitled “General Requirements for Petitions for Reconsideration, Removal, and Disqualification, and for Answers and Other Documents,” is added. Rule 10845 requires that, except as otherwise provided by sections 10840 or 10865, all documents filed in connection with any petition for reconsideration, petition for removal, petition for disqualification or any other matter pending before the Appeals Board shall comply with the requirements of Court Administrator Rules 10228, 10229, 10230, 10232, 10235, and 10236. These provisions are necessary in light of EAMS. Rule 10845 requires compliance with the general 25-page limitation of Court Administrator Rule 10232(a)(6), however, any supplemental petition or answer submitted under Rule 10848 shall not exceed ten pages. Rule 10845 allows the Appeals Board to make exceptions on its own motion or on a clear and convincing showing of good cause. Finally, Rule 10845 provides that a document sent directly to the Appeals Board by fax or e-mail will not be accepted for filing, unless otherwise ordered by the Appeals Board.

Section Amended: 10846.

Rule 10846, entitled “Skeletal Petitions,” is amended to provide that petitions for removal and disqualification, in addition to petitions for reconsideration, may be denied if unsupported by specific references to the record and to the principles of law involved. Rule 10846 also allows all three types of petitions (reconsideration, removal, and disqualification) to be “dismissed.”

Section Amended: 10848.

Rule 10848, entitled “Supplemental Petitions,” is amended to provide that for petitions for removal and disqualification (as well as petitions for reconsideration): (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.

Section Amended: 10850.

Rule 10850, entitled “Proof of Service,” is amended to specifically require that service of petitions for reconsideration, removal, and disqualification be made “in accordance with Rule 10505.” Rule 10505 applies to service by parties and lien claimants, and it sets out proof of service standards for personal service, service by mail, service by e-mail, and service by fax.

Section Amended: 10860.

Rule 10860, entitled “Report of Workers’ Compensation Judge,” is amended 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.

Section Amended: 10865.

Rule 10865, currently entitled “Reconsideration--Labor Code Sections 3201.5 and 3201.7,” is amended. It is re-entitled “Reconsideration of Arbitration Decisions Made Pursuant To Labor Code Sections 3201.5 and 3201.7.” Rule 10865 sets forth various requirements relating to petitions for reconsideration from an arbitration decisions in “carve-out” cases. A “carve-out” petitions for reconsideration (together with a document cover sheet) is to be filed directly with the office of the Appeals Board in San Francisco, and not with any district office, including the San Francisco district office. 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 explaining the defect and indicating that the petition should be filed directly with the Appeals Board in San Francisco. Rule 10865 also provides that a petition for reconsideration in carve-out cases shall include a completed application for adjudication of claim (but without the venue designation), which shall be appended to the petition under a document separator sheet. 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. The arbitrator is required to submit a photocopy of the complete arbitration record to the Appeals Board within 15 days after receipt of the petition for reconsideration, and the arbitrator is required to prepare a Report on the petition consistent with Rule 10860.

Section Amended: 10866.

Rule 10866, currently entitled “Reconsideration of Arbitrator’s Decisions or Awards,” is amended. It is re-entitled “Reconsideration of Arbitrator’s Decisions or Awards Made Pursuant To the Mandatory or Voluntary Arbitration Provisions of Labor Code Sections 5270 through 5275.” Rule 10866 provides that a petition for reconsideration from an arbitration decision made pursuant to sections 5270 through 5275 may be filed with any district office or with the office of the Appeals Board in San Francisco. However, Rule 10866 requires the arbitrator to submit a photocopy his or her file, and of his or her report and recommendation on the petition, to the district office having venue. The costs of photocopying are to be reimbursed to the arbitrator in accordance with the provisions of Labor Code section 5273.

Section Repealed: 10867.

Rule 10867, relating to “Report of Arbitrator,” is repealed because its provisions are merged into Rule 10866.

Section Repealed: 10890.

Rule 10890, relating to “Walk-Through Documents,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of Rule 10890 are transferred to Court Administrator Rule 10280.

Section Amended: 10946.

Rule 10946, currently entitled “Medical Reports,” is amended. It is re-entitled “Medical Reports in Subsequent Injuries Benefits Trust Fund Cases.” Rule 10946 requires that medical reports shall be served on the Subsequent Injuries Benefits Trust Fund (SIF) no later than thirty (30) days prior to the mandatory settlement conference (MSC) or other hearing, unless service is waived by SIF.

Section Amended: 10950.

Rule 10950, currently entitled “Appeal from Order Granting or Denying Petition for Order Requiring Employee to Select Employer-Designated Physician,” is amended. It is re-entitled “Petitions Appealing Orders Issued by the Administrative Director.” Rule 10950 provides that, except for petitions appealing audit penalty assessments issued by the Administrative Director pursuant to Labor Code section 129.5(g), all petitions appealing orders issued by the AD are to be filed in accordance with the provisions of Article 9 (section 10290 et seq.) of the rules of the Court Administrator. Then, when a WCJ 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.

Section Repealed: 10952.

Rule 10952, entitled “Appeal of Notice of Compensation Due,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of Rule 10952 are transferred to Court Administrator Rule 10291.

Section Amended: 10953.

Rule 10953, entitled “Petition Appealing Audit Penalty Assessment – Labor Code Section 129.5(g),” is amended. Under Rule 10953, 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. Some additional changes to Rule 10953 are made in light of the EAMS. A petition appealing a Labor Code section 129.5(g) penalty assessment must be accompanied by a completed document cover sheet. Moreover, after the filing of the petition, an EAMS adjudication case will be created and an EAMS adjudication case number will be assigned, which will be served by the WCAB on the AD and on the parties and attorneys listed on the proof of service to the petition. Furthermore, a certified photocopy of the AD’s record of proceedings is submitted, which the WCAB scans into EAMS and discards.

Section Repealed: 10955.

Rule 10955, entitled “Rehabilitation Appeals,” is repealed. Pursuant to Labor Code section 5307(c), the provisions of Rule 10955 are transferred to Court Administrator Rule 10293.

Section Repealed: 10957.

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

Sections Repealed: 10995 and 10996.

Rules 10995 and 10996 – entitled, respectively, “Mandatory Arbitration” and “Voluntary Arbitration” – are repealed. Pursuant to Labor Code section 5307(c), the provisions of Rules 10995 and 10996 are transferred to Court Administrator Rules 10295 and 10296.

STATE REIMBURSABLE MANDATE:

The WCAB has determined that its proposed regulatory action (i.e., its adoption, amendment, or repeal of various of its rules of practice and procedure) will not impose any new mandated programs on any local agency or school district. The California Supreme Court has determined that an increase in workers’ compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; cf. *City of Sacramento v. State of California* (1990) 50 Cal.3d 51; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.) The requirements imposed on all employers by the proposed changes to these regulations, although not a benefit level increase, are similarly not a new State mandate because the regulations apply to all employers, private and public, and not uniquely to local governments.

COST OR SAVINGS TO LOCAL AGENCIES OR SCHOOL DISTRICTS:

The WCAB’s proposed regulatory action (i.e., its adoption, amendment, or repeal of various of its rules of practice and procedure) may, from time to time, impose minor costs on local agencies and school districts. Any such costs, however, will be non-discretionary because the requirement that every employer contribute to the funding of California’s workers’ compensation programs is a statutory obligation. Furthermore, any such costs are non-reimbursable because, as discussed above, the requirement on employers to contribute to the funding of California’s workers’ compensation programs is not unique to local agencies or school districts and applies to all employers alike, public and private, including the State of California. (See Lab. Code, §§ 62.5(a)(1) & (e)(1) (workers’ compensation system is funded by surcharges assessed “upon all employers, as defined in [Labor Code] Section 3300”), 3300 (defining “employer” to include “[t]he State and every State agency,” “[e]ach county, city, district, and all public and quasi public corporations and public agencies therein,” and “[e]very person including any public service corporation, which has any natural person in service”), 3700 (providing that “[e]very employer ... “shall secure the payment of [workers’] compensation” either by being insured or by obtaining a certificate of consent to self-insure, including “any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state”).)

COST OR SAVINGS TO STATE AGENCIES:

The WCAB’s proposed regulatory action (i.e., its adoption, amendment, or repeal of various of its rules of practice and procedure) may, in certain situations, impose minor costs on State agencies. (State government accounts for about 3% of the occupational injuries and illnesses.) Any such costs are non-reimbursable, however, since, as discussed above, the requirement that employers contribute to the funding of California’s workers’ compensation programs is not unique to State agencies and applies to all employers alike, both public and private. (See Lab. Code, §§ 62.5(a)(1) & (e)(1) (workers’ compensation system is funded by surcharges assessed “upon all employers, as defined in [Labor Code] Section 3300”), 3300 (defining “employer” to include “[t]he State and every State agency,” “[e]ach county, city, district, and all public and quasi public corporations and public agencies therein,” and “[e]very person including any public service corporation, which has any natural person in service”).³

³ Although Labor Code section 3700 provides that “[e]very employer *except the state*” shall secure the payment of workers’ compensation” either by being insured or by obtaining a certificate of consent to self-insure, this means merely that the State may be legally uninsured. It does not immunize the State from payment of workers’ compensation benefits.

COST OR SAVINGS IN FEDERAL FUNDING TO THE STATE:

The proposed regulations will not affect any federal funding.

DETERMINATION REGARDING SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS:

The WCAB declares that it has initially determined that its proposed regulatory action (i.e., its adoption, amendment, or repeal of various of its rules of practice and procedure) will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposed regulatory action involves changes in the procedures for the adjudication of workers' compensation cases that do not impose significant financial or economic burdens on the regulated public; there is no change in the amount of compensation that is paid to injured workers.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES:

Preliminarily, the WCAB emphasizes that it has examined the cost impacts only of its own proposed regulatory action. That is, the WCAB will not examine the cost impact of the Electronic Adjudication Management System (EAMS), except to the extent that EAMS has lead the WCAB to adopt regulations that, in and of themselves, have a cost impact. The WCAB has concluded that none of its EAMS-related regulations have any cost impacts.⁴

Also, the WCAB will not examine the cost impact of the Legislature's transfer of some regulatory authority over the workers' compensation adjudication system to the Court Administrator of DWC. (See Lab. Code, § 5307(a).) Therefore, the WCAB will not address the cost impact of the regulations being proposed by the Court Administrator, including: (1) those that cover subjects formally covered by the WCAB's rules; or (2) those that implement EAMS and establish procedures for EAMS. Similarly, the WCAB will not address the cost impact of regulations it has repealed in light of the Legislature's transfer of some regulatory authority to the Court Administrator, even if the Court Administrator has decided not to adopt the same or similar rules.

The WCAB has concluded that none of its proposed new or amended rules have any cost impacts.

Proposed Rule 10561 does expand the types of "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay" that are expressly subject to sanctions under Labor Code section 5813. However, current Rule 10561 already provides that "[v]iolations subject to the provisions of Labor Code Section 5813 shall include but are not limited to the following" (Emphasis added.) Therefore, nothing in current Rule 10561 precludes the imposition of sanctions for "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay" that are not listed therein (and that are now listed in proposed Rule 10561). Moreover, the parties and representatives to a workers' compensation case pending before the WCAB may avoid the costs associated with proposed Rule 10561 by simply not engaging in "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."

Proposed Rule 10603 does limit when oversized exhibits, diagnostic imaging, physical exhibits, and exhibits on media may be filed and does require the party introducing such exhibits to retain them after trial until the later of either: (1) five years after the filing of the initial application for adjudication (or other case opening document) or (2) at least six months after all appeals have been exhausted or the time for seeking appellate

⁴ As discussed above, EAMS is a computerized system that *the Division of Workers' Compensation* (DWC) has created pursuant to a legislative appropriation. (Stats. 2004, ch. 208, Item 7350-001-0223(4), p. 592 (S.B. 1113 [appropriations bill].) The WCAB will leave it to the Court Administrator of DWC to assess the cost impacts of EAMS.

review has expired with respect to the decision on the issue(s) for which the exhibit was offered in evidence. However, in large part, this is merely a codification of existing practice. In essence, the WCAB has never stored exhibits that do not readily fit within its paper case files. Instead, such exhibits have routinely been returned to the party introducing them, with either a formal order or an implicit expectation (by custom and practice) that the party will retain the exhibit within its possession or control. Occasionally, under its current rules, the WCAB will keep photographs, videotapes, CDs, and DVDs in its paper files. However, these are duplicates (not “originals” per se), and the parties will normally keep copies of these photographs, videotapes, CDs, and DVDs in their possession or control in any event. Accordingly, proposed Rule 10603 does not cause any identifiable costs.

Proposed Rule 10610 allows for the admission in evidence of the written report of a non-medical expert, in lieu of or in addition to the expert’s sworn testimony at hearing. As discussed in the Initial Statement of Reasons, however, written report of a non-medical experts are commonly admitted in evidence. Therefore, a rule expressly allowing the admission of a report that would have been admitted even in the absence of the rule will not have any cost impact. Moreover, to the extent that written report of a non-medical experts have been excluded from evidence, a rule expressly allowing their admission still will not have any adverse cost impact. To the contrary, there are normally extra costs associated with 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). Further, the costs associated with an expert’s preparation for trial often substantially overlap the costs associated with an expert’s preparation of a written report because, in either case, the expert must do the same interviews, review the same documents, and conduct the same tests in order to render his or her opinion. Yet, even absent proposed Rule 10610, an expert is not entitled to a “double recovery” to the extent his or her work in preparing a report overlaps or duplicates his or her work in preparing to testify. (See *Costa v. Hardy Diagnostic* (2006) 71 Cal.Comp.Cases 1797, 1819 (Appeals Board en banc).) Moreover, even absent Rule 10610, the WCAB has the discretion to award costs for the preparation of non-medical expert’s report, even if the report itself is not admissible. (*Barr v. Workers’ Comp. Appeals Bd.* (2008) __ Cal.App.4th __ [2008 Cal. App. LEXIS 942, 78 Cal.Rptr.3d 732].) Accordingly, proposed Rule 10610 does not cause any identifiable costs.

Proposed Rule 10770, among other things, changes the circumstances under which lien claims must be served. However, proposed Rule 10770 requires a *lesser* degree of service (and, therefore lesser overall costs) than current Rule 10770, because it allows a lien claimant not to serve the injured employee (even if he or she is unrepresented) if the employee’s underlying claim is deemed to have been resolved. (Proposed Rule 10770 then goes on to define when an employee’s underlying claim is deemed to have been resolved.)

Proposed Rules 10770.5 and 10770.6 to set out certain verification requirements for the filing of lien claims, applications for adjudication, and declarations of readiness to proceed by lien claimants seeking reimbursement for medical or medical-legal expenses under section 4903(b). However, these proposed rules merely implement the statutory requirements of Labor Code section 4903.6 and, therefore, any costs arise out of the Legislature’s enactment, not the proposed rules.

The WCAB concludes that all of its other new or amended rules either do not significantly alter costs as they exist under current rules, or reduce costs as they exist under current rules.

ECONOMIC IMPACT ON SMALL BUSINESSES:

The WCAB estimates that approximately half of the businesses affected are small businesses, either third-party administrators or law firms that handle workers’ compensation cases. The impact on these businesses is discussed under *Cost Impacts on Representative Private Persons or Businesses*, above.

ASSESSMENT OF EFFECTS ON JOB AND/OR BUSINESS CREATION, ELIMINATION OR EXPANSION:

The WCAB has determined that the changes proposed to the regulations will have no effect on the creation or elimination of jobs or existing businesses within California, or affect the expansion of current California businesses.

IMPACT ON HOUSING COSTS:

The WCAB has determined that the changes proposed to the regulations will have no effect on housing costs.

CONSIDERATION OF ALTERNATIVES:

The WCAB has identified no reasonable alternatives to its proposed regulatory action, and no such reasonable alternatives have been brought to the attention of the WCAB, that: (1) would be more effective in carrying out the purposes for which these regulations are proposed; or (2) would be as effective and less burdensome to affected persons than the proposed action.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS:

Consistent with Government Code section 11346.45, a tentative draft of the text of the WCAB's proposed regulations was made available for informal pre-regulatory public comment through the WCAB's web forum at <http://www.dir.ca.gov/wcab/wcabforums.htm>. As reflected in the Initial Statement of Reasons, the WCAB has considered and responded to the informal pre-regulatory public comments.

PRESENTATION OF ORAL AND/OR WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION OF WRITTEN COMMENTS:

Members of the public are invited to present oral and/or written statements, arguments or evidence at the public hearing. In addition, any person may submit written comments on the proposed regulations, prior to the public hearing. The address for submission of comments by mail is:

Neil P. Sullivan
Assistant Secretary and Deputy Commissioner
Workers' Compensation Appeals Board
Post Office Box 429459
San Francisco, CA 94142-9459

The address for submission of comments by delivery service or personal delivery is:

Neil P. Sullivan
Assistant Secretary and Deputy Commissioner
Workers' Compensation Appeals Board
455 Golden Gate Avenue, Ninth Floor
San Francisco, CA 94102

The address for submission of comments by electronic mail (e-mail) is WCABRules@dir.ca.gov.

Unless submitted at the public hearing, all written comments must be *received* by the agency contact person, no later than 5:00 p.m. on September 12, 2008. The WCAB prefers written comments to oral testimony. If you have provided a written comment, it will not be necessary to present oral testimony at the public hearing.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND INTERNET ACCESS:

In addition to the Informative Digest included in this Notice, an Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice, below. In addition, upon request, the entire rulemaking file will be made available for inspection and copying at the address and at the times indicated below. As of the date of this Notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, the proposed text of the regulations, and the pre-rulemaking comments.

In addition, the above-cited materials may be accessed on the internet at www.dir.ca.gov/wcab/WCABPropRegs2008.htm.

CONTACT PERSON:

Any interested person may inspect a copy, or direct questions regarding, the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the Rulemaking File. The Rulemaking File may be inspected by any interested person, and will be available for inspection at the Workers' Compensation Appeals Board, 455 Golden Gate Avenue, Ninth Floor, San Francisco, CA 94102, between the hours of 9:00 AM and 4:30 PM, Monday through Friday. Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing from the contact person:

Annette Gabrielli
Regulations Coordinator
Workers' Compensation Appeals Board
Post Office Box 429459
San Francisco, CA 94142-9459
E-mail: WCABRules@dir.ca.gov

The telephone number of the contact person is (415) 703-4580.

BACKUP CONTACT PERSON/CONTACT PERSON FOR SUBSTANTIVE QUESTIONS:

In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following backup contact persons:

Neil P. Sullivan
Assistant Secretary and Deputy Commissioner
Workers' Compensation Appeals Board
Post Office Box 429459
San Francisco, CA 94142-9459
E-mail: WCABRules@dir.ca.gov

The telephone number of the backup contact person/contact person for substantive questions is (415) 703-4554.

Note: In the event the backup contact person/contact person for substantive questions is unavailable, inquiries should be directed to the following alternative backup contact person/contact person for substantive questions at

the same address, email address and telephone number noted above: Rick Dietrich, Assistant Secretary and Deputy Commissioner.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING:

Consistent with Government Code section 11346.8(c) and Cal. Code Regs., tit. 1, § 44, if the WCAB makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF FINAL STATEMENT OF REASONS:

Following its preparation, a copy of the Final Statement of Reasons consistent with Government Code Section 11346.9(a) may be obtained from the contact person indicated above.

In addition, the Final Statement of Reasons will be posted on the internet and may be accessed at www.dir.ca.gov/wcab/WCABFinalRegs2008.htm.

AUTOMATIC MAILING:

A copy of this Notice, including the Informative Digest, the Initial Statement of Reasons, and the text of the proposed regulations, will automatically be sent to those interested persons on the mailing list of the WCAB, and to all persons who have requested notice of hearing as required by Labor Code Section 5307.4.

If adopted, the regulations as proposed will appear sequentially in the California Code of Regulations at Title 8, Chapter 4.5, Subchapter 2, commencing with Section 10300.