

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

FINAL STATEMENT OF REASONS

Subject Matter of Regulations:

Title 8, California Code of Regulations, Sections 10300 through 10999.

Rules of Practice and Procedure of the Workers' Compensation Appeals Board.

BACKGROUND TO REGULATORY PROCEEDING:

The Workers' Compensation Appeals Board (WCAB) adopts and amends certain of its Rules of Practice and Procedure (Rules),¹ specifically those relating to lien claims. The changes are being made to WCAB Rules 10582.5 (newly adopted), 10770 (amended), and 10770.1 (newly adopted). (Cal. Code Regs., tit. 8, §§10582.5, 10770, 10770.1.) These changes are taken pursuant to the WCAB's rulemaking power under Labor Code sections 5307(a), 133, 5309 and 5708,² subject to the procedural requirements of section 5307.4. This Final Statement of Reasons has been prepared to comply with the procedural requirements of section 5307.4 and for the convenience of the regulated public.³

All three of the newly adopted and amended Rules become effective on May 21, 2012. The provisions of Rule 10582.5, however, will become *operative* on August 1, 2012. (Cal. Code Regs., tit. 8, § 10582.5(j).)⁴

1. Section Added: 10582.5.

Statement of Specific Purpose and Reasons for Addition of Section 10582.5

A massive number of lien claims filed with the WCAB currently lie dormant, i.e., no declaration of readiness to proceed (DOR) has been filed on these liens for many months or even years after the injured employee's underlying case has resolved.⁵ Often, there has been no case activity on long dormant liens because the defendant made payment years ago that was acceptable to the lien claimant but the lien claimant failed to withdraw its lien. (See new Cal. Code Regs., tit. 8, § 10770(f) [formerly § 10770(g)].)

These long dormant lien claims are problematic for the WCAB because, while they remain of record, the WCAB is obligated to expend time, money, and resources in notifying the lien claimants of any and all scheduled hearings. (See new Cal. Code Regs., tit. 8, § 10770(g) [formerly § 10770(h)].) Also, once the injured

¹ The WCAB's Rules are found in Cal. Code Regs., Title 8, Chapter 4.5, Subchapter 2, section 10300 et seq. Existing Rules not being amended remain in full force and effect.

² All further statutory references are to the Labor Code unless otherwise specified.

³ Under Government Code section 11351, the WCAB is not subject to Article 5 (commencing with section 11346 [Procedure for Adoption of Regulations]), Article 6 (commencing with section 11349 [Review of Proposed Regulations]), and Article 7 (commencing with section 11349.7 [Review of Existing Regulations]) 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.

⁴ Generally, the effective date and the operative date for a statute or regulation are one and the same. On occasion, however, the operative date will be after the effective date. (See Lab. Code, § 5814(i); *Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426 [70 Cal.Comp.Cases 294]; *Abney v. Aera Energy* (2004) 69 Cal.Comp.Cases 1552 (Appeals Board en banc).) Here, for reasons discussed below, the WCAB is providing for a different operative date for Rule 10582.5.

⁵ Labor Code section 4903.6(b) provides that medical treatment and medical-legal lien claimants under section 4903(b) cannot file a DOR "until the underlying case has been resolved or where the applicant chooses not to proceed with his or her case." (See also Cal. Code Regs., tit. 8, §§ 10250, 10301(x)(3).)

employee's underlying case has resolved, the WCAB either must set a lien conference, issue a 10-day notice of intention to order full or partial payment of the lien, or issue a 10-day notice of intention to disallow the lien. (See Cal. Code Regs., tit. 8, § 10888.) Again, this requires the WCAB to expend time, money, and resources.

These long dormant lien claims are also problematic for defendants. When there are outstanding lien claims, the defendants cannot close their files, predict their future liability, or unfetter their reserves. Also, while lien claims lie dormant, evidence can be lost and witnesses can disappear or have their memories dimmed. Additionally, files and/or records of payments can be lost, particularly where, for example, a self-insured employer or insurance carrier changes claims administrators. Therefore, if a lien claim is resurrected after many years (so-called "zombie liens"), it is often difficult for a defendant to present an effective defense or even to know whether it already made payments on the lien.

Rule 10582.5 essentially provides that, after a lien claimant is given notice and an opportunity to be heard, a lien claim may be dismissed for lack of prosecution if the lien claimant does not file a DOR by the later of: (1) 180 days after it has become a "party";⁶ or (2) 180 days after a lien conference or lien trial in which the lien claim is directly at issue is ordered off calendar.⁷ Rule 10582.5 also establishes procedures that must be followed before a lien claim may be dismissed for lack of prosecution. It further establishes certain classes of liens that are not subject to dismissal for lack of prosecution, i.e., the lien claims of specified governmental entities (including the Employment Development Department (EDD)) and of self-represented lien claimants with living expense, burial expense, and spousal or child support expense liens.

Rule 10582.5 is modeled in part on current Rule 10582. (Cal. Code Regs., tit. 8, § 10582.) Rule 10582 allows an injured employee's entire case to be dismissed for lack of prosecution, after notice and an opportunity to be heard, unless it is activated for hearing within one year after the filing of the application or after the entry of an order taking the case off calendar (OTOC).

Rule 10582.5 will cause lien claimants to pursue their lien claims in a timely manner before evidence is lost and witnesses disappear or have their memories dimmed. This will result in a reduction of the number of hearings needed to address discovery issues in lien cases. Such hearings arise more frequently when evidence is no longer available or difficult to unearth.

Also, Rule 10582.5 will allow a dormant lien claim to be dismissed through pleadings, without a hearing, if a lien claimant does not timely object to the dismissal after having notice and an opportunity to be heard or its objection, on its face, fails to show good cause. Therefore, this frees up calendar time for hearings resolving disputes between injured employees and their employers or insurance carriers over the employees' rights to benefits.

Further, Rule 10582.5 will help create more certainty and predictability in workers' compensation claims management by allowing insurance carriers and self-insured employers to close their cases on long dormant lien claims, liquidate their reserves, and more accurately predict future liabilities.

The provisions of Rule 10582.5 will not become operative until August 1, 2012. This gives lien claimants a reasonable time to file a DOR before their lien claims are subject to potential dismissal for lack of prosecution. (See *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122 [a party must have a reasonable time to avail itself of a remedy before its right is cut off]; cf. Lab. Code, § 5814(g) & (i) [two-year statute of limitations for filing a penalty claim enacted by Senate Bill (SB) 899 did not become operative until June 1, 2004, which

⁶ Only a party may file a DOR (Cal. Code Regs., tit. 8, § 10250(a).) A lien claimant becomes a party when the injured employee's underlying case has been resolved or the employee has chosen not to proceed with it. (Cal. Code Regs., tit. 8, § 10301.)

⁷ In Rule 10582.5 as it was originally proposed, a lien claimant would have had one year to file a DOR after it has become a party or after the entry of an order taking off calendar. After public comments, however, the WCAB concluded that 180 days (essentially, six months) would be adequate. (See Summary Of and Response to Public Comments, *infra*.)

gave injured employees approximately 2-½ months after SB 899’s April 19, 2004 effective date to perfect their penalty claims].)⁸

Specific Technologies or Equipment

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

Consideration of Alternatives

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

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

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

2. Section Amended: 10770.

Statement of Specific Purpose and Reasons for Amendments to Section 10770

The amendments to section 10770 are intended to address a few basic problems.

One problem is that, under former section 10770, too much paper was being filed with the WCAB. That is, prior to these amendments, lien claimants were required to file not only opening liens, but also amended liens, and they were required to file supporting documentation with both their opening and amended liens.

The provisions of Rule 10770(b)(1) and (2) change the *filing* requirements for lien claims to provide that: (1) only original (i.e., initial or opening) liens shall be filed, and *not* amended liens; and (2) that *no* supporting documentation for *any* liens (original or amended) shall be filed. However, supporting documentation and/or amended liens may be filed as proposed exhibits (see Cal. Code Regs., tit. 8, § 10233(g) & (h)) or as ordered by the WCAB. These provisions of Rule 10770(b) also allow the WCAB to reject and destroy amended liens and supporting documentation lodged in violation of the Rule, as well as to destroy any amended lien claim or any documentation in support of any lien claim (original or amended) that was previously lodged or filed.

These provisions will significantly reduce the overall volume of paper relating to lien claims that has been or will be filed at the district offices. This will help alleviate scanning backlogs.⁹ These provisions also will have other beneficial effects, including: (1) reducing the number of support staff needed to process lien filings; (2) reducing wear and tear on office equipment; and (3) eliminating the need to correct defects or to prepare and issue deficiency notices—with their associated costs of postage, paper, and envelopes (see Cal. Code Regs., tit. 8, § 10222(a))—that would result if amended liens could still be filed, thereby allowing support staff to perform other functions.

⁸ Based on the reasoning of *Rosefield Packing*, this 2-½ month period was determined to be reasonable. (*Green v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1441 [70 Cal.Comp.Cases 294]; *Abney v. Aera Energy* (2004) 69 Cal.Comp.Cases 1552, 1561-1562 (Appeals Board en banc).)

⁹ As it was originally envisioned, the Electronic Adjudication Management System (EAMS) was going to be virtually paperless. However, due to problems that need not be addressed here, a massive number of documents are currently being filed in paper form (see, generally, Cal. Code Regs., tit. 8, §§ 10210(m) & (x), 10228(a), (c), (d), (e), & (f), 10232, 10232.1, 10232.2, 10400, 10770, 10845, 10866(c)) and then scanned into EAMS by district office staff (see Cal. Code Regs., tit. 8, §§ 10210(m) & (x), 10216(a), 10228(b), 10295(g), 10296(e)). Because of the sheer volume of documents that must be scanned, some district offices have significant scanning backlogs.

It should be emphasized that Rule 10770(c) still requires lien claimants to *serve* all original liens, amended liens, and supporting documentation *on the parties*. It also clarifies what must be included in a “full statement or itemized voucher” supporting a lien claim (see Lab. Code, § 4903.1(c)). Therefore, the parties will remain fully apprised of the nature and amount of each lien claim, even though some information is not being *filed* with the WCAB.

Rule 10770 also addresses the problem of so-called “zombie liens.”¹⁰ These arise when a medical treatment or medical-legal billing is paid by the defendant at a lower amount than billed, with the provider writing off the balance. Years later, however, a debt collection firm files a lien with the WCAB—or resurrects a previously filed lien—after either purchasing the provider’s accounts receivable or agreeing with the provider to pursue the lien for a significant percentage of any recovery. The debt collection firms then use the WCAB’s scarce judicial resources to attempt to collect some payment on these ancient bills.¹¹ In the past, these zombie liens were arguably viable because some interpretations of Labor Code sections 4904(a)¹² and 4903.1(b)¹³ had created a potential loophole in the Labor Code section 4903.5 statute of limitations.¹⁴

Rule 10770(b)(3)¹⁵ interprets section 4904(a) to mean that if a lien claim (or notice of any claim that would be allowable as a lien) is *served on a defendant*, this does not constitute the *filing* of a lien *with the WCAB*.¹⁶

Also, Rule 10770(b)(4) interprets sections 4904(a) and 4903.1(b) to mean that a defendant does not have “notice” that a lien is being asserted, and therefore has no duty to “file” a lien with the WCAB after a C&R or a stip F&A, if the lien claimant is silent for at least 90 calendar days after a defendant has made a good faith partial payment, together with a clear written explanation justifying the amount paid and specifying all additional information that must be submitted to receive full payment, in conformity with various existing laws, e.g., Labor Code section 4603.2(b)(1).

The provisions of Rule 10770(b)(3) and (b)(4) will give greater force to the statute of limitations provisions of section 4903.5 and should significantly reduce the amount of calendar time and judicial resources devoted to zombie liens. These provisions will also create more certainty and predictability in workers’ compensation claims management and, ultimately, cause lien claimants to act promptly when there is a legitimate lien dispute.

The amendments to Rule 10770 also address other less significant problems.

Rule 10770(a) makes minor, non-substantive changes regarding lien claim forms.

¹⁰ For a general discussion of zombie liens, see the January 5, 2011 Liens Report of the California Commission on Health, Safety, and Workers’ Compensation, at pp. 32-33 (http://www.dir.ca.gov/chswc/reports/2011/chswc_lienreport.pdf).

¹¹ In doing so, the debt collectors would often rely on the fact that it was sometimes cheaper for the defendants to settle than to litigate the liens, especially where, as discussed under section 10582.5 above, evidence, files and/or records of payments are lost or in deep storage, or witnesses have disappeared or lost their recollections.

¹² Section 4904(a) provides in substance that if a defendant has written notice of a claim that would qualify as a lien, such notice constitutes a lien. Whether this language is limited only to EDD lien claims has not been resolved by a binding en banc or appellate decision.

¹³ Section 4903.1(b) provides that when a compromise and release agreement (C&R) or stipulated Findings and Award (stip F&A) is submitted to the WCAB, a party (effectively, the defendant) shall “file” with the WCAB any lien that was “served” on it.

¹⁴ Section 4903.5 establishes time limitations on when a medical treatment or medical-legal lien may be “filed.”

¹⁵ Rules 10770(b)(5) and (b)(6) in the originally proposed lien rules have been renumbered to (b)(3) and (b)(4), but there have been some changes of note to the latter provision.

¹⁶ Also, the former language of Rule 10770(c) that “[s]ervice of a lien on a party shall constitute notice to it of the existence of the lien” has been deleted.

Rule 10770(b)(1) continues to allow the WCAB to reject for filing and destroy without notice liens that do not bear a previously assigned ADJ number, unless an application is concurrently filed.¹⁷

Rule 10770(c)(2) requires that a lien claimant must give proof that it is the owner of the alleged debt and specify the proof that will satisfy this requirement. This provision will minimize problems the WCAB periodically has with disputes over, or false claims of, ownership of a lien.

Rule 10770(f) clarifies and expands the notification obligations of a lien claimant after its lien has been resolved or withdrawn. This will reduce (1) the unnecessary sending of hearing notices to lien claimants whose liens are no longer in issue, (2) the expenditure of time at hearings unnecessarily attempting to determine the status of such liens, and (3) the time and expense involved in issuing notices of intention and/or orders unnecessarily dismissing or disallowing such liens.

Rule 10770(g) provides that a lien claimant may be served with notice of a hearing by a party who is designated to serve (see Cal. Code Regs., tit. 8, §§ 10500(a), 10544).

Rule 10770(i) reminds parties and lien claimants that any violation of Rule 10770's provisions may result in sanctions.

Rule 10770(j) makes certain provisions of Rule 10770 inapplicable to the lien claims of specified governmental entities (including EDD) and of self-represented lien claimants claiming living expenses, burial expenses, and spousal or child support expenses.

The balance of Rule 10770 is essentially unchanged.

Specific Technologies or Equipment

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

Consideration of Alternatives

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

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

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

3. Section Added: 10770.1.

Statement of Specific Purpose and Reasons for Addition of Section 10770.1

Although "lien conference" is defined by regulation (Cal. Code Regs., tit. 8, § 10301(u)), clear procedures for lien conferences have never been established. Rule 10770.1 is intended as a first step in establishing such procedures. Rule 10770.1 also establishes, to some extent, procedures for lien trials. All of these procedures are necessary, in part, to minimize the tremendous amounts of judicial resources and calendar time that are devoted to lien claims and lien issues. In particular, these procedures are necessary to drastically reduce the number of continuances and orders taking off calendar that, in the past, were granted because the lien claimants and/or defendants were not fully prepared for the lien conferences.

¹⁷ This provision essentially tracks the language of former Rule 10770(d).

Rule 10770.1(a) establishes how a “lien conference” is set, including on the WCAB’s own motion, and provides that a lien claimant may file a DOR for a lien conference only if it is a “party” under Rule 10301(x)(3). Rule 10770.1(a) also establishes that, when a lien conference is set, all unresolved lien claims will be the subject of the lien conference unless otherwise expressly ordered by the WCAB.

Rule 10770.1(b) makes clear that the provisions of the Rule do not circumscribe: (1) the WCAB’s discretion under Rule 10420 to set a lien issue for a hearing other than that requested by a DOR; and (2) the WCAB’s authority under Rule 10888 to issue a 10-day notice of intention to disallow a lien, or to allow the lien in whole or in part, after a case has been resolved by a C&R.

Rule 10770.1(c) provides that when a party, including a lien claimant who is a “party,” files a DOR on an issue directly relating to a lien, the DOR must specify that a “lien conference” is being requested and, if another type of hearing is requested or set, it shall still be deemed a “lien conference,” even if only preliminary or intermediate procedural or evidentiary issues are in dispute. This provision will minimize any confusion on the part of lien claimants, defendants, and judges about the nature and effect of any conference on lien issues. Also, it will minimize the number of trials, petitions for reconsideration, and petitions for removal regarding the nature of a judge’s authority and discretion to act at a conference on lien issues.

Rule 10770.1(d) establishes that anyone appearing at a lien conference or lien trial (1) must be prepared, i.e., must have sufficient knowledge of the lien dispute(s) to inform the WCAB as to all relevant factual and/or legal issues in dispute; (2) must have authority to enter into binding stipulations, and (3) must have full settlement authority or such authority immediately available by phone.

Rule 10770.1(e) provides that, for any lien claim(s) or lien issue(s) not fully resolved at the lien conference by an order signed by a WCJ, the defendant(s) and lien claimant(s) shall prepare, sign, and file a pretrial conference statement (PTCS) with the WCJ. Rule 10770.1(e) further provides that the right to present any issue, documentary evidence, or witness not listed in the PTCS shall be deemed waived, absent a showing of good cause. Rule 10770.1(e) has several beneficial effects.

First, it makes clear that a lien will be deemed resolved only if there is an actual order signed by a WCJ. Therefore, the parties and lien claimants cannot escape preparation of a PTCS or escape the setting of a lien trial merely by reaching a tentative agreement to settle the lien, including settlement agreements that must be proved by the governing body of a public entity. Accordingly, unless the parties and lien claimants managed to actually finalize their settlement agreement, they will still have to appear at the lien trial. It is anticipated that this will reduce the gamesmanship by litigants who use tentative settlements to get unwarranted continuances or orders taking off calendar.

Second, requiring the preparation of a PTCS forces the parties to focus on what points are actually in dispute and what witnesses or documentary evidence they have to support their claim or defense. This will help facilitate settlements because it will narrow the issues and bring clearly to the minds of the parties and lien claimants what are the relative strengths and weaknesses of their evidence.

Third, the mere requirement that the parties must sit down to prepare a PTCS, by itself, may facilitate settlements. Time is money and, therefore, where the parties are not too far apart in their settlement negotiations, they may decide it is worth bridging the gap just to avoid the need to prepare the PTCS.

Fourth, if the parties and lien claimants cannot reach a settlement, the PTCS gives a WCJ something to look at in deciding whether or not to grant a one-time continuance or an OTOC (see Cal. Code Regs., tit. 8, § 10770.1(f).)

Fifth, even if a WCJ does grant a one-time continuance or an OTOC, the WCJ may and generally should close discovery with respect to exhibits and witnesses not listed on the PTSC, except as to whatever additional discovery is prompting the need for the one-time continuance or OTOC.

Rule 10770.1(f) provides if all lien disputes cannot be entirely resolved at a lien conference, the remaining lien issues shall be set for trial except, upon a showing of good cause, there may be a one-time continuance of the lien conference or it may be taken off calendar. Additionally, Rule 10770.1(j) provides that if a lien conference is taken off calendar, a new DOR cannot be filed for 90 days. These provisions of Rule 10770.1(f) and (j) will reduce the number of lien conferences, thereby freeing up valuable calendar time. Also, these provisions will make it harder for e-filers (see Cal. Code Regs., tit. 8, § 10229) and others to manipulate the calendar by obtaining a lien conference, going off calendar, filing for another lien conference immediately or shortly thereafter, and repeating that cycle to avoid being set for a lien trial.

Rule 10770.1(g) tracks the discovery closure provisions of Labor Code section 5502(e)(3) for mandatory settlement conferences. Accordingly, at a lien conference, discovery will close in the same way it does at an MSC, with the same exceptions. This provision (together with Rule 10770.1(e)'s provision that the right to present any issue, evidence, or witness not listed in the PTCS shall be deemed waived, absent a showing of good cause) will effectively force both lien claimants and defendants to prepare in advance of the lien conference. This will minimize the number of DORs on lien issues that are filed before the parties are actually ready to proceed, thereby reducing the scheduling of unnecessary lien conferences. It will also minimize the number of lien conference continuances or OTOCs. In particular, if a continuance or OTOC is requested for discovery purposes, the party or lien claimant making the request must demonstrate that the evidence was not available and could not be obtained with the exercise of due diligence. For all these reasons, there will be more calendar time for hearings dedicated to ripe and valid lien disputes, as well hearings to resolve disputes between injured employees and their employers or insurance carriers over the employees' rights to benefits.

Rule 10770.1(h) essentially reiterates the provision of Rule 10562(d)(1) that, if a lien claimant fails to appear at a lien conference, the WCAB may dismiss the lien after giving the lien claimant notice and an opportunity to be heard through a 10-day notice of intention. It also imposes certain requirements on a defendant if designated service is used under Rule 10500(a). This gives the WCAB an alternative method of resolving liens without necessitating additional calendar time or requiring significant additional use of judicial, secretarial, and clerical resources.

Rule 10770.1(i) provides that, if no witnesses are listed in the PTCS at a lien conference, or if no good cause to testify is shown for at least one of the witnesses listed, the WCAB may direct that the lien issues be submitted for decision on the documentary evidence. This will give the WCAB the discretion, in some circumstances, not to set a lien trial, thereby preserving valuable calendar time. The provision allowing a case to be submitted for decision if there is no good cause for each and every witness listed is consistent with Evidence Code sections 350 and 351, which allow the presentation only of "relevant" evidence (see also Evid. Code, § 210), and section 352, which provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time." Rule 10770.1(j) also provides that if the matter is submitted based on the documentary evidence, the WCJ shall prepare a descriptive listing of the evidence that shall be filed and served no later than the decision on the submitted issues. This requirement is consistent with sections 10566 and 10629(b) and with the WCAB's decisions in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc) and *Hernandez v. AMS Staff Leasing* (2011) 76 Cal.Comp.Cases 343 (Significant Panel Decision).

Rule 10770.1(j) establishes that, if a lien conference has been ordered off calendar, no DOR on the lien issues can be filed for at least 90 days. This will help prevent parties and lien claimants from creating havoc with the lien calendar by requesting an OTOC and then, within a very short time period, turning around and filing a new DOR.

Rule 10770.1(k) provides that when a defendant has been designated to serve a lien claimant with notice of a lien conference or trial (see Cal. Code Regs., tit. 8, §§ 10500(a), 10544), the defendant shall bring its proof of service to the lien conference or trial and, if the lien claimant fails to appear, file it with the WCAB. This provision will more easily allow the WCAB to issue a 10-day notice of intention if a lien claimant fails to appear at a lien conference. The provision also emphasizes the obligation of a defendant to actually serve notice when it has been designated to serve. This will cause proper designated service to occur more frequently, resulting in better attendance at lien conferences and reducing the number of continuances due to improper service, thereby preserving valuable calendar time.

Rule 10770.1(l) reminds parties and lien claimants that any violation of Rule 10770's provisions may result in sanctions.

Rule 10770.1(m) provides that certain classes of lien claims that are not subject to certain provisions of Rule 10770.1, i.e., the lien claims of specified governmental entities (including the Employment Development Department (EDD)) and of self-represented lien claimants with living expense, burial expense, and spousal or child support expense liens.

Specific Technologies or Equipment

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

Consideration of Alternatives

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

Effect on Small Businesses

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

Economic Impact on California Business Enterprises and Individuals

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

SUMMARY OF AND RESPONSE TO PUBLIC COMMENTS RECEIVED DURING THE NOTICE PERIOD OF AUGUST 4, 2011 THROUGH SEPTEMBER 8, 2011.

Comment No. 1:

H. Neal Wells IV of Hallett, Emerick and Wells states, in substance, that the "proposed regulations appear to be a step forward in addressing some of the[] problems" relating to lien claims.

Response:

No response is necessary.

Comment No. 2:

Reina Archuleta, CPC, the Business Administrator for Southland Spine and Rehabilitation Medical Center states that "I am in favor of these changes." However, Ms. Archuleta says "I take offense at the fact that the lien backlog is being blamed on the Lien Claimants alone." Therefore, she asks the WCAB to look into delays by defendants in paying lien claims and to address the problem of defense attorneys' various excuses for being unable to resolve a lien claim at a lien conference. For example, Ms. Archuleta states that if a defense attorney requests a continuance because the attorney cannot get authority or cannot reach the claims adjuster, then "the

judge should just issue an Order to Pay Lien Claimant just as they will issue an Order to Dismiss Lien if the Lien Claimant does not show up.” Also, she suggests that instead of continuing a lien conference when a defendant is not in position to resolve the lien, the case should be set for a lien trial.

Response:

The WCAB’s new lien Rules are intended to expedite the resolution of lien claims and to reduce the amount of calendar time devoted to lien claims. The new lien Rules by no means are intended to attach “blame” to any particular group.

Also, in the public comments and at the public hearing, the WCAB received anecdotal evidence (in addition to that of Ms. Archuleta) alleging that there is a widespread problem of defendants failing to pay lien claims. However, this problem is largely not a subject of the current rulemaking, although there are provisions requiring a defendant to make a reasonable and good faith payments (1) before it may file a petition to dismiss a lien for lack of prosecution (Rule 10582.5) and (2) before it is excused from filing a lien under Labor Code section 4903.1(b) (Rule 10770).

With respect to the questions of a defense attorney/representative’s failure to appear at a lien conference or inability to obtain authority to settle a lien, the WCAB cannot simply order the defendant to pay the lien in full. This is because, among other things, a lien claimant has the burden of proving all elements necessary to establish its lien. (Lab. Code, §§ 3202.5, 5705.) Nevertheless, if a defendant with notice fails to appear at a lien hearing, then this could be a violation of WCAB Rule 10240(a) (Cal. Code Regs., tit. 8, § 10240(a))¹⁸ and it could subject the defendant and/or its attorney/representative to sanctions under Labor Code section 5813. (See Cal. Code Regs., tit. 8, § 10561(b)(4) [failure to comply with the WCAB’s Rules is sanctionable unless that failure results from mistake, inadvertence, surprise, or excusable neglect].)

Furthermore, if a defense attorney or other representative appears at a lien conference without having authority to settle or without the ability to reach the claims adjuster, then the unresolved lien claim(s) ordinarily must be set for a lien trial and a continuance or an OTOC should not be granted unless there is an affirmative showing of good cause. (See new Rule 10770.1(f); see also Lab. Code, § 5502.5; Cal. Code Regs., tit. 8, §§ 10243, 10353(b).) Further, an appearance without authority and without the ability to reach the claims adjuster could be a violation of WCAB Rule 10240(b) and, as above, that violation could subject the defendant and/or its attorney or representative to sanctions.

Comment No. 3:

The bulk of the comments by “Eilbow18,” who is otherwise unidentified, relate to (1) injured employees who self-procure medical treatment, (2) the attorneys of such employees (if represented), and (3) the physicians who provide that self-procured treatment on a lien basis. In essence, Eilbow18 makes various suggestions about adopting certain requirements for those injured employees, attorneys, and physicians that would reduce the amount of time and money expended by insurance carriers on self-procured medical treatment issues.

Eilbow18 also suggests there should be language requiring that lien claimants must make all contact with the insurance carrier by mail only, not telephone, which would result in a reduction of repetitive calls and in false or misleading phone statements.

¹⁸ WCAB Rules 10210 et seq. were formerly Rules of the Court Administrator. AB 1426 has eliminated the position of Court Administrator, however, the bill provides that “[r]egulations of the court administrator that have been adopted pursuant to Sections 5307, 5500.3, or subdivision (a) of Section 5502 shall be deemed to be regulations of the [WCAB]” and that “[a]ll regulations adopted by the court administrator shall remain in effect unless amended or repealed by [the WCAB].”

Finally, Eilbow18 states that when third-party collectors contact an insurance carrier, the third-party collectors should be required to include state their company name, instead of falsely representing themselves as employees of a doctor or medical facility.

Response:

Eilbow18's comments relate to issues outside the scope of the WCAB's current rulemaking, which only addresses the procedures for dismissing lien claims for lack of prosecution (new Rule 10582.5), the procedures for filing and service of lien claims (amended Rule 10770), and the procedures for lien conferences and lien trials (new Rule 10770.1).

Comment No. 4:

Bill Potter, who identifies himself as a senior lien representative for "a real Honorable Doctor in the system," states that the lien problem is not due to doctors/lien claimants providing services in good faith. Instead, "the problem [is] the doctors who sell the AR's [accounts receivable] to third party collection agents. Usually the sold AR is for balances after the doctor is paid per [the] fee schedule."

Response:

Preliminarily, the WCAB does not have authority to prevent physicians from selling their accounts receivable to third parties.

However, new Rule 10770(b)(4) [initially proposed as Rule 10770(b)(6)] does address the issue of "balance due" liens. That is, Rule 10770(b)(4) provides that, where a lien has been served on a defendant, then that defendant shall have no obligation to file that lien with the WCAB if: (A) the defendant makes a good faith partial payment and concurrently provides a clear written explanation, consistent with existing laws (e.g., Lab. Code, § 4603.2(b)(1)) that both justifies the amount paid and specifies all additional information the lien claimant must submit as a prerequisite to full payment; and (B) no additional written demand for payment by the lien claimant is served on the defendant within 90 calendar days after the partial or full payment was made.

Therefore, if a medical provider sends a bill to a defendant, receives full payment or partial payment made in accordance with the Rule, does not make a timely additional written demand, and later sells its accounts receivable to a third party (or agrees to let a third party attempt to recover the unpaid balance for a percentage of that recovery), then the third party will have to file a lien with the WCAB. If the third-party's lien is not timely filed, it will be barred under Labor Code section 4903.5.

Mr. Potter also asks: "what if the case is still pending when green liens were filed and EAMS failed to transfer those green liens from INT [i.e., the "integrated case" portion of EAMS] to the ADJ file [i.e., the "adjudication case" portion of EAMS]? Who[se] fault is it, the WCAB's or the Lien Claimant's?"

Response:

A lien claim may be filed only when either an ADJ case already exists or the lien claimant concurrently files a case opening application. (Cal. Code Regs., tit. 8, § 10770(b) [formerly, § 10770(d).] Moreover, where lien is concurrently filed with an application, this creates an ADJ file. (Cal. Code Regs., tit. 8, § 10216(b).) Therefore, all lien claims should always be in an ADJ file and never in an INT file.

Mr. Potter also states: "it is common practice by some defense firms and insurance carriers "NOT" to serve lien claimants with copies of the settlement documents in violation of [Rule] 10886.... If the defendants failed to

serve the lien claimant and Lien Claimant discovers this fact after the one [year] period as proposed...Is the Lien claimant in violation of the proposed new reg. if he files his lien after the one year period?"

Response:

The issue of whether a lien claim can be dismissed for lack of prosecution under new Rule 10582.5 where a defendant fails to serve the lien claimant with copies of the settlement documents as required by Rule 10886 can be addressed only in real cases and the result might depend on the facts of each case. However, new Rule 10582.5(d)(1)(B) provides that if a petition to dismiss a lien claim for lack of prosecution is based on the lien claimant's alleged failure to file a DOR within 180 days after the underlying case was "resolved" within the meaning of section 10301(x)(3)(A), then the petition must be accompanied by proof that the lien claimant was served with a copy of any order approving a C&R or stip F&A, if designated service was utilized (see Cal. Code Regs., tit. 8, § 10500(a)).

Mr. Potter also states that it is commonly the defendant, not the lien claimant, who "manipulates" a continuance of a lien conference using various excuses. Mr. Potter asks therefore, "If the defendant appears and offers one of these stupid excuses not to resolve a lien claim...will they be sanctioned for bad faith actions or tactics per Labor Code 5813? If not WHY?"

Response:

A lien claimant is always free to request the WCAB to impose sanctions if the lien claimant believes that a defendant's actions or inactions at a lien conference were frivolous or in bad faith. (See Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561.) This fact is re-emphasized by the language of Rule 10770.1(l) that any violation of its provisions may give rise to sanctions, attorney's fees, and costs under section 5813 and Rule 10561.

Comment No. 5:

Dr. Gerald L. Pearlman, the president of The Comp Specialists, LLC, states that the new lien procedures "will clearly help to reduce the number of liens, however, it will be a further inducement for Bill Review companies and Payers to downcode medical bills as there will be less of a chance for collections." Therefore, Dr. Pearlman requests: "Please write a regulation that will protect providers from illegal downcoding, which is already in [Labor Code section] 4603[.2] but no one does anything about it."

Response:

A rule relating to illegal downcoding would likely have to be adopted by the Administrative Director (AD) as part of the Official Medical Fee Schedule regulations (see Cal. Code Regs., tit. 8 § 9789.10 et seq.) or the Audit regulations (see Cal. Code Regs., tit. 8, § 10100 et seq.). In any event, such a rule would be beyond the scope of the WCAB's current rulemaking, which relates only to the procedures for dismissing lien claims for lack of prosecution (new Rule 10582.5), the procedures for filing and service of lien claims (amended Rule 10770), and the procedures for lien conferences and lien trials (new Rule 10770.1).

Comment No. 6:

Jorge G. Valdez, Esq., of Louis & Stettler, makes multiple comments, which may fairly be summarized as follows.

Mr. Valdez states that Rule 10582.5 "makes absolutely no sense" in that it "actually create[s] a disincentive to a lien claimant to actually file a lien" because "[m]ost lien claimants will believe that by filing the lien claim they will start the one year rule to file a DOR."

Response:

Mr. Valdez is correct that lien claimants will not be subject to having their lien claims dismissed for lack of prosecution under Rule 10582.5 if they never actually file any liens with the WCAB. However, the WCAB disagrees with Mr. Valdez's conclusion that lien claimants will have a disincentive to file lien claims. First, Labor Code section 4903.5(a) provides that, to be timely, a medical treatment or medical-legal lien claim must be filed within six months after the date of a decision that resolves the merits of the injured employee's underlying claim, five years from the date of injury for which the services were provided, or one year from the date the services were provided, whichever is later. These statute of limitations provisions of section 4903.5(a) create a strong incentive to timely file medical and medical-legal lien claims.¹⁹ Second, as discussed in the first and second full paragraphs of page 3 of the Initial Statement of Reasons, which the WCAB adopts and incorporates by reference herein (including the associated footnotes), the provisions of Rule 10770(b)(3) and (b)(4) [initially proposed as Rule 10770(b)(5) and (b)(6)] will give greater force to the statute of limitations provisions of section 4903.5. Accordingly, a medical treatment or medical-legal lien claimant that chooses not to file lien claim because of Rule 10582.5 runs a very significant risk that, if it ultimately files its lien, the lien will be barred by the statute of limitations.

Mr. Valdez states that the WCAB should require each medical treatment lien claimant to file an opening lien claim within 90 days of the date services were first provided and that a failure to file within 90 days should invalidate the lien claim.

Response:

Any regulation adopted must be consistent with, and not conflict with, statute. (Gov. Code, §§ 11342.2, 11342.1.) The WCAB cannot adopt a rule that would require an opening lien claim to be filed within 90 days of the date that services were first provided because such a requirement would be inconsistent with Labor Code section 4903.5(a). That section provides that medical treatment and medical-legal lien claims may be filed up to six months after the date of a decision that resolves the merits of the injured employee's underlying claim, five years from the date of injury for which the services were provided, or one year from the date the services were provided, whichever is later.

Mr. Valdez states that Rule 10770.1 "must allow two lien conferences." The first lien conference would be for the parties to attempt settlement and, if settlement fails, the parties would be ordered to specify the issues in dispute and to exchange documents. If the lien is not settled at the second lien conference, then the lien claim must be set for trial. Mr. Valdez also states that many defendants "do not respond to lien claimant correspondence" and many lien claimants "do not respond to defense letters." Therefore, the WCAB "cannot assume that the parties have conducted the appropriate discovery by the time of the first lien conference!"

Response:

The WCAB disagrees that there must be two lien conferences before a lien claim may be set for trial. Rule 10770.1(f)(2) provides that, upon a showing of good cause, there can be a one-time continuance of the initial lien conference to another lien conference. However, the intention of Rule 10770.1(f)(2) is that this should be the exception rather than the rule.

As to Mr. Valdez's comment about completion of discovery before the first lien conference, the WCAB observes that, under current Rules 10250 and 10250.1, a lien claimant or party that files

¹⁹ Medical treatment lien claims (including pharmacy and durable medical equipment lien claims), medical-legal lien claims, and interpreter lien claims (related to medical or medical-legal services) constitute the majority of lien claims filed with the WCAB.

a DOR for a lien conference must declare under penalty of perjury that it has completed discovery on the issues raised by the DOR. (Cal. Code Regs., tit. 8, §§ 10250, 10250.1.) Therefore, if the party filing the DOR (including a lien claimant who is a “party” under Rule 10301(x)(3)) arrives at the lien conference without actually having completed discovery, then ordinarily that will not be “good cause” for a continuance under Rule 10770.1(f)(2). Therefore, ordinarily, discovery will close and the matter will be set for trial.

Also, if the party filing a DOR for a lien conference serves it on other parties and lien claimants who fail to timely object to the DOR, then those other parties and lien claimants ordinarily will have waived any assertion that their discovery is not complete (Cal. Code Regs., tit. 8, § 10251(d)) and ordinarily there will not be “good cause” for a continuance.

Similarly, even if a lien claimant or party served with the DOR files an objection under penalty of perjury, this ordinarily will not be “good cause” for a continuance unless the objection expressly states that discovery has not been completed and specifically explains why discovery could not have been completed with the exercise of reasonable diligence. (Cal. Code Regs., tit. 8, § 10251.)

Furthermore, any violation of Rules 10250, 10250.1, and/or 10251 may subject the party or lien claimant to sanctions, attorney’s fees, and costs under Labor Code section 5813. (See Cal. Code Regs., tit. 8, § 10561(b)(4).) The sanction issues can be raised by a party or lien claimant. Sanctions can also be raised by a WCJ on his or her own motion after reviewing the DOR and/or any objection to the DOR. Accordingly, any parties or lien claimants who are served with the DOR but did not complete discovery before the lien conference run a significant risk both that discovery will be closed against them and that sanctions may be imposed.

Mr. Valdez states that, because Rule 10770 requires that only original liens shall be filed, this “perpetuate[s] the problem that the defense counsel does not necessarily know that final amount of the lien.”

Response:

Although Rule 10770 does provide that only original lien claims shall be filed with the WCAB, this in no way means that defense counsel will be unaware of the final amount of the lien at the time of the lien conference. Rule 10770 continues to require that all amended liens must be served on the defendant. A violation of this provision of Rule 10770 could lead to monetary sanctions against the lien claimant under Labor Code section 5813 and Rule 10561 and, conceivably, could lead to evidentiary sanctions, issue sanctions, or terminating sanctions. (Cf. Code Civ. Proc., § 2023.030.)

Mr. Valdez states that the WCAB also should “do AWAY with constructive liens,” i.e., treating a bill submitted to a defendant as a lien claim, even if the provider of services never actually filed a lien claim with the WCAB.

Response:

Rule 10770(b)(3) and (b)(4) [initially proposed as Rule 10770(b)(5) and (b)(6)] effectively do “do away” with constructive liens, as discussed in the first and second full paragraphs of page 3 of the Initial Statement of Reasons, which the WCAB adopts and incorporates by reference herein (including the associated footnotes).

Mr. Valdez states that “[d]efense attorneys should be REQUIRED to serve the C&R and Order Approving on every filed lien claim after the case settles.” He further states that “at this point the case should automatically be set for lien conference if there is any [un]resolved lien at the time of case settlement.”

Response:

Rules 10500(a) and 10886 (Cal. Code Regs., tit. 8, §§ 10500(a), 10886) already require that any order approving a compromise and release agreement must be served on all parties and lien claimants of record, either by the WCAB itself or by a party or lien claimants designated by the WCAB.

Rule 10888 (Cal. Code Regs., tit. 8, § 10888) already requires that, if any unresolved liens remain after an order approving a compromise and release, then either: (1) the remaining liens shall be set for a lien conference; (2) a 10-day notice of intention (NIT) to order full or partial payment of the unresolved lien(s) shall issue; or (3) a 10-day NIT to disallow the unresolved lien(s) shall issue.

Mr. Valdez states that “[a]ny provider that does not appear for the first lien conference should have a Notice of Intent issued against them dismissing the lien [and] the WCJ should do this automatically.”

Response:

New Rule 10770.1(h) provides that if a lien claimant fails to appear at the lien conference, the WCJ may issue a 10-day NIT to dismiss. This is consistent with current Rules 10562(d)(1) and 10241(b)(2). (Cal. Code Regs., tit. 8, §§ 10562(d)(1), 10241(b)(2).) The WCAB does not believe that this provision should be amended to require a WCJ to automatically issue a 10-day NIT. This would interfere with a WCJ’s judicial discretion, including the discretion to close discovery and set the case for trial. (See Cal. Code Regs., tit. 8, §§ 10562(d)(2), 10241(b)(3), 10770.1(f)(1) & (g).) Also, a 10-day NIT might not be factually warranted in any particular case.

Similarly, Mr. Valdez states that if a lien claimant again fails to appear at the second lien conference—after having received notice of the first conference, a 10-day NIT to dismiss, and notice of the second conference—then “their lien should be dismissed completely [with] [n]o questions asked.”

Response:

Presumably, Mr. Valdez’s statement assumes the lien claimant filed a timely objection to the 10-day NIT that showed good cause why its lien should not be dismissed after its failure to appear at the first conference. Otherwise, the lien claim should have been dismissed following the NIT and no second conference should have been set.

In any event, the WCAB cannot adopt rules that address every conceivable scenario. In the scenario just described in the paragraph above, it is conceivable that a new 10-day NIT should be issued, however, that would be for the WCJ to determine in the first instance.

Mr. Valdez states that if a lien claimant fails to appear at the first lien conference after receiving notice but appears at the second lien conference, then a lien trial can still be set on all outstanding liens, with discovery remaining open for the newly appearing lien claimant and the defendant with respect to that lien, with both having the opportunity to amend the stipulations and issues up to ten days before the trial date.

Response:

Once again, the WCAB’s Rules cannot address every conceivable scenario. The issue of whether discovery should remain open for the newly appearing lien claimant (and, therefore, the defendant with respect to that lien) will be for the WCJ to determine.

Comment No. 7:

Bruce P. White, Claims Manager, of Workers’ Compensation Administrators, LLC, states that Rule 10608 (Cal. Code Regs., tit. 8, § 10608) should be amended to limit a lien claimant’s rights to copies of an injured

employee's medical reports. Mr. White states that such an amendment would both protect the employee's privacy and reduce the burden on employers, who often must provide an entire medical file to a lien claimant even though only a minimal portion of the medical file is "relevant" to the lien.

Response:

Rule 10608 is not part of the current rulemaking. The current rulemaking is limited to procedures for dismissing lien claims for lack of prosecution (new Rule 10582.5), procedures for filing and service of lien claims (amended Rule 10770), and procedures for lien conferences and lien trials (new Rule 10770.1).²⁰

Comment No. 8:

Janet Selby, Workers' Compensation Program Manager of the Municipal Pooling Authority (MPA) states that the MPA "strongly supports the proposed rule changes regarding liens."

Response:

No response is necessary.

Comment No. 9:

Some written comments were submitted by an unidentified person or entity. The WCAB observes, however, that the first three paragraphs of these written comments duplicate the e-mailed comments submitted by "Eilbow18," discussed under Comment No. 3 above. Those comments and the WCAB's responses to them will not be reiterated.

The additional comments, however, suggest that the lien filing fee should be revived.

Response:

A \$100 fee for the filing of medical treatment and medical-legal lien claims was enacted by the Legislature in 2003 and became effective in 2004. (See former Lab. Code, § 4903.05 [Stats. 2003, ch. 639, § 33 (SB 228)].) However, it was repealed by the Legislature in 2006 and became ineffective as of July 12, 2006. (Stats. 2006, ch. 69, § 25 (A.B. 1806)].²¹ The reinstatement of any lien filing fee would require new legislative action.

The additional comments also suggest that a copy service should not be permitted to file a lien claim unless the documents it copied were served on the defendant at least 30 days prior to the filing of the lien, which would enable the defendant to determine if the alleged services actually took place, if the copied documents were relevant to the employee's claim, and if the copied documents were duplicates of documents previously copied.

Response:

Any limitation on copy service lien claims is outside the scope of the current rulemaking, which addresses only the procedures for dismissing lien claims for lack of prosecution (new Rule 10582.5), the procedures for filing and service of lien claims (amended Rule 10770), and the procedures for lien conferences and lien trials (new Rule 10770.1).

²⁰ We observe, however, that one troublesome issue under Rule 10608 is who should determine what medical reports are "relevant" to a particular lien claim. A unilateral determination by defendant might not be appropriate. However, having WCJs routinely make determinations on relevancy would be impractical and burdensome to defendants, lien claimants, and the WCAB. Alternatives, such as those proposed in the later comments by Pamela Faust of Zenith Insurance Company, might be considered in future rulemaking.

²¹ The Court Administrator rule governing the collection of filing fees (see former Cal. Code Regs., tit. 8, § 10250), which was adopted pursuant to the authority granted under former section 4903.05(d), was subsequently repealed.

Comment No. 10:

Three sets of e-mailed comments were filed by Dennis Knotts, who identifies himself both as “Senior Workers’ Compensation Claims Adjuster, Special Investigation Unit, Lien Specialist” and as “Instructor Insurance Education Association.”

Mr. Knotts’ first set of comments relate to Labor Code section 4905, which he describes as a “back door” for many lien claimants that “refuse to file their liens, [and] stay under the radar and then appear two or five years later when the case is closed [and] no one remembers the facts of the case, [when] it is cheaper to buy out rather than litigate.” Mr. Knotts proposes that the WCAB should use section 4905 “to address bills that are not filed as liens and to declare them as liens before the WCAB,” which would give defendants an opportunity to address them “in a timely manner rather than giving lien claimants the ability to avoid dismissal or litigation of their bills as a delaying tactic.”

Response:

Labor Code section 4905 only allows the WCAB to order payment of bills not filed as liens, if it appears that a lien should have been allowed had it been filed. Section 4905 does not allow the WCAB to declare that a particular bill is actually a lien claim, thereby allowing a defendant to litigate or seek dismissal of that bill. Nevertheless, as discussed above (see Responses to Comments Nos. 4 & 6), Rule 10770(b)(3) and (b)(4) [initially proposed as Rule 10770(b)(5) and (b)(6)] address “zombie” liens and will give greater force to the statute of limitations provisions of section 4903.5. Accordingly, a medical treatment or medical-legal lien claimant that chooses not to file a lien claim will run a very significant risk that, when it ultimately files its lien, the lien will be barred by the statute of limitations.

In his second set of comments, Mr. Knotts initially states that if a lien claimant files a DOR to protect its claim from being dismissed (see Rule 10582.5), then the lien claimant must not be allowed to take the claim off calendar and start over; otherwise, “you really are not fixing the problem.”

Response:

If a lien claimant files a DOR to avoid the risk of dismissal of the lien for lack of prosecution under Rule 10582.5, then under Rule 10770.1 the lien claim ordinarily will be set for a single lien conference and then for a lien trial. Under Rule 10770.1(f)(3), a lien claim or lien issue will be ordered off calendar only upon a showing of good cause.

Mr. Knotts states that, when a DOR is filed on a lien claim, everyone in the Official Address Record should be notified, so there will be only one lien conference before all parties and lien claimants are forced to go to trial.

Response:

Under current Rules 10500(a), 10544, and 10770(g) [formerly, Rule 10770(g)], all parties and lien claimants in the Official Participant Record (OPR) [see Cal. Code Regs., tit. 8, § 10217] will be served with any notice of hearing for a lien conference. Further, as just discussed, new Rule 10770.1 will ordinarily provide for only a single lien conference before all unresolved liens are set for trial. (See also Rule 10888.) Therefore, the filing of a DOR with respect to any particular lien will ordinarily result in all unresolved liens being set for one lien conference and, if any liens still remain unresolved, for a lien trial.

Mr. Knotts states: “It would be nice if your Regulations could create a presumption of notice of the settlement of the case. If there is notice of a lien conference or if there is an objection letter; it should put the vendor on notice that they will need to file their lien with the WCAB.”

Response:

Unless a vendor has actually filed a lien claim with the WCAB, the vendor is not a “lien claimant” and will not be in the OPR. If a non-lien claimant vendor is not in the OPR, it will not be served with any settlement (see Cal. Code Regs., tit. 8, §§ 10886, 10500(a)) or with notice of the lien conference. Accordingly, there cannot be a presumption that the non-lien claimant vendor had notice of actual settlement of the underlying case. In any event, a notice of a lien conference does not absolutely indicate that the underlying case has been settled.

Mr. Knotts next states there are vendors who do not object to a payment based on a defense bill review “and then years later turn their unpaid balance[s] over to ... collection agent[s]” who then file lien claims, relying on interim changes in the Official Medical Fee Schedule (OMFS) to “guarantee additional payment for just delaying the objection.” Mr. Knotts states that application of the OMFS that was in effect when the services were rendered should be mandatory.

Response:

This is beyond the scope of the current rulemaking. Nevertheless, Labor Code section 4603.2(b)(1) already provides that “payment for medical treatment ... shall be made at reasonable maximum amounts in the official medical fee schedule, pursuant to Section 5307.1, in effect on the date of service,” although a 15% penalty and interest may apply under some circumstances. (Emphasis added.)

Mr. Knotts next states: “An EOB [explanation of benefits] showing a reduction in the payment should start the clock running and serve as an official objection to the bill. It would be nice if the WCJ could have the option to order an outside bill review company to conduct an appeal review and [have] its decision [be] final regarding the reasonableness of the payment. It would also be nice to set a time limit in which to appeal a bill reduced per the OMFS.”

Response:

Again, this is beyond the scope of the current rulemaking. Also, at least some of what Mr. Knotts proposes would require statutory changes, such as the proposal to have binding independent bill review. With respect to a time limit for disputing a bill that has been reduced based on the defendant’s view of the OMFS, Labor Code section 4903.5 already establishes statutory time limits for the filing of a lien claim.

Mr. Knotts also states that there is a conflict between Rule 10608 (Cal. Code Regs., tit. 8, § 10608), regarding the service of medical reports on lien claimants, and Labor Code 4610, which contains “a specific restriction from releasing medical information to any non-physician provider,” such as durable medical equipment companies, copy services, and interpreters.

Response:

Rule 10608 is not being addressed in the current rulemaking. Also, the WCAB is not aware of any specific provision in Labor Code section 4610 that precludes the release of medical information to any non-physician lien claimant.

Mr. Knotts also raises various issues about Labor Code section 4620 and lien claims for copying medical records, as well as various issues about durable medical equipment and interpreter lien claims.

Response:

Once more, this is outside of the current rulemaking. The current rulemaking is limited to procedures for dismissing lien claims for lack of prosecution (new Rule 10582.5), procedures for

filing and service of lien claims (amended Rule 10770), and procedures for lien conferences and lien trials (new Rule 10770.1).

Mr. Knotts' third set of comments recommend that, at the time of the lien trial, a WCJ should be required to determine whether any other lien claimants or vendors exist through a detailed search of the WCAB file and inquiries of the parties. If no other lien claimants or vendors are identified, the WCJ should have the authority to declare that the record relating to lien claims is complete and that any additional vendor that later comes forth is barred from further legal action. This would discourage vendors from not filing their liens and not participating in lien trials. It would also reduce lien trials to one per case.

Response:

Even assuming the injured employee's underlying case has been resolved, there is no legal authority for the WCAB to absolutely bar the filing of new lien claims after the first lien trial. It is Labor Code section 4903.5 that establishes the time limits for the filing of lien claims. In particular, if the underlying case was resolved by a stipulated or adjudicated F&A, new liens for medical treatment and/or medical-legal expenses could arise well after the first lien trial for further medical treatment or new and further disability. (See Lab. Code, § 4903.5(a); see also §§ 4600, 5410, 5803, 5804.) In any event, in light of all of their other duties and responsibilities, it would be unduly burdensome (if not impossible, in the case of vendors who have not filed any lien) to require a WCJ to make a diligent search of the WCAB's file(s) to determine whether there are any additional lien claimants or vendors.

Comment No. 11:

David P. Mitchell, Senior Vice President of Republic Indemnity suggests that "the WCAB consider adopting more strenuous lien dismissal regulations much like the Civil Court system where claims can be dismissed if not brought to trial within a specific period of time." Mr. Mitchell suggests that the WCAB could use California Rules of Court, Rule 3.1340, or Code of Civil Procedure sections 583.410-583.430 as potential models. In substance, these provisions allow a civil action to be dismissed upon the motion of a defendant or on the court's own motion if the action is not brought to trial or conditionally settled within two years of its filing.²²

Response:

The chief problem with Mr. Mitchell's suggestion is that, under the current rules, a lien claimant cannot file a DOR unless it has become a "party" (see Cal. Code Regs., tit. 8, § 10250) and a lien claimant cannot become a "party" unless the underlying case has been resolved (see Cal. Code Regs., tit. 8, §§ 10301(x)(3)). Therefore, by rule, there will be many instances when a lien claimant will be unable to bring its lien to trial within two years of its filing.

However, Rule 10582.5 provides that a lien is subject to dismissal for lack of prosecution if the lien claimant does not file a declaration of readiness within 180 days after it has become a party. [NOTE: This is a reduction from the originally proposed one year.]

Comment No. 12:

Rosaura M. Picasso, a California State Certified Interpreter, states that "insurance practices create the need for liens in the first place." Ms. Picasso states that, even when "the Labor Code requires payment," the insurance industry "[h]ardly ever" pays as required by law because the provider's invoices are "lost," "ignored," or

²² Rule 3.1340(a) provides that "[t]he court on its own motion or on motion of the defendant may dismiss an action under Code of Civil Procedure sections 583.410-583.430 for delay in prosecution if the action has not been brought to trial or conditionally settled within two years after the action was commenced against the defendant."

“misfiled,” thus forcing the provider to file a lien claim. Ms. Picasso is concerned that Rule 10582.5 “eliminates the utility of a lien and places its enforcement in the hands of that very party motivated to avoid enforcement, the insurance carrier,” thereby rewarding the insurance industry when it does not pay. She also is concerned that, under Rule 10582.5, the insurance industry would be able to “orchestrate both ‘notice’ and ‘opportunity to be heard’ in its favor.” She also suggests that the “lack of prosecution” issue can be manipulated by insurance carriers by deliberately misrepresenting in settlement documents that no known liens exist. This means that months or years could pass before the lien claimant learns that the underlying case has resolved. Further, Ms. Picasso states that no enforcement procedure is in place to prevent a defendant from closing out a case without “notice and an opportunity to be heard” being given to the lien claimant. Ms. Picasso comments that “[t]he D.O.R. ... even[s] the playing field somewhat,” but “[i]f the ... Rule were to take effect, the D.O.R. would effectively cease to exist” and “[t]he *de facto* death of the D.O.R. would occur by operation of law.”

Response:

The issue of a defendant’s failure to pay an interpreter’s or other provider’s billing, where payment is required by law, is beyond the scope of this rulemaking. The current rulemaking is limited to procedures for dismissing lien claims for lack of prosecution (new Rule 10582.5), procedures for filing and service of lien claims (amended Rule 10770), and procedures for lien conferences and lien trials (new Rule 10770.1).

However, as Ms. Picasso acknowledges, if a defendant fails to pay or fully pay an interpreter’s bill(s), the remedy for the interpreter is to file a lien claim and, ultimately, a declaration of readiness.

*The WCAB does not agree with Ms. Picasso’s assertion that Rule 10582.5 would effectively cause the *de facto* death of the DOR for lien claimants. Rule 10582.5 does not in any way eliminate the right of a lien claimant to file a DOR. Instead, Rule 10582.5 merely gives lien claimants notice of what might happen if they do not file a DOR within certain timelines.*

The WCAB also does not agree with Ms. Picasso that Rule 10582.5 will allow defendants to “orchestrate” notice and an opportunity to be heard.

First, before a defendant may even file a petition to dismiss a lien claim for lack of prosecution, the defendant must send a copy to the lien claimant stating its intention to seek dismissal of the lien. Therefore, upon receipt of the letter, the lien claimant may file a DOR or take other possible actions to preserve its rights.

Second, if, for example, a petition to dismiss is based on a lien claimant’s failure to file a DOR within 180 days after an order approving a compromise and release agreement, the defendant must establish that a copy of the order was served on the lien claimant. Therefore, if at the time of a settlement of the underlying case a defendant deliberately or inadvertently misrepresents that no known liens exist, the defendant cannot later obtain an NIT to dismiss for lack of prosecution unless it proves that a copy of the settlement was served on the lien claimant. (See also Cal. Code Regs., tit. 8, § 10886.)

Third, even if a defendant’s petition to dismiss satisfies these requirements, a lien claim still cannot be dismissed for lack of prosecution unless the WCAB issues a notice of intention to dismiss, giving the lien claimant at least 30 days (not 10 days, as originally proposed) to show good cause why its lien should not be dismissed. In many instances, this NIT will be served by the WCAB itself, not by the defendant through designated service (see Cal. Code Regs., tit. 8, § 10500(a)). But, even if designated service is utilized the WCAB can require the defendant to file a proof of service.

Fourth, under Rule 10582.5, any actual order of dismissal must be served on the lien claimant by the WCAB itself. Therefore, if a lien claimant believes an order of dismissal issued without it having been given proper notice and an opportunity to be heard, the lien claimant can file a petition for reconsideration with the Appeals Board.

The WCAB also disagrees with Ms. Picasso that no enforcement mechanisms are in place to deal with a defendant who does not pay a bill, where payment is required by law, or with a defendant who deliberately misrepresents at the time of the settlement that no known liens exist. In the first instance, a lien claimant might seek penalties and interest²³ and, if the failure to pay was in bad faith, the lien claimant also might seek sanctions, attorney's fees, and costs.²⁴ Similarly, if a defendant deliberately misrepresented that no known liens exist and/or deliberately failed to serve a copy of a settlement on a lien claimant, the lien claimant could seek sanctions, attorney's fees, and costs.

Comment No. 13:

Alina Castañeda, a State Certified Medical Interpreter, has filed comments that duplicate those filed by Ms. Picasso (see Comment No. 12 above).

Response:

The WCAB adopts the response given to the comments of Ms. Picasso.

Comment No. 14:

Lawrence Morrow, who states he has practiced law in California since 1980, writes that he completely supports the content of an attachment to his e-mail. The attachment he submits is the comments filed by Ms. Picasso (see Comment No. 12 above).

Response:

The WCAB adopts its response to the comments of Ms. Picasso.

Comment No. 15:

Stephen Suchil, the Assistant Vice President of State Affairs (Western Region) of the American Insurance Association (AIA), filed written comments and also testified at the September 8, 2011 public hearing.

In both his written comments and oral testimony, Mr. Suchil emphasized that AIA is “very supportive” of the proposed lien claimant regulation changes.” In his written comments, however Mr. Suchel suggests some modification of the proposed lien rules.

Mr. Suchil suggests that “the one year period [of Rule 10582.5(a), as initially proposed] to file a declaration of readiness to proceed after the lien claimant qualifies as a party, or after entry of an order taking a lien conference or trial off calendar, appears to be overly long. We recommend 6 months as a reasonable timeframe.”

Response:

²³ Unreasonable delays in the payment of lien claims are subject to Labor Code section 5814 penalties, although the penalty itself is payable to the injured employee and not the lien claimant. (See *Vogh v. Workmen's Comp. Appeals Bd.* (1968) 264 Cal.App.2d 724, 728 [33 Cal.Comp.Cases 491, 494].) In the context of an interpreter lien, no binding published appellate opinion or en banc opinion of the Appeals Board has yet resolved the issue of whether interpreters might be entitled to Labor Code section 4603.2(b) penalties and interest if their interpretation services were reasonably required for medical treatment provided or authorized by the treating physician.

²⁴ See Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561.

The WCAB agrees. Therefore, the WCAB has modified Rule 10582.5(a) to change the time frame for filing a DOR from one year to 180 days.

The one-year time frame for filing a DOR of Rule 10582.5(a), as initially proposed, was modeled after current Rule 10582 (Cal. Code Regs., tit. 8, § 10582). However, Rule 10582 provides that the injured employee's entire case may be dismissed for lack of prosecution unless the employee activates it for hearing within one year after either the filing of an application or the entry of an OTOC. The dismissal of the employee's entire case ordinarily also means that all lien claims are effectively dismissed, because lien claimants stand in the shoes of the injured employee (see Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin) (1985) 39 Cal.3d 57, 67 [50 Cal.Comp.Cases 411, 418]).

Given that the consequences of Rule 10582 are so draconian, its one-year time frame is appropriate. However, Rule 10582.5(a) merely permits the dismissal of an individual lien for lack of prosecution, not the entire case. Therefore, changing the time frame to 180 days is appropriate, especially given that this 180-day period does not start running when the lien claim is filed. Instead, a lien cannot be dismissed for lack of prosecution for 180 days (plus an additional 30 days under Rule 10582.5(b)) after the lien claimant has become a party under Rules 10301(x)(3) or after a lien conference or lien trial has been taken off calendar. Ordinarily, a lien claimant will not become a party—and a lien conference or trial will not be set and heard—until many months, if not years, after a lien has been filed. Therefore, a lien claimant almost uniformly will have had a very substantial time to prepare its case and to then file a DOR.

With respect to Rule 10582.5(d)(3), Mr. Suchil states: “[T]here does not appear to be a need to copy the injured worker and his or her attorney with the petition to dismiss a [lien] claim for lack of prosecution if the injured worker’s case has been resolved. We are concerned that it will create confusion for the injured worker.”

Response:

The WCAB disagrees. The injured employee and his or her attorney (if represented) are entitled to notice of any petition to dismiss a lien claim for lack of prosecution because there is a possibility that, if the lien claim is dismissed, the lien claimant may turn around and attempt to obtain payment from the injured employee. For example, in the context of medical treatment liens, a provider whose lien has been dismissed could seek payment from the injured employee on the basis that the treatment was obtained at the employee’s own expense (see Lab. Code, § 4605), that the treatment was improperly obtained outside a validly established and properly noticed medical provider network (MPN),²⁵ or on the basis that the treatment was entirely non-industrial²⁶. Indeed, if a medical treatment lien claim is dismissed, it is not inconceivable that a medical provider could attempt to recover from the employee even for treatment for an accepted industrial injury, although it might be illegal for the provider to do so.²⁷

²⁵ See *Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 330 (Appeals Board en banc) (*Valdez I*) and *Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 970 (Appeals Board en banc) (*Valdez II*).

²⁶ See Lab. Code, § 3602(c).

²⁷ In *Bell v. Samaritan Medical Clinic, Inc.* (1976) 60 Cal.App.3d 486 [41 Cal.Comp.Cases 415], a medical provider sued an injured employee in small claims court. The Court of Appeal, however, held that the WCAB has exclusive jurisdiction to decide any controversy arising out of medical treatment rendered to an injured employee whenever a physician undertakes to treat an industrially injured patient and the employer accepts liability. The Court of Appeal also held that the physician may not (1) condition the rendition of treatment on the employee’s agreement to pay the difference between the amount of the physician’s charges and the amount paid by the defendant, (2) bill the injured employee for the difference, or (3) otherwise attempt to collect the difference from the injured employee. After *Bell*, however, the practice of seeking payment directly from the injured employee did not entirely cease. (E.g., *Fiorito v. Superior Court* (1996) 61 Cal.Comp.Cases 445 [unpublished opinion].)

Mr. Suchil suggests that Rule 10770.1 “should clearly state that only those lien claimants who have followed the proper procedures will be heard at conference or trial.”

Response:

The WCAB disagrees. There is no practical way to determine in advance of a hearing whether a lien claimant has followed “proper procedures,” however that phrase might be defined. In any event, prior to any hearings, both lien claimants and defendants should follow proper procedures with respect to lien claims.

Mr. Suchil lastly suggests that the second sentence of Rule 10770.1(a) should be amended to provide that when the WCAB sets a lien conference, lien claims or lien issues not listed in the declaration of readiness may be included only when “*the issues are stated with sufficient specificity to give the defendant notice of the issues to be adjudicated.*” (Emphasis in original.)

Response:

The WCAB disagrees.

When a DOR is filed and a hearing is set with respect to one lien claim or lien issue, the purpose of also setting additional lien claims or lien issues for hearing is to promote judicial economy, i.e., preserving scarce judicial resources and calendar time. It is preferable from the point of view of judicial economy and efficiency to resolve all lien disputes, or at least as many as possible, in a single proceeding, thereby minimizing (1) repetitive litigation, (2) duplicative efforts by WCJs and WCAB staff, (3) increased costs to the WCAB, (4) delays in resolving multiple lien claims, and (5) delays in getting the claims of injured employees on calendar.

If lien claims or lien issues not listed in the DOR cannot be set unless the notice of hearing states the issues with specificity, this would not serve judicial economy and efficiency. Also, as a practical matter, there is no effective way a WCAB’s notice of a lien conference could specifically list all of the issues regarding each lien claim that was not the subject of the DOR, even if the WCAB could somehow determine what those issues might be.

Moreover, even for a lien claim or lien issue not specified in the DOR, the defendant and the lien claimant ordinarily will have some idea of the nature of the dispute based on communications between them after the building was first submitted to the defendant and/or after the lien was first filed.

However, in those relatively rare cases where a lien claim that was not the subject of a DOR is set for a lien conference and the parties, by offer of proof or otherwise, satisfy the WCJ that that they did not have reasonable prior notice of the issues raised at the lien conference with respect to that lien, then there likely would be “good cause” for a one-time continuance of that particular lien claim to a second lien conference.

Comment No. 16:

Derrick M. Au, Esq., from the Los Angeles County Counsel’s Office, suggested various changes to the language of the lien rules. He states that his suggested changes are jointly endorsed and submitted by the County of Los Angeles, the Los Angeles County Metropolitan Authority, and the Los Angeles Unified School District.

For tracking purposes, Mr. Au’s suggested additions to the originally proposed regulatory text are indicated by italicized bold double underline (illustrated as follows: **suggested added language**) and his suggested deletions

to the originally proposed regulatory text are indicated by italicized bold double strike-through (illustrated as follows: ~~suggested deleted language~~).²⁸

Mr. Au first suggests that Rule 10770(c), as originally proposed, be amended to read as follows:

(c) Service of Lien Claims and Supporting Documentation: All original and amended lien claims liens shall be served in accordance with subsections (1) and (2) below, ~~along together with the a~~ complete and full statement or itemized voucher supporting the lien claim or amended lien claim, including but not limited to the amounts previously paid for each itemized service, a statement that justifies the claim for additional reimbursement, documentation that the lien claimant is the owner of the alleged lien claim, a declaration under penalty of perjury that the information provided is true and correct, and a proof of service., shall be concurrently served as follows:

(1) Service of original and amended lien claims shall be made on the injured worker (or, if deceased, the worker's dependent(s)) shall be served, unless: (A) the worker or dependent is represented by an attorney or other agent of record, in which event service may be made solely upon the attorney or agent of record; or (B) the underlying case of the worker or dependent(s) has been resolved. For purposes of this subdivision, 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 claim;

(ii) a defendant had written notice of the lien claim in accordance with Labor Code section 4904(a) before the lien claim 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 lien claims;

(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) Service of original and amended lien claims shall be made on any employer(s) or insurance carrier(s) that are parties to the case ~~and, if represented, their attorney(s) or other agent(s) of record shall be served, unless the employer(s) or insurance carrier(s) is/are represented by an attorney or other agent of record, in which event service may be made solely upon the attorney(s) or other agent(s) of record.~~

(3) When serving an amended lien claim, the lien claimant shall indicate on the box set forth on the lien form that it is an "amended" lien claim.

(4) The requirement for the full statement to include amounts previously paid for each itemized service shall not apply to any payment credited on account if the person who received the payment furnishes a declaration under penalty of perjury attesting to personal knowledge, not on information and belief, that the payment was not accompanied by an explanation of the amounts included in the payment for each itemized service.

(5) The requirement for documentation that the lien claimant is the owner of the alleged lien claim may be satisfied by a statement under penalty of perjury that the declarant has in his or her possession the written documents by which the claim of right to payment for services was transferred by the original owner to the lien claimant including any intermediate owners, provided that the lien claimant shall furnish a copy of such

²⁸ Mr. Au actually submitted two sets of suggested changes, which to some extent suggest different additional language the same subdivisions. The WCAB's discussion of Mr. Au's suggested changes is based on its understanding of what his intent was when the two sets of suggested changes are read together.

documentation to an any interested person upon demand and shall have a copy available for immediate production at any lien hearing, lien conference, or lien trial.

Service of a lien on a party shall constitute notice to it of the existence of the lien.

Response:

The WCAB largely agrees with Mr. Au's suggested changes to Rule 10770(c). For the most part, his suggested changes clarify the requirements of Rule 10770(c) or suggest additional requirements that are consistent with the intent of this rule and/or existing rules. For example, the language regarding ownership of the lien claim is consistent with current Rule 10550(d). Accordingly, the WCAB has amended Rule 10770(c) to incorporate most of Mr. Au's suggested language, with some minor changes.

The WCAB, however, does not agree with Mr. Au's suggested addition of subdivision (c)(4) because this suggested requirement would be too cumbersome.

Mr. Au also suggests that Rule 10770(i) be amended to read as follows:

(i) Any violation of the provisions of this section may give rise to monetary sanctions, attorney's fees, and costs under Labor Code section 5813 and Rule 10561 and dismissal of the lien claim with prejudice.

Response:

The WCAB disagrees. There appears to be no legal basis for dismissing a lien claim with prejudice for "any violation" of Rule 10770. The new and already existing rules provide other bases upon which to dismiss a lien claim. Moreover, for "bad-faith" or "frivolous" violations of Rule 10770, the sanctions, attorney's fee, and cost provisions of Labor Code section 5813 and Rule 10561 should provide a sufficient remedy.

Comment No. 17:

Mark Gerlach has submitted comments on behalf of Barry Harris Hinton, the President of the California Applicants' Attorneys Association (CAAA). Mr. Gerlach also testified on behalf of CAAA at the September 8, 2011 public hearing.

CAAA suggests that the 10-day notice of intention to dismiss of Rule 10582.5(b), as it was originally proposed, does not give the lien claimants sufficient time to process their mail and to take appropriate steps to enforce their lien. Therefore, CAAA recommends that a 30-day notice of intention be required.

Response:

As discussed in the response to Comment 11, the WCAB agrees and has amended Rule 10582.5(f) accordingly.

CAAA also suggests that Rule 10582.5(c)(1), as originally proposed [see now, Rule 10582.5(c)(1)] be amended to require a defendant to provide a proof of service that the required letter was sent at least 30 days prior to the filing of the petition to dismiss.

Response:

The WCAB disagrees. Rule 10505(d)(3) allows letters to be served in a manner that does not necessarily require a proof of service. Further, the WCAB is unaware of any significant abuses of the 30-day prior service requirement of Rule 10582 relating to the dismissals of applications. Therefore, the WCAB does not anticipate significant problems in the context of lien claims. In

any event, if a lien claimant disputes whether the letter under Rule 10582.5(c)(1) was actually served on it, it can raise that point in an objection to the notice of intention to dismiss.

CAAA next suggests that the quotation marks around the terms “filing” and “served” in Rule 10770(b)(5) and (6), as originally proposed [now, Rule 10770(b)(3) and (4)], be deleted unless the quotation marks are intended to signify that these terms have some different meaning than under current law and usage, in which case these terms should be defined.

Response:

The WCAB agrees and has deleted the quotation marks. (See now Rule 10770(b)(3) and (4).)

CAAA objects to the provision of Rule 10770(b)(6), as originally proposed [see now, Rule 10770(b)(4)], that a defendant shall have no obligation to file a lien with the WCAB if the defendant has made full or partial payment on the lien and if the lien claimant makes no additional written demand within three months after the full or partial payment. CAAA generally asserts that this language violates the requirements of Labor Code section 4603.2(b) and specifically asserts that payment of a clearly incorrect amount, even as little as one dollar, would technically meet the requirement of the proposed rule. CAAA observes that, under Labor Code section 4603.2(b), a defendant who does not make full payment of the medical treatment bill must give notice that the itemization is incomplete and state all additional information required to make a decision. CAAA further asserts that, for non-medical liens, the proposed rule should require that the defendant has tendered full payment.

Response:

The WCAB agrees that Rule 10770(b)(6), as originally proposed, improperly had its provisions triggered when a defendant makes “any” payment, even if that payment is not made in good faith and is clearly unreasonable. Various provisions of the Labor Code and the AD’s Rules establish that, if particular types of billings are submitted to a defendant, the defendant must pay all uncontested charges and must give a written explanation regarding any contested charges, including a clear description of what additional information must be submitted to support full payment. (E.g., Lab. Code, § 4603.2(b)(1) & Cal. Code Regs., tit. 8, § 9792.5(c) [medical treatment liens]; Lab. Code, § 4622(a) & (c) & Cal. Code Regs., tit. 8, § 9794(b) and (c) [medical-legal liens]; Cal. Code Regs., tit. 8, § 9795.4(a) [interpreter liens].) Therefore, Rule 10770(b)(4), as adopted, has been amended accordingly.

At the public hearing, Mr. Gerlach testified that one of the main issues surrounding the filing of lien claims is that the defendant “is simply not paying a bill.” Mr. Gerlach suggests that Rule 10582.5 be amended to provide that a lien claim may not be dismissed for lack of prosecution unless the defendant filing the petition for dismissal has certified that they have followed the requirements of the Labor Code and the Administrative Director’s regulations regarding the payment of claims.

Response:

See response above.

Comment No. 18:

The 4600 Group has submitted various comments, including two sets of written comments Nancy Roberts, Esq., and testimony at the September 8, 2011 public hearing from both Ms. Roberts and David Robin.

The 4600 Group objects to the language of proposed Rule 10770.1(a) which provides that, when a lien conference is set based on a DOR, the WCAB on its own motion and upon notice “may” include lien claims or lien issues not listed in the DOR. The 4600 Group complains that this will cause confusion in cases involving

multiple liens because any lien claimant that did not file the DOR will be uncertain whether its lien claims or lien issues have been included for the lien conference.

Response:

The originally proposed “may” language was included to make it clear that it was within the WCAB’s discretion to have the lien conference include liens other than the one(s) listed in the DOR. However, the general intention of Rule 10770.1 is to set all unresolved liens for a lien conference at the same time. In fact, this is already the law where the underlying case has been resolved by a C&R or stip F&A (Cal. Code Regs., tit. 8, § 10888), which is the situation with the vast majority of unresolved lien claims. The concurrent setting of all unresolved liens will expedite their ultimate resolution and minimize the use of the WCAB’s limited calendar time. Therefore, the WCAB has amended Rule 10770.1(a) to provide that, unless otherwise expressly stated in the notice of hearing, all unresolved lien claims will be heard at the lien conference.

The 4600 Group also suggests that Rule 10770.1(a), as originally proposed, should be amended so that, any time a DOR is filed by a lien claimant, the “default” should be that all lien claims should be set for a lien conference, including those not listed in the DOR.

Response:

As stated above, the WCAB agrees and has amended Rule 10770.1(a) accordingly.

The 4600 Group also states that proposed Rule 10582.5 does not take into account liens for medical treatment rendered more than one year after an award of further medical treatment, particularly where it is beyond the five years to reopen the case (see Lab. Code, §§ 5410, 5803, 5804).

Response:

The 4600 Group misconstrues Rule 10582.5. Rule 10582.5 does not limit when a lien can be filed. It merely establishes the circumstances under which a lien can be dismissed for lack of prosecution once it has been filed. Therefore, consistent with Labor Code section 4903.5, a lien for medical treatment provided pursuant to a continuing award may be filed within one year after the treatment was furnished—or, for specified Labor Code section 4903(b) liens, within two years from knowledge that an industrial injury is being claimed—even if that date more than five years after the date of injury. However, once a lien has been filed, the lien claim may be subject to dismissal under proposed Rule 10582.5 if the lien claimant does not file a DOR within the time limits specified by the proposed rule.

The 4600 Group indicates that, from its experience, WCJs in Southern California will routinely continue a lien conference and not set it for trial if the defendant is not ready. The 4600 Group states that defendants’ requests for continuances primarily arise because: (1) the defendant has not served medical reports and records on a lien claimant that previously requested service; (2) the defendant has not conducted a timely fee schedule review of a lien claimant’s billings; and (3) the defendant needs additional information to conduct an adequate review. The 4600 Group suggests that all of these functions can and should be done before the filing of a DOR. Therefore, if discovery is going to close at a lien conference, then a defendant should be required to submit a specific written objection at least 20 days prior to the lien conference.

Response:

Rule 10770.1(f) mandates that a lien conference shall be continued only one time and only if there is a showing of good cause. The WCAB expects that WCJs throughout California will adhere to the mandates of Rule 10770.1(f) and anticipates that DWC will train them to do so. However, if in any given case a WCJ fails to comply with the requirements of Rule 10770.1(f), a

petition for removal may be filed with the Appeals Board. (See Lab. Code, § 5310; Cal. Code Regs., tit. 8, § 10843.)

The 4600 Group additionally states: “We need a Board rule that provides a self-executing order requiring payment of the interest and increase provisions of Labor Code §4603.2(b).”

Response:

The WCAB disagrees. The penalty and interest provisions of Labor Code section 4603.2(b) are statutory and, therefore, apply by operation of law where the statutory conditions are met. Accordingly, no Rule is needed. In any event, there may be disputes over whether the statutory conditions have been met and, therefore, a self-executing order would be inappropriate.

The 4600 Group also complains about the “urban myth” that, once a lien claim is filed, defendants believe they “don’t have to pay it or deal with it until the case in chief resolves.” The 4600 Group states that “maybe that myth would disappear” if the penalty and interest provisions of Labor Code section 4603.2(b) are enforced.

Response:

The WCAB agrees that the mere filing of a lien claim does not excuse a defendant from making a good faith and reasonable payment on the lien, any more than the filing of an application would excuse a defendant from providing good faith and reasonable benefits to an injured employee. A defendant that fails to make good faith and reasonable payments on a lien acts may subject itself to, among other things: (1) penalties and interest (see, e.g., Lab. Code, § 4603.2(b)(1) & Cal. Code Regs., tit. 8, § 9792.5(c) [medical treatment liens]; Lab. Code, § 4622(a) [medical-legal liens]; Cal. Code Regs., tit. 8, § 9795.4(a) [interpreter liens]); (2) monetary sanctions, attorney’s fees, and costs (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561); and possibly audit penalties (Cal. Code Regs., tit. 8, § 10111.1(a)(8)-(10)).

Nevertheless, the WCAB will not now propose a rule requiring defendants to pay lien claimants because: (1) such a rule would be beyond the scope of the current rulemaking; and (2) given the existing provisions of law, it is questionable whether a further rule would be of any benefit.

Comment No. 19:

Linda D. Loza, M.S., the Workers’ Compensation Lien Attorney Program Manager for the Regional Occupational Health program of The Permanente Medical Group, Inc., has submitted comments on behalf of Kaiser Permanente.

Kaiser Permanente’s comments start by saying that it “fully supports the WCAB in addressing the issue of frivolous and inappropriate lien filings which clog the District Office Courts and delay access to the Courts by injured or ill workers.” However, Kaiser Permanente makes several recommendations.

Initially, Kaiser Permanente states that, although Rule 10886 requires that medical reports [sic] be served on lien claimants, there is nothing in Rule 10582.5 which specifically allows for monetary sanctions for a failure to serve reports.

Response:

Rule 10582.5 relates to the dismissal of lien claims for lack of prosecution, not with monetary sanctions for the failure to serve medical reports on lien claimants. Rule 10582.5(c)(2)(C) now provides, however, that a defendant seeking dismissal for lack of prosecution must declare under penalty of perjury that it has timely served all medical reports and medical-legal reports on the lien claimant, to the extent required by section 10608(f).

Moreover, there is a frivolous or bad faith failure to comply with Rule 10608, a lien claimant can seek sanctions in accordance with Rule 10561(b) [“willful failure to comply with a ... regulatory obligation”] or Rule 10561(b)(4) [“[f]ailing to comply with the [WCAB’s] Rules of Practice and Procedure ...”].

Kaiser Permanente also suggests that language be included in Rule 10582.5 which mandates that the defendant serve the lien claimant with all final decisions and medical-legal reports at the time the underlying case is resolved.

Response:

Again, Rule 10582.5 relates to the dismissal of lien claims for lack of prosecution, not the failure to serve final decisions and medical-legal reports on lien claimants.

Furthermore, Rules 10500 and 10886 already address the service of final decisions on lien claimants, and Rule 10608 already provides for the service of medical-legal reports.

Kaiser Permanente next suggests that the new lien rules should include a provision that when the underlying case is resolved the defendant must send notice to the lien claimant that they are now a party to the action.

Response:

The WCAB believes that this is a good proposal and one that should be considered in the future, perhaps as an amendment to Rule 10886. However, this proposal is beyond the scope of the current proposed rules, which relate only to the procedures for dismissing lien claims for lack of prosecution (new Rule 10582.5), the procedures for filing and service of lien claims (amended Rule 10770), and the procedures for lien conferences and lien trials (new Rule 10770.1).

Kaiser Permanente lastly suggests that language be included in Rule 10770.1 which requires that, prior to the setting of a lien conference, a defendant must serve a lien claimant with copies of any fee schedule reviews and any medical reports not previously served upon which the defendant intends to rely. In addition, there should be sufficient time for the lien claimant to obtain rebuttal evidence.

Response:

Once again, this is beyond the scope of the current rulemaking but is a provision that should be considered in future rulemaking.

Comment No. 20:

Elizabeth Wahnon, the Deputy Director of the Disability Insurance Branch of the Employment Development Department (EDD), has submitted comments.

EDD first objects to the provisions of Rule 10770, as originally proposed, which would: (1) eliminate the provision of current Rule 10770(c) that “[s]ervice of a lien on a party shall constitute notice to it of the existence of the lien” and (2) provide that the service of a lien on the defendant would not constitute the filing of that lien with the WCAB.

Response:

With respect to EDD lien claims, the WCAB agrees. EDD liens are clearly given special treatment under the Labor Code. (See, e.g., Lab. Code, §§ 4903(f), (g), & (h); 4904.) Moreover, the first sentence of Labor Code section 4904(a) provides that “[i]f notice is given in writing to the insurer, or to the employer if uninsured, setting forth the nature and extent of any claim that is allowable as a lien, the claim is a lien against any amount thereafter payable as

compensation.” Although this first sentence makes no specific reference to EDD, virtually the entire balance of section 4904 clearly applies to EDD. Therefore, a reasonable interpretation of the first sentence of section 4904 is that it applies to EDD.

Accordingly, the WCAB has amended Rule 10770 to add a subdivision (j)(1) which provides that subdivisions (b)(3) and (4) [originally proposed as subdivisions (b)(5) and (6)] do not apply to the lien claims of EDD.

EDD also states that Rule 10770(b)(5) and (6), as originally proposed [see, now, Rule 10770(b)(3) and (4)] might encourage insurers and defense attorneys to make token partial payments to EDD, resulting in an undue administrative burden on it.

Response:

The WCAB agrees. See Response above.

EDD also states that Rule 10770.1, as originally proposed, should be amended from the requirement to submit a pretrial conference statement and from the provisions allowing a notice of intention to dismiss its lien if it fails to appear at the lien conference.

Response:

The WCAB agrees and it has amended Rule 10770.1 to add a subdivision (m), which limits the application of Rule 10770.1 to EDD.

Comment No. 21:

Vernon Englund, D.C., the president of the California Chiropractic Association (CCA), has submitted comments on behalf of the CCA.

The CCA first suggests that Rule 10582.5(b) [as originally proposed] should be amended to increase the written objection period from 10 to 15 days because this would provide a more reasonable amount of time for a lien claimant to address the situation.

Response:

As discussed in the responses to Comments 12 and 17, the WCAB agrees that the written objection period is too short. Therefore, in Rule 10582.5(f)(1), the WCAB has increased the written objection period from 10 to 30 days.

CCA next states that it supports the provisions of Rule 10582.5(c)(2), as initially proposed (see now § 10582.5(c)(2)(A) & (d)).

Response:

No response is necessary.

CCA, however, objects to the provision of Rule 10770 providing that if any amended lien claim—or any supporting documentation to an original or amended lien claim—is submitted to the WCAB, it shall not be accepted for filing. CCA states: “We believe it is important to insure lien claimants are notified about the status of their filed lien. If denied, the WCAB should provide an explanation about the rules that have been violated.”

Response:

CCA appears to misconstrue the provisions of Rule 10770. Rule 10770 does not allow the WCAB to deny a lien (original or amended) if its provisions are violated. Instead, Rule 10770 merely instructs lien claimants to file

only original liens without any supporting documentation. This provision is intended to reduce the amount of paperwork the WCAB must process. However, when an original lien is filed, the lien claimant will be added to the official participant record and it will receive any notices it is entitled to receive under the WCAB's rules, including notice of any denial of the lien on the merits.

However, Rule 10770 has been amended to make it clear that if an original lien is filed together with supporting documentation, the original lien will be accepted and only the supporting documentation will be rejected and destroyed.

Comment No. 22:

Eric Scott has submitted comments on behalf of Absolute Medical Billing & Collections (Absolute Medical).

Mr. Scott initially indicates that Absolute Medical largely supports Rule 10582.5, but Absolute Medical is concerned that an external e-filer may have its lien dismissed where it has actively attempted to file a DOR but where EAMS rejects the DOR because "NO SUITABLE SLOT" is available. [NOTE: As background, some district offices of the WCAB have allocated only a limited number of "slots" on their calendars for lien hearings, thus assuring that at least some calendar time is available for the claims of injured employees. At these district offices, EAMS will permit lien hearings to be set out only for a certain limited number of months on their calendars. If a DOR on a lien claim is filed by an e-filer but there are no lien hearing slots available within the limited time period, the DOR will be rejected and the e-filer will receive a "NO SUITABLE SLOT" error message from EAMS.]

Response:

It is not the intention of Rule 10582.5 to allow for the dismissal of lien claims for lack of prosecution where the lien claimant has made reasonable and good faith efforts to file a DOR but the DOR is rejected by EAMS because the WCAB does not have a lien hearing slot available on its calendar.

Therefore, if a petition to dismiss a lien claim is submitted under these circumstances, the lien claimant should object both to the petition and to any notice of intention, stating under penalty of perjury the basis for its objection. A prudent lien claimant (or its third-party vender) will print out a copy of the "NO SUITABLE SLOT" error message from EAMS, together with whatever other information is available (e.g., the EAMS batch number), and submit copies of that information with its written objection.

Mr. Scott also indicates Absolute Medical's agreement with many of the provisions of Rule 10770.1. However, Absolute Medical objects to certain provisions of Rule 10770.1 (i.e., the pretrial conference statement, the closure of discovery, etc.) because: (1) defense counsel is often assigned a file only a day or two before the lien conference and, therefore, has not had a chance to review the file, formulate defenses, and identify exhibits in support of the defendant's positions; (2) a defendant might not be in actual possession and control of its file;²⁹ and (3) some necessary records might be in the possession or control of the employer, not the insurance carrier. Similarly, Absolute Medical objects to the provisions of Rule 10770.1 to the extent it would allow the WCAB to set a trial over the objection of a party or lien claimant. Further, Absolute Medical objects to Rule 10770.1(j) (which would allow liens to be submitted for decision solely on the exhibits listed in the pretrial conference statement under particular circumstances) because it potentially allows the summary dismissal of a lien without due process. In summary, Mr. Scott states:

²⁹ As examples, Mr. Scott points to situations where the defendant's file is in cold storage, where the defendant is the California Insurance Guarantee Association (CIGA) and it needs to get files from the insolvent insurance carrier, or where the defendant is employing a new third-party administrator (TPA) different from the TPA that generated the file.

“The way that the proposed language is currently written might result in a cure much worse than the disease. It can result in a one size fits all outcome by seeking to close discovery and the development of the record before appropriate. It presupposes that defendants will timely provide discovery prior to the hearing [footnote omitted], notify lien claimants of their defenses, and allow lien claimants to review their own records to develop rebuttal evidence all before the hearing.

“The current constructive effect of the confluence of [proposed] subsections (d), (e), and (g) [(see, now, subdivisions (e), (f), (g) and (i))] is to deprive lien claimants of the requisite discovery, force them to trial with an incomplete record and rebuttal evidence, and enforce a summary judgment upon them without the opportunity to be heard.

“I would recommend a court ordered discovery plan at each stage of the proceedings until the record is complete, easy imposition of legal costs and sanctions against a party not complying with that discovery without good cause, and the generation of a complete trial record to preserve the record for appeals. Court cases are factually and legally idiosyncratic and there must be enough opportunity to develop a case without also creating the opportunity for a party to profit from delay.”

Response:

The principal intention of Rule 10770.1(d) and (e), as originally proposed (see, now, Rule 10770.1(e), (g), and (f)) is to ensure that both the lien claimant and the defendant are fully prepared at the lien conference so that continuances—which waste calendar time—are avoided. Therefore, if a defendant is not prepared, a continuance (or an OTOC) should not be allowed unless there is a showing of good cause.³⁰ If a continuance is denied, this should not prejudice a prepared lien claimant because there will be little or no defense evidence or witnesses it will have to rebut.

It appears that Absolute Medical misconstrues the provisions of Rule 10770.1(g), as originally proposed (see, now, Rule 10770.1(i)). The rule does not permit the summary dismissal of a lien claim nor does it preclude a defendant or lien claimant from objecting to the admission of documentary evidence. It merely provides that if no witnesses are listed, or if no good cause is shown for each witness listed, then the lien claim may be submitted for decision solely on the exhibits listed in the pretrial conference statement.

With respect to Absolute Medical’s suggestion regarding a court-ordered discovery plan to ensure that discovery is complete before the lien conference, Rule 10770.1 already provides that the WCAB may order a one-time continuance of the lien conference or order it off calendar, upon a showing of good cause. Accordingly, if a party or lien claimant can demonstrate good cause, the WCAB can set up a discovery plan.

Mr. Scott also states that Absolute Medical objects to Rule 10770.1(f), as originally proposed (see, now, Rule 10770.1(h)) because it makes no provision for a timely filing of a “Notice of Telephone Availability” in accordance with former Rule 10770(e).

Response:

Preliminarily, the Appeals Board recognizes that some lien claimants, and even some WCJs, interpreted former Rule 10770(e) to mean that lien claimants did not have to appear at lien

³⁰ As to Absolute Medical’s comment about CIGA (see preceding footnote), Insurance Code section 1063.15 provides: “In any workers’ compensation matter [CIGA] shall have the same period of time within which to act or to exercise a right as is accorded to the insurer by the Labor Code, and those time periods shall be tolled against the association until 45 days after the appointment of a domiciliary or receiver.” (Emphasis added.) This gives CIGA extra time to obtain the file from the insolvent insurance carrier. However, there may be instances where there is good cause for continuance, even taking into consideration these extra 45 days.

hearings, either in person or by attorney or hearing representative, if they were available by phone. While this interpretation was arguably understandable, it was incorrect. Former Rule 10770(e) never provided that a lien claimant is entirely excused from appearing at a lien conference or lien trial if it files a “Notice of Telephone Availability.” What former Rule 10770(e) meant was that if a lien claimant did not personally appear at a lien conference or lien trial, and instead appeared through an attorney or hearing representative, the lien claimant had to be available by phone to resolve the lien claim. (See also Rule 10240(a) [all lien claimants who have become a “party” shall appear at lien conferences and all lien claimants shall appear for lien trials at which their lien is an issue to be decided].) To help clarify this, current Rule 10770(d) has changed the language of former Rule 10770(d) to read as follows: “The lien claimant shall provide the ... telephone number of a person ~~who will be available at the time of all conferences and trials, and who will have~~ with authority to resolve the lien claim on behalf of the lien claimant.”

In any event, the goal of Rule 10770.1 is to resolve as many liens as expeditiously as possible. The WCAB has concluded that this goal is best accomplished if the lien claimant or a person representing the lien claimant is required to appear at all lien conferences. Therefore, Rule 10770.1(d) requires that each lien claimant shall appear at each lien conference, either in person or by an attorney or hearing representative. If the lien claimant does not personally appear, then its attorney or hearing representative must have immediate settlement authority available by phone.

Comment No. 24:

Jill DeAnn Dahl, the Chief Financial Officer of PhyMed, has submitted comments.

Preliminarily, Ms. Dahl states in substance that, as a lien claimant, her company follows a protocol to attempt to resolve its lien claims, including filing DORs and attending hearings. Nevertheless, her experience is that the lien claims do not resolve because the defendants do not respond or do not adequately respond to pre-hearing attempts to resolve the liens. Furthermore, at the lien conferences, the defendant often requests an OTOC because: (1) the defense attorney does not have any type of authority and cannot reach the assigned adjustor; (2) not all lien claimants are present; or (3) the defendant needs additional time for discovery regarding one or more lien claims. Ms. Dahl suggests that, before any party or lien claimant may file a DOR on a lien issue, the party or lien claimant must establish that there were good faith negotiations to resolve the lien, including proof of service of a written settlement offer and copies of any written response.

Response:

WCAB Rule 10250(b) (formerly, Court Administrator Rule 10250(b)) already provides that, before filing a DOR, the moving party “shall state under penalty of perjury the moving party has made a genuine, good faith effort to resolve the dispute” and that the good faith effort “shall [be] state[d] with specificity.” Further, Rule 10250(c) already provides that “[a] false declaration or certification by any party, lien claimant, attorney or representative may give rise to proceedings under Labor Code section 134 for contempt or Labor Code section 5813 for sanctions.” Therefore, if a party or lien claimant believes that a DOR was filed before making good faith efforts to resolve the lien dispute, that party or lien claimant can ask the WCAB to initiate proceedings for contempt and/or sanctions.

Also, under new Rule 10770.1(f), an OTOC may be granted only upon a showing of good cause. As stated in response to Comment 18, the WCAB expects that WCJs throughout California will adhere to the mandates of Rule 10770.1(f) and anticipates that DWC will train them to do so. However, if in any given case a WCJ fails to comply with the requirements of Rule 10770.1(f), a

petition for removal may be filed with the Appeals Board. (See Lab. Code, § 5310; Cal. Code Regs., tit. 8, § 10843.) If the Appeals Board determines that there was not good cause for an OTOC, it ordinarily will order the case back on calendar and, depending on the circumstances of each particular case, the Board might take additional action.³¹

Ms. Dahl also asserts that lien claimants “should automatically be awarded DWC fee schedule” where (1) a defendant ignores a settlement offer, (2) a defendant refuses to provide the lien claimant with requested documentary evidence, or (3) the WCAB finds that the defendant has some liability but has made no attempt to settle with the lien claimant. Ms. Stahl suggests that, if these standards are enacted, there will be a “significant drop in cases requiring the assistance of the WCAB to aid in settlement negotiations” and, “[a]lso, this will allow lien claimants to quickly identify accounts that need to be written off as well as liens that need to be withdrawn.”

Response:

The WCAB does not have the power to “automatically” make an award to a lien claimant against a defendant under any of the circumstances referenced by Ms. Dahl. The law is that a lien claimant has the burden of proof on every element necessary to establish its lien. (Lab. Code, §§ 3202.5, 5705; Tapia v. Skill Masters Staffing (2008) 73 Cal.Comp.Cases 1338 (Appeals Board en banc); Kunz v. Patterson Floor Coverings, Inc. (2002) 67 Cal.Comp.Cases 1588 (Appeals Board en banc).) Accordingly, a lien claimant must prove its lien and cannot prevail simply because a defendant allegedly drags its feet. However, if a defendant files a DOR on a lien issue without having made a good faith effort to resolve the dispute as required by current Rule 10250, or if it fails to comply with various provisions of new Rule 10770.1, then the defendant may be subject to sanctions for “failure to comply with a ... regulatory obligation (Cal. Code Regs., tit. 8, § 10561(b)) and/or “[f]ailing to comply with the [WCAB’s] Rules... [or] with the regulations of the ... Court Administrator” (Cal. Code Regs., tit. 8, § 10561(b)(4)). Also, if a defendant fails to provide a lien claimant with requested documents, the defendant might be subject to evidentiary sanctions.

Ms. Dahl states that 10 days is not a reasonable amount of time to respond to a notice of intention to dismiss a lien for lack of prosecution because, often, seven calendar days have elapsed between the date of service of the NIT and the date the lien claimant receives it. She suggests that 30 days is more reasonable.

Response:

The WCAB agrees and, as adopted, Rule 10582.5 gives lien claimants 30 days to respond to a notice of intention to dismiss a lien for lack of prosecution.

Ms. Dahl suggests that a defense attorney’s appearance at a lien conference without authority should be “treated equally” to a lien claimant’s non-appearance since the defense attorney’s lack of authority is tantamount to a non-appearance because no lien is resolved, nothing is addressed, and there has to be a continuance.

Response:

Preliminarily, it is not clear whether Ms. Dahl is suggesting that, in much the way that a lien claim is subject to dismissal if the lien claimant fails to appear (see Cal. Code Regs., tit. 8, §§ 10562(d), 10241(b), 10770.1(h)), a lien claim should be automatically allowed if a defense attorney appears without full authority. If she is suggesting this, however, there is no legal basis for it. Again, the law is that a lien claimant has the burden of proof on every element necessary

³¹ For example, if the pre-trial conference statement was completed before the OTOC, the Appeals Board might order that the matter be set for a lien trial, with discovery remaining closed. If no PTCS was completed, the Appeals Board might order that discovery shall be deemed closed as of the date of the conference that was taken off calendar and then return the matter for completion of the PTCS and for trial.

to establish its lien. (Lab. Code, §§ 3202.5, 5705; Tapia v. Skill Masters Staffing (2008) 73 Cal.Comp.Cases 1338 (Appeals Board en banc); Kunz v. Patterson Floor Coverings, Inc. (2002) 67 Cal.Comp.Cases 1588 (Appeals Board en banc).)

However, if a defense attorney appears without either having authority to settle or the immediate ability to contact a person with such authority, this could be a violation of current Rule 10240(b) and new Rule 10770.1. Accordingly, the defendant, the defense law firm, and/or the defense counsel could be subject to sanctions—together with attorney’s fees and costs payable to the lien claimant—for a “failure to comply with a statutory or regulatory obligation (Cal. Code Regs., tit. 8, § 10561(b)) and/or “[f]ailing to comply ... with the regulations of the ... Administrative Director” (Cal. Code Regs., tit. 8, § 10561(b)(4)).

Nevertheless, this issue may be addressed in future rulemaking.

Ms. Dahl also complains that defendants rarely provide reasons for denying a lien claim and/or fail to provide evidence supporting a denial.

Response:

Various provisions of the Labor Code and of the Administrative Director’s Rules require defendants to provide reasons for denying a billing. (E.g., Lab. Code, § 4603.2(b)(1)(B) and Cal. Code Regs., tit. 8, § 9792.5(c)(1) & (2) [medical treatment]; Lab. Code, § 4622(c) and Cal. Code Regs., tit. 8, § 9794(c)(1) & (2) [medical-legal]; Cal. Code Regs., tit. 8, § 9795.4(a)(1) & (2) [interpreters].) Some provisions of the new lien rules give recognition to these statutory and regulatory duties. (See Cal. Code Regs., tit. 8, §10582.5(c)(2)(B)(i); 10770(b)(4)(B)(i).) Moreover, a defendant that violates these provisions could be subject to sanctions—together with attorney’s fees and costs payable to the lien claimant—for a “failure to comply with a ... regulatory obligation (Cal. Code Regs., tit. 8, § 10561(b)) and/or “[f]ailing to comply ... with the regulations of the ... Administrative Director” (Cal. Code Regs., tit. 8, § 10561(b)(4)).

Ms. Dahl next refers to the provision of Rule 10770(b)(3) (originally proposed as Rule 10770(b)(5)) that notice to a defendant of any claim that would be allowable as a lien shall not constitute the filing of a lien with the WCAB. Ms. Dahl states, if this provision is adopted, that the WCAB will be overcome with new lien claims, thus causing “the exact opposite effect” of what the WCAB is trying to achieve.

Response:

The WCAB agrees that this provision might increase the overall number of lien claims filed. The WCAB believes, however, that this provision is necessary to close a loophole in the statute of limitations laws that created an incentive for entities to purchase old accounts receivables, file liens many years after the claimed services had been rendered (informally called “zombie liens”), and use the WCAB’s scarce judicial resources to collect payment on ancient bills. The WCAB believes that, even if the overall number of liens filed is increased by Rule 10770(b)(3), there ultimately will be a greater benefit to the system in reducing or eliminating “zombie liens.”

Lastly, Ms. Dahl suggests that Rule 10770 be amended to provide that a lien claim need not be filed for unresolved billings that are less than \$500.00, unless the lien claimant does not have “any type of documentation that supports the insurance carrier[’s] acknowledgement of having received the bill.” Instead, under such circumstances, a lien claim should have to be filed only if the lien claimant or the defendant is requesting a lien conference to facilitate the resolution of the lien.

Response:

The WCAB disagrees. A statutory change would be required to exclude liens under \$500 from the Labor Code's lien-filing requirements. (E.g., Lab. Code, §§ 4903.1(c) 4903.5.)

Comment No. 25:

York McGavin, President of Gibraltar Electro Medical Services, states that Rule 10582.5 “requires amendment to ensure due process for lien claimants in regards to the service of medical reports pursuant to WCAB Rule 10608(f), which at the present is observed in the breach.” Mr. McGavin says that the failure to serve lien claimants with the medical reports “has long been problematic for the WCAB, and has resulted in numerous lien conferences being continued, or taken off calendar.” Mr. McGavin suggests that the goal of expeditious resolution of lien claims would be accomplished if section 10582.5(c)(2)(A) is amended as follows:

“proof that a copy of an order approving a compromise and release agreement, a stipulated Findings and Award, and adjudicated Findings and Award, or other decision or order resolving the underlying case was served on the lien claimant *along with all medical reports relating to the claim as required by section 10608(f).*”³²

Response:

The WCAB agrees. Accordingly, the WCAB has amended Rule 10582.5(c)(2)(C) consistent with Mr. McGavin's suggestion.

Comment No. 26:

Michael McClain, General Counsel and Vice President of the California Workers' Compensation Institute (CWCI), submitted comments on behalf of CWCI and also testified at the September 8, 2011 public hearing.

CWCI initially suggests that the language of Rule 10582.5(a)(1) and (a)(2) as originally proposed, which would have given a lien claimant “one year” to file a DOR after it becomes a “party” or after the issuance of an OTOC relating to its lien, be changed to “six months.” CWCI points out that the WCAB's declared purposes in proposing these provisions are: (1) to encourage lien claimants to pursue their lien claims in a timely manner, before evidence is lost and witnesses disappear or have their memories dimmed; and (2) to reduce the number of hearings needed to address discovery issues and lien cases, which arise more frequently when the evidence is no longer available or is difficult to resurrect.

Response:

The WCAB agrees that a 180-day period rather than a one-year period is appropriate and it has amended Rule 10582.5 accordingly.³³

In addition to the reasons already pointed out by CWCI, it should be emphasized that, unlike current Rule 10582, Rule 10582.5 does not involve the potential dismissal of an entire case, but only of an individual lien claim. Therefore, its impact would not be so draconian. Moreover, by the time a lien claimant becomes a “party” within the meaning of section 10301(x)(3)—or by the time an OTOC regarding a lien claim has issued—a significant period of time ordinarily will have elapsed. During this extended period of time, the lien claimant can engage in settlement discussions regarding its lien and, if those discussions fail, begin preparations to bring the disputed lien to hearing. Therefore, again, reducing the time period from one year to six months is not that draconian.

³² As with the comments of Mr. Au, the change Mr. McGavin's suggested additions to the originally proposed regulatory text are indicated by italicized bold double underline (illustrated as follows: *suggested added language*).

³³ The phrase “six months” is a bit amorphous because different months have different numbers of days.

Accordingly, the WCAB has amended Rule 10582.5(a)(1) and (a)(2) consistent with CWCI's suggestion. The WCAB has also made corresponding amendments to Rule 10582.5(d)(1) & (2).

CWCI also suggests that lien claimants should have no more than six months from the date the WCAB issues a final decision on the injured employee's underlying claim—including an order approving a compromise and release agreement (OACR)—within which to file their liens.

Response:

The WCAB disagrees. Labor Code section 4903.5 establishes the limitation periods for filing a lien claim. To provide otherwise would require a statutory change.

CWCI next suggests that the language of Rule 10582.5 should be amended to require that a notice of intention to dismiss a lien claim shall be served only by the WCAB. It is CWCI's position that because Rule 10582.5 would result in dismissals based on pleadings, without a hearing, any NIT that precedes such an action should be served directly by the WCAB.

Response:

The WCAB disagrees. Rule 10582.5(f) allows the WCAB to serve an NIT itself, but it also gives the WCAB the flexibility to designate service (see Cal. Code Regs., tit. 8, § 10500(a)) in instances where it has limited staff or financial resources or where it serves its convenience to do so. Also, if designated service is used, Rule 10582.5(c) specifically allows the WCAB to direct the filing of the proof of service if a dispute arises.

CWCI recommends that the language of Rule 10582.5 be amended to make it clear that the six-month period of subdivision (a)(1) is computed from when the original lien claimant becomes a party, and not from the date a collection company is hired or, implicitly, the ownership of the lien is transferred to a purchaser.

Response:

The WCAB agrees and has amended Rule 10582.5 to that effect.

CWCI also recommends that Rule 10582.5(d)(3) should be amended to provide a defendant must serve a petition to dismiss a lien claim for lack of prosecution on the injured employee and, if represented, on the injured employee's attorney only if the injured employee's case is open and unresolved.

Response:

The WCAB disagrees for the reasons set forth in its second response under Comment No. 15.

CWCI further recommends that Rule 10770.1(a) be amended to allow the WCAB to notice a lien conference that includes lien claims or lien issues not listed in the DOR only when the notice of the lien conference states "the issues ... with sufficient specificity to give the defendant notice of the issues to be adjudicated." CWCI asserts that, "[u]nless the defendant clearly understands what issues are open at a given conference, they may not have the relevant EOBs [explanation of benefits], reports, bills, or other supporting evidence available."

Response:

The WCAB disagrees for the reasons stated in its fourth response to Comment No. 15.

CWCI suggests that Rule 10770.1(f), as originally proposed (see, now, Rule 10770.1(h)) should be amended to simply state that the WCAB may dismiss the lien claim in accordance with sections 10241 and 10562. CWCI states that this avoid potential conflicts with currently existing regulatory options available to the WCAB.

Response:

The WCAB agrees and has amended Rule 10770.1(h) accordingly.

Comment No. 27:

Robert W. Ehle, Jr., the Corporate Claims Operations Manager of State Compensation Insurance Fund (SCIF), and Patricia A. Brown, SCIF's Deputy Chief Counsel, have submitted comments on behalf of SCIF.

SCIF states that it supports Rule 10582.5, but recommends that additional language be included to clarify that it applies to all liens regardless of date of injury or date of service. SCIF observes that, without such an amendment, lien claimants might assume that the proposed rule applies prospectively as to dates of injury and that this could result in additional litigation. SCIF points out that a clear statement of the effective date of the provision will reduce litigation on that point.

Response:

The WCAB agrees and has amended Rule 10582.5(j) accordingly.

SCIF also indicates that it supports Rule 10770 because: (1) its limitations on the filing of lien documents will reduce paper, while the requirement that lien claimant still serve those documents will ensure that defendants have currently an information; and (2) the provisions of subdivision (b)(3) and (4) (formerly, (b)(5) and (6)) promote the timely resolution of disputes and case finality.

SCIF, however, makes two recommendations for amending Rule 10770. First, SCIF recommends that the filing fee be reinstated to reduce the volume of frivolous lien issues that are placed on calendar. Second, SCIF recommends that all lien representatives be required to disclose the party whom they represent to ensure that a valid and true representative is appearing and entering into settlement agreements and stipulations. This will prevent subsequent lien claimant representatives from appearing on the same liens at a later time and claiming that they are the true representative and that the prior representative did not have the power to act on behalf of the provider.

Response:

As to the lien filing fee, the WCAB disagrees for the reasons stated in its first response to Comment No. 9. Reinitiating the lien filing fee would require a statutory change.

As to disclosing the entity that a lien representative represents, current Rule 10550 and the Appeals Board'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) already impose such a requirement. Therefore, when appearing before the WCAB, a defendant can ask the WCJ to order a lien claimant to comply with these provisions. Also, amended Rule 10770(c)(2) requires a lien claimant to provide proof that it is the owner of the alleged debt.

SCIF states that it supports Rule 10770.1, however, it recommends that it be amended to require that lien representatives must appear in person at "all hearings." SCIF states that such a provision "will encourage lien claimants to pursue only matters in which resources should be allocated."

Response:

See the discussion in the third response to Comment No. 22 regarding the amendment to Rule 10770.1(d) to require that each defendant and each lien claimant shall appear at all lien conferences and lien trials, either in person or by attorney or representative.

Finally, SCIF states: “There should also be a written Ethical Code of Conduct for those who appear [before the WCAB]. All parties who appear on a dispute should be required to adhere to the utmost standards of honesty, integrity, and fair dealing. A failure to adhere to the Code of Conduct should be deemed grounds for barring a party from appearing and practicing [before the WCAB].”

Response:

This suggestion is beyond the scope of the WCAB’s current rulemaking, which only addresses the procedures for dismissing lien claims for lack of prosecution (proposed new Rule 10582.5), the procedures for filing and service of lien claims (proposed amended Rule 10770), and the procedures for lien conferences and lien trials (proposed new Rule 10770.1).

Comment No. 27:

Stephen J. Cattolica, Director of Government Relations for the California Society of Industrial Medicine and Surgery (CSIMS) and the California Society of Physical Medicine and Rehabilitation (CSPM&R), has submitted comments on behalf of those organizations. He also testified at the September 8, 2011 public hearing.

Preliminarily, Mr. Cattolica states that “the over-arching concern [of CSIMS and CSPM&R] has been and remains to be, the fact that these regulations and no currently proposed legislation strike at the heart of activities that create liens in the first place.” (Emphasis in original written comments.)

Response:

This concern is beyond the scope of the WCAB’s current rulemaking, which only addresses the procedures for dismissing lien claims for lack of prosecution (proposed new Rule 10582.5), the procedures for filing and service of lien claims (proposed amended Rule 10770), and the procedures for lien conferences and lien trials (proposed new Rule 10770.1).

CSIMS and CSPM&R recommend that Rule 10582.5(b) be amended to give lien claimants 30 days within which to object to an NIT to dismiss for lack of prosecution. They also state that “proofs of service are appropriate to establish compliance.”

Response:

As discussed its responses to Comments Nos. 12, 17, 21, and 24, the WCAB has amended Rule 10582.5 to provide 30 days, instead of 10 days, to object.

With respect to proofs of service, if an NIT is served by the WCAB itself, then its proof of service will be in accordance with current Rule 10500(d). If designated service under current Rule 10500(a) is utilized, then the service provisions of current Rule 10505 will apply. Moreover, Rule 10582.5 allows the WCAB to direct the filing of the proof of service if a dispute arises.

CSIMS and CSPM&R assert that the language of Rule 10582.5(c)(1), as originally proposed, stated as follows: “a copy of a letter to the lien claimant *and*, if represented, to the lien claimant’s attorney or representative of record, if unrepresented, to the Applicant, that was mailed more than thirty (30) days before the filing of the petition to dismiss.” They state that this language is confusing in that it mixes terminology, referring to the “lien claimant” in once instance and “the Applicant” in another.

Response:

CSIMS and CSPM&R misquote the language of Rule 10582.5. No such language exists anywhere in Rule 10582.5, either in its final form or as originally proposed.

CSIMS and CSPM&R asserts that Rule 10582.5(e), as originally proposed, states, “This section shall become operative on January 1, 2012 and applicable to all liens filed after the operative date.” (Emphasis added.) They then state their belief that the WCAB meant the regulation to apply to all liens outstanding on January 1, 2012.

Response:

Once again, CSIMS and CSPM&R misquote the language of Rule 10582.5(e), as originally proposed, because the highlighted portion of their alleged quote was never in proposed Rule 10582.5(e).

The WCAB, however, agrees that, as originally proposed, Rule 10582.5 was unclear as to the lien claims to which it applies. Therefore, the WCAB has amended Rule 10582.5(i) to provide: “This section shall become operative on August 1, 2012 and ... shall apply to all lien claims, regardless of the date of filing of the lien claim, the injured employee’s date(s) of injury, or the date(s) on which the lien claimant provided the service(s) that are the subject of the lien claim.”

CSIMS and CSPM&R state that Rule 10770, as originally proposed, used quotation marks “around terms that have working definitions already established in the Code.” They suggest that the quotation marks imply that the words should not be given their generally accepted meanings, yet, no alternative definitions are offered. Therefore, they state that “[t]he quotation marks should be eliminated or appropriate definitions included in the regulation.” In making the statements, CSIMS and CSPM&R specifically referred to proposed Rule 10770’s alleged use of “partial payment” and “amended liens.”

Response:

The WCAB has not used quotation marks around the term “partial payment” anywhere in Rule 10770, either as amended or originally proposed.

The WCAB has used quotation marks around the word “amended” in Rule 10770(c)(3) and (e). However, this is because the term needs to be defined and is defined in Rule 10770(e). Moreover, in Rule 10770(e), the use of the word “amended” and its definition are simply carried over from former Rule 10770(f).

Nevertheless, consistent with the WCAB’s response to Comment No. 17, the WCAB has deleted the quotation marks around the terms “filing,” “served,” and “filed” in Rule 10770(b)(3) and (4) (formerly, Rule 10770(b)(5) and (6)).

Comment No. 28:

Pamela Foust, Vice President Claims Legal for Zenith Insurance Company (Zenith), has submitted comments on Zenith’s behalf.

Zenith “believes that the ... revisions to the WCAB[’s] Rules ... will greatly help to alleviate the current lien crisis and the backlog at the [WCAB’s] District Offices.” However, “Zenith also believes that these revisions could be implemented more effectively if consideration were give to additional amendments to [Rules] 10608 and 10505.”

Zenith states disputes concerning service of medical reports on the lien claimants are a major cause of continuances and OTOCs because Rule 10608 requires that all medical reports must be served on each and every medical lien claimant regardless of whether the content of the reports is germane to the particular lien dispute. Zenith also states:

“[I]n cases where the defendant admits liability for the lien claimant’s services, has paid the bill at less than face value, and the only dispute concerns the proper application of the Official Medical Fee Schedule, the only relevant medical reports are those of the individual lien claimants themselves. There

is no useful purpose to be served in requiring a defendant to serve 6 inches of medical reports on 'balance biller' lien claimants. In fact, this procedure only encourages the nuisance value litigation that is clogging the calendars of the District Offices.

"It is suggested that for such cases, [Rule] 10608 be amended to relieve the defendant of any obligation to serve medical reports on the lien claimant. A form could be made available on the DWC's website to enable the defendant to file and serve a written admission of liability and a waiver of any defenses other than reasonable value as a condition of not being required to serve medical reports. This procedure would further reduce litigation if the defendant were not permitted to later change its mind and raise a liability issue for trial absent very good cause such as newly discovered evidence or misrepresentation."

Response:

The WCAB believes that this proposal is very worthy of consideration for a future rulemaking. However, it is beyond the scope of the current rulemaking, which only addresses the procedures for dismissing lien claims for lack of prosecution (new Rule 10582.5), the procedures for filing and service of lien claims (amended Rule 10770), and the procedures for lien conferences and lien trials (new Rule 10770.1).

Zenith further states:

"Another regulatory revision that would serve to alleviate medical report service problems would be to amend [Rule] 10505 to allow a defendant to serve the lien claimants with a CD containing all medical reports and proposed exhibits. Presently, the regulation restricts service to mailing of hard copies unless the parties agree upon an alternative type of service. Frequently, a new lien claimant will appear at a continued conference and dispute service of the medical reports. If service by CD were authorized, the defense attorney could simply hand the CD to the new lien claimant and the service could be noted on the Minutes of Hearing, thus avoiding future disputes over whether the reports were actually received and future requests for additional continuances.

Response:

Again, this is beyond the scope of the current rulemaking.

Comment No. 29:

Kathleen G. Bissell, Assistant Vice President and Senior Regional Director for Liberty Mutual Insurance Company (Liberty Mutual), has submitted comments on their behalf.

Liberty Mutual's first concern is that Rule 10582.5's provisions for dismissing liens for lack of prosecution will be frustrated by lien claimants who make requests for additional time alleging "good cause," that these requests will outweigh any perceived resource savings, and the granting of these requests will result in further delays.

Response:

The WCAB disagrees. Where the procedures of Rule 10582.5 are met and properly followed, they will result in a dismissal of a lien claim for lack of prosecution unless the lien claimant shows "good cause." The requirement to show "good cause" is not satisfied by showing "any" cause. Therefore, if a lien claimant fails to affirmatively show that it has exercised reasonable diligence, its lien should be dismissed in the vast majority of cases.

Moreover, if it turns out that Liberty Mutual is correct that Rule 10582.5, if adopted, does not have its intended effect, then the WCAB can revisit it at some time in the future.

Liberty Mutual is also concerned that about situations where three or four new lien claimants, previously unknown to the defendant, show up at the lien conference. Liberty Mutual suggests that a procedure be established requiring all lien claimants to notify the defendant prior to the hearing.

Response:

The WCAB is aware that, for a variety of reasons, defendants are not always previously aware of lien claimants who appear at a lien conference. This situation can occur, for example, (1) where a lien claimant never serves—or the defendant does not receive—an actual lien claim, or (2) where a defendant pays based on its reasonable estimate of the value of the lien and the lien claimant makes no response, but then some entity that has purchased the lien claimant’s accounts receivable shows up at a lien conference years later.

However, under Rule 10770.1(f)(2) and (3), these scenarios are likely “good cause” for a one-time continuance or an OTOC, although solely with respect to the particular lien or liens in question.

It is the present intention of the Appeals Board to address this issue further in future rulemaking.

Liberty Mutual also suggests amendments to Rule 10770(a)(1), stating: “[W]e would suggest that the e-form filing requirements be dependent on the ability of all parties to send and receive information in a reliable format. Specifically, we need an assurance that we can be properly served in an electronic format and that all EAMS related processes have been tested to assure a smooth and a sufficient process.

Response:

The WCAB cannot ensure, by regulation, that EAMS will be able to do what Liberty Mutual suggests.

Liberty Mutual requests that Rule 10582.5 be amended to include situations where a billing has been sent to a defendant but no actual lien has been filed with the WCAB.

Response:

The WCAB disagrees. Unless a lien has actually been filed, the WCAB cannot dismiss it for lack of prosecution. Moreover, the WCAB has no power to force a service provider to file a lien claim. However, its failure to do so could result in the lien claim being barred under Labor Code section 4903.5 if it is seeking payment for medical treatment or medical-legal services under Labor Code section 4903(b).

Finally, Liberty Mutual complains about the inconsistent application of the WCAB’s rules of practice and procedure by individual district offices or judges. It suggests that “statewide enforcement of current practices and procedures should be pursued.”

Response:

The Labor Code already requires that each district office and each WCJ shall follow uniform procedures. (Lab. Code, § 5500.3.) It is up to the Administrative Director, through training and enforcement, to ensure that these uniform procedures are followed. (Lab. Code, § 123.5; see also § 5500.3.)

Comment No. 30:

Mark Sektan testified at the September 8, 2011 public hearing on behalf of the Association of California Insurance Companies (ACIC). Mr. Sektan stated that ACIC associated itself with the comments submitted by

Republic Indemnity (see Comment 11) and with the comments of Jason Schmelzer (which, as discussed below, were not timely submitted).

Mr. Sektnan also stated that one of the major problems is that many providers file a lien claim on the same day they submit their billing to the defendant. He said that defendants “need to have the opportunity to actually pay the bill before they get a lien.”

Response:

This problem might be the subject of future rulemaking.

Comment No. 31:

Jo Cinq-Mars from the Orthopaedic Medical Group of Santa Ana testified at the September 8, 2011 public hearing. Ms. Cinq-Mars stated that one problem in getting liens paid is that defendants outsource their bills to review companies, but the defendants and the review companies do not communicate with each other. She also said that there are communication problems because defendants are now on paperless systems and, therefore, lien claimants are unable to phone claims adjusters. She further complained that, where an injury claim has been denied by the defendant, the review company will refuse to pay medical-legal liens, even for a billing by an agreed medical evaluator (AME).

Response:

Although these complaints may be valid, they are beyond the scope of the current rulemaking.

Ms. Cinq-Mars is also concerned that if a defendant makes only a partial payment on a billing, and the lien claimant does not send any objection to defendant regarding the partial payment, then the WCAB could dismiss the lien. Therefore, she recommends that the lien regulations be amended to require that before a lien claim may be dismissed, the defendant must show that it properly handled the lien claimant’s billing(s).

Response:

Preliminarily, Rule 10770(b)(4) (formerly, Rule 10770(b)(6)) does not provide that a lien claim may be dismissed if a defendant makes a partial payment and no additional demand for payment is made by the lien claimant within 90 days. Instead, Rule 10770(b)(4) merely provides that the defendant would not have to file that lien claim under Labor Code sections 4904(a) and 4903.1(b). The lien claimant could still file the lien itself, subject to any applicable statute of limitations.

Moreover, Rule 10770(b)(4), as adopted, provides that, before its provisions are triggered, the defendant must tender or make a good faith payment and it must concurrently provide a clear written explanation, consistent with existing laws, that both justifies the amount paid and specifies all additional information the lien claimant must submit to obtain full payment.

Late Comments:

The comment period for the WCAB’s proposed lien regulations closed on Thursday, September 8, 2011, at 5pm. The WCAB, however, received four sets of comments after that time.

On Friday, September 9, 2011, the WCAB received two identical sets of comments from Arturo Mora and Veronica Campbell, who are both state-certified interpreters. Mr. Mora and Ms. Campbell each stated that they were unable to file their comments on Thursday, September 8, 2011, because of a power outage in San Diego.

Various websites confirm that there was a massive power outage in the San Diego area on September 8 that affected approximately 1.4 million customers.³⁴ Therefore, the WCAB has decided to accept their comments.

Nevertheless, Mr. Mora's and Ms. Campbell's comments largely discuss their frustration with insurance companies that choose not to pay their invoices (or do not promptly pay them), thereby forcing them to file lien claims. These comments do not recite any specific concerns about the WCAB's rulemaking and, therefore, the WCAB will not respond to them.

Mr. Mora and Ms. Campbell each also state:

“If the object is to save time for the courts, why not automate the whole process? ... Why not make it a requirement that all parties involved in a claim provide a valid email address, that way instead of having to use the services of USPS, service by email could be provided instead, an email could be sent to the court with all the required paperwork and one would just ‘CC’ all the other parties involved, anyone wishing to add to their file would simply print out their own copy and it would speed up the process. Claims adjustors also should provide their email address so that interpreters can communicate more easily with them.”

Response:

The concept of an entirely automated lien claim system is beyond the scope of the current rulemaking. However, Rule 10218(b) currently permits lien claimants and defendants to voluntarily agree to exchange documents by e-mail. Moreover, EAMS was intended to be largely an automated system and, although it has not yet fully achieved its intended goal, steps have been taken and will be taken to move the reality closer to the initial vision.

Another set of late comments was submitted by Julianne Broyles of California Advocates, Inc., on behalf of the California Association of Joint Powers Authority (CAJPA). These comments were not considered. In any event, Ms. Broyles essentially just states in substance that the CAJPA “strongly supports the proposed rule changes regarding liens” and that CAJPA “believes that the proposed revision[s] to the WCAB[’s] Rules ... are an important step in the right direction.”

The last set of late comments was submitted by Jason Schmelzer, a Legislative Advocate from Shaw/Yoder/Antwih, Inc. Mr. Schmelzer's comments were submitted on behalf of various entities.³⁵ These comments were not considered. In any event, Mr. Schmelzer essentially states that the listed organizations believe that the new lien rules “are an important step in the right direction.” Furthermore, Mr. Schmelzer suggests changes to Rules 10505 and 10608, which are not the subject of the current rulemaking, and he suggests changes various changes to Rule 10770.1 that have already been suggested in other timely comments.

³⁴ See, e.g., <http://latimesblogs.latimes.com/lanow/2011/09/businesses-try-to-get-back-on-track-after-blackout.html> & <http://online.wsj.com/article/BT-CO-20110909-710366.html>.

³⁵ Specifically, the California Coalition on Workers' Compensation, the California Chamber of Commerce, the California Manufacturers & Technology Association, the California Association of Joint Powers Authorities, the California State Association of Counties, the CSAC Excess Insurance Authority, Employers Group, and ALPHA Fund.