

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

FINAL STATEMENT OF REASONS

**Subject Matter of Proposed Regulations:
Rules of Practice and Procedure of the Workers' Compensation Appeals Board**

BACKGROUND:

By its authority under Labor Code sections 5307 and 5307.4 (see also Lab. Code, §§ 133, 5309 and 5708), the Workers' Compensation Appeals Board (WCAB) noticed and held a public hearing and accepted written comments on its proposal to adopt and amend certain Rules of Practice and Procedure (Rules) in Title 8, Division 1, Chapter 4.5, subchapters 1.9 (§ 10210 et seq.) and 2 (§ 10300 et seq.), of the California Code of Regulations. The public hearing on the initially proposed Rules modifications was held on April 16, 2013. The initial written comment period also closed on that date. Thereafter, the WCAB stated its intention to modify its initially proposed Rules and, on July 9, 2013, gave the public until July 25, 2013 to submit written comments regarding the newly proposed modifications. On July 16, 2013, the WCAB extended the time for submitting written comments to August 9, 2013. No additional public hearing was held.

The WCAB has considered the public hearing testimony and all of the timely written comments. The WCAB now adopts its proposed Rules, as modified after the public hearing, together with some further modifications subsequent to the extended written comment period.

In this Final Statement of Reasons (FSOR), the WCAB addresses both the written public comments it received during the extended written comment period and the further modifications it made to its Rules subsequent to the extended written comment period.

By analogy to Government Code Section 11346.9(b),¹ this FSOR incorporates the Initial Statement of Reasons (ISOR) as modified by the Supplemental Statement of Reasons (SSOR). Accordingly, not all of the provisions of the adopted Rules will be discussed in this FSOR. Instead, unless otherwise expressly noted, the discussion in this FSOR will relate to changes the WCAB has made to the proposed modified Rules after the closure of the extended written comment period.

1. Section Amended: 10250 (entitled "Declaration of Readiness to Proceed").

The WCAB has made a minor, non-substantive modification to Rule 10250(b), i.e., the phrase "their attorney(s) or nonattorney(s) representative(s) of record" has been changed to "their attorney or nonattorney representative(s) of record."

2. Section Amended: 10260 (entitled "Consolidation Procedures").

The WCAB has made two minor, non-substantive modifications to Rule 10260(d). In both instances, the WCAB used the word "section" in place of the phrase "California Code of Regulations, title 8, section." This phrase is not used anywhere else in the Rules being adopted and it is not necessary when the "section" reference is to another WCAB Rule.

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¹ As discussed more thoroughly in its ISOR (at p. 1, fn. 2) and its SSOR (at p. 1 & fn. 1), the WCAB is not subject to the rulemaking provisions of Article 5 (Gov. Code, § 11346 et seq.), Article 6 (*id.* § 11349 et seq.), Article 7 (*id.* § 11349.7 et seq.), and Article 8 (*id.* § 11350 et seq.) of the Administrative Procedure Act (APA), with one exception not relevant here.

3. Section Amended: 10301 (entitled “Definitions”).

The WCAB has modified Rule 10301(h) to add the phrase “Except as otherwise provided in section 10451.3” in front of the phrase “the inclusion of medical-legal expenses within the definition of ‘cost’ does not permit them to be claimed through a petition for costs; however, medical-legal expenses may be sought through a claim of costs in the form of a lien.” This modification was engendered by a change to Rule 10451.3 on petitions for costs, which will be discussed later in this FSOR. In substance, however, this change to Rule 10301(h) was made because Rule 10451.3 will now allow interpreters to file petitions for costs for depositions, including medical-legal depositions.

The WCAB has also modified Rule 10301(dd) to define “party” to include “a medical-legal provider involved in a medical-legal dispute not subject to independent bill review.” This change is based on comments the WCAB received from Carl Brakensiek of AdvoCal. This change will allow: (1) a medical-legal provider to respond to a “Petition for Determination of Non-IBR Medical-Legal Dispute” and a declaration of readiness (DOR) filed by a defendant under Labor Code section 4622(c) and Rule 10451.1(c)(2)(A), and to receive notice of any hearing set based on the DOR; and (2) a medical-legal provider to file a “Petition for Determination of Non-IBR Medical-Legal Dispute” and a DOR under Rule 10451.1(c)(3), and to receive notice of any hearing set based on the DOR.

4. Section Added: 10451.1 (entitled “Determination of Medical-Legal Expense Disputes”).

The WCAB has modified Rule 10451.1(c)(1) to strike “medical-legal goods or services provided prior to January 1, 2013” from the list of issues that are expressly not subject to independent bill review (IBR). When the WCAB included this language in its proposed modifications to its initially proposed rules, the WCAB did so largely because the Rules of the Administrative Director (AD) provide that an IBR shall not apply to medical legal expenses incurred prior to January 1, 2013. (See Cal. Code Regs., tit. 8, §§ 9792.5.4, 9792.5.5(a), 9792.5.7(a).) However, the public comments of the California Workers’ Compensation Institute (CWCI) and the California Coalition on Workers’ Compensation (CCWC) assert that these provisions of the AD’s Rules does not conform with Labor Code section 4603.6 and the uncodified provisions of Section 84 of SB 863, which provides in relevant part: “This act shall apply to all pending matters, regardless of date of injury, unless otherwise specified in this act.” In light of these public comments, the WCAB has determined that this assertion should be addressed through adjudication (possibly by an en banc decision) and not through regulatory action.²

In addition, the WCAB has modified Rule 10451.1(c)(1) to include “an assertion by the defendant that an interpreter was not reasonably required at a medical-legal examination because the employee proficiently speaks and understands the English language” in the list of non-IBR issues.³ This language is based on the provisions of Labor Code section 4600(f) and 4620(d), which provide that an injured employee is entitled to the services of a qualified interpreter during a medical-legal exam if the injured employee cannot effectively communicate with an examining physician because he or she “cannot proficiently speak or understanding the English language.” IBR only involves questions regarding the amount payable under an official fee schedule in effect on the date of service (Lab. Code, §§ 4603.6(a), 4622(c)) and, therefore, independent bill reviewers will not be determining whether the injured employee can proficiently speak or understand English.

² The public comments of State Compensation Insurance Fund (SCIF) suggest that Rule 10451.1 should be modified to provide that IBR should apply to pre-January 1, 2013 dates of service if ordered by the WCAB. Given that the WCAB has concluded that the issue of whether “medical-legal goods or services provided prior to January 1, 2013” are subject to IBR should be addressed by case law, the WCAB similarly concludes that the issue of whether IBR may be ordered for pre-January 1, 2013 dates of service should also be addressed by case law.

³ This is in addition to (but consistent with) the provision that non-IBR issues include “an assertion by the defendant that an interpreter who rendered services at a medical-legal examination did not meet the criteria established by Labor Code sections 4620(d) and 5811(b)(2) and the Rules of the Administrative Director, as applicable.”

The WCAB is also entirely deleting the proposed modified version of Rule 10451.1(f), which was entitled “Petition to Enforce IBR Determination,” because those provisions are addressed more fully in Rule 10451.4, which is also so entitled.

Further, the WCAB is making changes to new Rule 10451.1(f) [previously, Rule 10451.1(g)], entitled “Waiver of Medical-Legal Expense Issues.” Some of these changes are non-substantive, which will not be discussed here. However, the WCAB is making substantive changes to Rule 10451.1(f)(2), entitled “Waiver by a Medical-Legal Provider.” Rule 10451.1(f)(2)(A) is being changed to provide that a medical-legal provider’s bill will be deemed satisfied “if the defendant issued a timely and proper UR and made payment consistent with that EOR within 60 days after receipt of the provider’s written billing and report and *the provider failed to make a timely and proper request for a second review in the form prescribed by the Rules of the Administrative Director* within 90 days after service of the UR.” This change more closely comports with the language of Labor Code section 4622.⁴ Similarly, Rule 10451.1(f)(2)(A) is being changed to provide that a medical-legal provider’s bill will be deemed satisfied “if, within 14 days after receipt of the provider’s request for second review, *the defendant issued a timely and proper final written determination and made payment consistent with that determination and the provider failed to request IBR within 30 days after service of the second review determination.*” Again, this change more closely comports with the language of Labor Code section 4622.⁵

Finally, the WCAB is making changes to new Rule 10451.1(g)(1) [previously, Rule 10451.1(h)(1)], regarding “Bad Faith Actions or Tactics.” The WCAB is striking the language from the modified proposed version of the Rule that had stated: “In addition, the medical-legal provider’s ‘costs’ shall include reimbursement of any lien filing or activation fee paid by the provider.” The WCAB concludes that what “costs” a medical-legal provider might be entitled to under Labor Code section 5813 and Rule 10561 should be determined on a case-by-case basis. However, the WCAB is amending the last paragraph of this subdivision to add the following italicized language: “These attorney’s fees, costs, and monetary sanctions shall be in addition to any penalties and interest that may be payable under Labor Code sections section 4622 or other applicable provisions of law, and in addition to any *lien filing fee, lien activation fee, or IBR fee* that, *by statute*, the defendant might be obligated to reimburse to the medical-legal provider.” This gives recognition to the fact that, when a medical-legal provider prevails in IBR, it is entitled not only to have defendant pay its IBR fee (see Lab. Code, § 4603.6(c)), but also to have its lien filing or activation be reimbursed if certain statutory conditions are met (see Lab. Code, § 4903.07(a)).

CCWC’s public comments suggest that the language of Rule 10451.1(c)(1) be amended to strike the phrase “but are not limited to” from the provision that “non-IBR disputes shall include, but are not limited to ...” The WCAB disagrees. Although the WCAB has made an effort to specifically identify a number of non-IBR disputes, the WCAB cannot now divine the entire universe of possible non-IBR disputes. Also, if subsequent legislation expands the possible realm of non-IBR disputes, then the language of the Rule would not have to be immediately amended.

⁴ Labor Code section 4622(a) basically provides that, within 60 days after receipt of a provider’s billing, the defendant must pay any uncontested charges and issue an EOR with respect to any contested charges. Next, section 4622(b)(1) provides that the provider may request a second review within 90 days of service of the EOR and that this request for second review shall be on a form prescribed by the AD. Then, section 4622(b)(2) further provides that if the provider does not request second review within 90 days, the bill will be deemed satisfied and neither the employer nor the employee shall be liable for any further payment.

⁵ Labor Code section 4622(b)(3) basically provides that, if a timely request for a second review is made, the employer has 14 days to respond with a “final written determination.” Next, section 4622(b)(4) states: “If the provider contests the amount paid, after receipt of the second review, the provider shall request [IBR] as provided for in Section 4603.6.” In turn, section 4603.6(a) states: “If the only dispute is the amount of payment and the provider has received a second review that did not resolve the dispute, the provider may request [IBR] within 30 calendar days of service of the second review pursuant to Section 4603.2 or 4622. If the provider fails to request [IBR] within 30 days, the bill shall be deemed satisfied, and neither the employer nor the employee shall be liable for any further payment.”

CWCI's public comments express concerns about Rule 10451.1(c)(1)(D) and (E) [previously, Rule 10451.1(c)(1)(E) and (F)], stating in essence that the WCAB's effort to define waiver by regulation is like an attempt to define "good cause." The WCAB disagrees. These are merely *procedural* provisions establishing that the waiver issues are not subject to IBR and, instead, are solely within the authority of the WCAB. They are completely unlike an attempt to define "good cause" by regulation, which would be a *substantive* provision.

AdvoCal, however, suggests that Rule 10451.1(c)(1) be expanded to include "an assertion by a party or lien claimant that a decision by the Administrative Director or that a dispute is not subject to independent bill review is erroneous." The WCAB deems this addition to be unnecessary because, under Rule 10957(a), this is an issue that is subject to a petition appealing an IBR determination.

CCWC also asserts that the "Bad Faith Actions or Tactics" provisions of Rule 10451.1(g) [formerly, Rule 10451.1(h)] should be deleted because they are "duplicative, one-sided, and unnecessary considering the ample direction provided by Labor Code Section 5813 and [Rule] 10561." The WCAB disagrees. As discussed more extensively in the SSOR, Labor Code sections 4622(e)(2) and 4627 expressly instruct the WCAB to adopt rules to insure and compel compliance with the medical-legal statutes. The WCAB's experience has shown that the penalty and interest provisions of Labor Code section 4622 are often not enough, by themselves, to assure that defendants comply. Moreover, given that medical-legal providers now face a \$335 fee before they can even submit an amount payable dispute to IBR, there is even less incentive for a recalcitrant defendant to comply with its statutory obligations. Therefore, for defendants who engage in bad-faith or frivolous failures to pay properly and timely submitted medical-legal billings, the WCAB has deemed it appropriate to specifically emphasize that the provisions of Labor Code section 5813 and Rule 10561 apply and, in particular, to mandate that the minimum monetary sanction under section 5813 will be \$500. Of course, a defendant who makes good faith payments and/or has a good faith basis not to pay or fully pay will *not* be subject to sanctions. Moreover, as to CCWC's "one-sided" assertion, it neglects to acknowledge that the Rule also expressly states medical-legal provider who makes bad faith or frivolous claims of non-payment or insufficient payment will also be subject to sanctions, attorney's fees, and costs under section 5813 and Rule 10561, including a minimum monetary sanction of \$500.

On the other hand, AdvoCal suggests that the "Bad Faith Actions or Tactics" provisions of Rule 10451.1(g) [formerly, Rule 10451.1(h)] be expanded to describe additional "bad faith actions" by a defendant. The WCAB disagrees. The list of potential "bad faith actions" by a defendant in Rule 10451.1(g)(1) is not intended to be all-inclusive, but additional claims of "bad faith actions" can be sufficiently addressed by case law.

Jon C. Brissman of Brissman & Associates (Brissman) recommends that the WCAB adopt a Rule, presumably as part of Rule 10451.1, which would provide that, after the filing and/or activation of a lien for services provided prior to January 1, 2013, an agreed medical evaluator (AME) or a panel qualified medical evaluator (PQME) should be permitted to file a pre-resolution petition for payment. Brissman asserts that such a provision is needed because AMEs and PQMEs regularly receive explanations of review (EORs) that deny payment based on inapplicable objections, such as "the claim is denied," or "ML 104 is not a valid CPT code," or "provider is not in employer's MPN," or "UR did not certify the services." Brissman argues that such a provision is supported by the language of: (1) Labor Code section 4622, which provides in pertinent part: "All medical-legal expenses for which the employer is liable shall, upon receipt by the employer of all reports and documents ..., be paid to whom the funds and expenses are due ..."; and (2) Labor Code section 4625(a), which provides in pertinent part: "[A]ll charges for medical-legal expenses for which the employer is liable that are not in excess of those set forth in the official medical-legal fee schedule adopted pursuant to Section 5307.6 shall be paid promptly pursuant to Section 4622." The WCAB acknowledges the problems to which Brissman refers and, indeed, similar assertions by him were discussed in the SSOR, at page 10, fn. 8, as support for the WCAB's express inclusion of sanctions provisions in Rule 10451.1(g) [formerly, Rule 10451.1(h)]. Nevertheless, the WCAB concludes that consideration of any such Rule should be deferred to future rulemaking.

5. Section Added: 10451.2 (entitled “Determination of Medical Treatment Disputes”).

The WCAB has modified Rule 10451.2(c)(1)(C) to make a minor, non-substantive language change.

The WCAB has also modified Rule 10451.2(c)(1) to include “an assertion by the defendant that an interpreter was not reasonably required at a medical treatment appointment because the employee proficiently speaks and understands the English language” in the list of issues not subject to independent medical review (IMR) and/or IBR.⁶ This language is based on the provision of Labor Code section 4600(g), which provides that “[i]f the injured employee cannot effectively communicate with his or her treating physician because he or she cannot proficiently speak or understand the English language, the injured employee is entitled to the services of a qualified interpreter during medical treatment appointments.” IMR only involves questions of whether a particular treatment is medically necessary (Lab. Code, § 4610.5) and, therefore, independent medical reviewers will not be determining whether the injured employee can proficiently speak or understand English. Similarly, IBR only involves questions regarding the amount payable under an official fee schedule in effect on the date of service (Lab. Code, §§ 4603.6(a), 4622(c)) and, therefore, independent bill reviewers will not be determining whether the injured employee can proficiently speak or understand English.

CWCI’s public comments question the language of Rule 10451.2(c)(1) and (c)(1)(C) to the extent they provide that a non-IMR issue includes an employee’s or a medical treatment provider’s assertion that IMR is not required because the defendant’s utilization review (UR) was not timely undertaken or was otherwise procedurally deficient. CWCI argues that this language allows the authority of the independent medical review organization (IMRO) to be “usurped” by the WCAB based on technical defects or procedural deficiencies, thereby “entirely” defeating the IMR process and allowing the WCAB to “reacquire” jurisdiction over the employee’s need for medical treatment and the validity of the defendant’s UR. CWCI argues that this is “exactly contrary” to legislative intent. The WCAB disagrees. As extensively discussed in the SSOR (at pages 11-12), the provisions of Rule 10451.2(c)(1) and (c)(1)(C) do not circumvent IMR. To briefly reiterate, this is because: (1) IMR occurs only where there has been a UR decision (Lab. Code, § 4610.5(a)(1) & (2), (c)(1) & (3), (d), (e), (f), (h), (j), (k)); (2) to be valid, any UR decision must comply with the provisions of Labor Code section 4610 (Lab. Code, § 4610(b); *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 236-237, 244-245 [73 Cal.Comp.Cases 981]); and (3) IMR is limited to determining whether a recommended treatment is medically necessary (Lab. Code, Code, § 4610.6(a), (c), (e); see also § 4610.5(c)(2), (c)(3), (f)(2) & (3), (h)(2), (k), (l)(4)); and, therefore, IMR cannot determine whether a defendant’s UR determination was untimely or procedurally deficient. To the contrary, this question falls within the exclusive jurisdiction of the WCAB. (Lab. Code, § 4604 “[c]ontroversies between employer and employee *arising under this chapter* shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5*” (italics added)); see also § 5300.)⁷ Of course, if the WCAB finds that UR was proper and timely, then the issue of medical necessity must be determined solely by IMR, if applicable. (Lab. Code, §§ 4610(g)(3)(A) & (B) [disputes over medical necessity “shall be resolved in accordance with Section 4610.5, if applicable”], 4610.5 (d) & (e) [“the employee may request an independent medical review [of a UR decision] as provided by this section” and “a utilization review decision may be reviewed or appealed only by independent medical review pursuant to this section”].) If, however, the WCAB finds that UR was untimely or otherwise procedurally deficient, then IMR does not come into play, but the employee still has the burden of proof on his or her entitlement to the treatment, as more thoroughly discussed in the SSOR (at pages 13-14).

⁶ This is in addition to (but consistent with) the provision that non-IBR issues include “an assertion by the defendant that an interpreter who rendered services at a medical-legal examination did not meet the criteria established by Labor Code sections 4620(d) and 5811(b)(2) and the Rules of the Administrative Director, as applicable.”

⁷ Labor Code section 4610.5(k) gives the AD the authority to approve or disapprove an IMR request. However, there is nothing in the Labor Code or in the AD’s Rules that suggests, in making this determination, the AD (or the IMR organization) may consider whether the underlying UR decision was untimely or otherwise procedurally defective. (Lab. Code, § 4610.5(k); Cal. Code Regs., tit. 8, § 9792.10.3.)

The public comments of CCWC also question the language of Rule 10451.2(c)(1) and (c)(1)(C) regarding an employee's or a medical treatment provider's assertion that IMR is not required because the defendant's utilization review (UR) was not timely undertaken or was otherwise procedurally deficient. CCWC, however, asserts that this issue "is more appropriately addressed in the IMR and IBR regulations" of the AD. Yet, as just discussed above, this issue falls within the exclusive jurisdiction of the WCAB (Lab. Code, §§ 4604, 5300; see also fn. 6, *supra*.)

Much as it did with respect to Rule 10451.1(c)(1), AdvoCal suggests that Rule 10451.2(c)(1) be expanded to include "an assertion by a party or lien claimant that a decision by the Administrative Director or that a dispute is not subject to independent medical review or independent bill review is erroneous." The WCAB deems this addition to be unnecessary because, under Rules 10957(a) and 10957.1(b), these are issues that are subject to a petition appealing an IBR determination or a petition appealing an IMR determination.

6. Section Added: 10451.3 (entitled "Petition for Costs").

The WCAB has reorganized the proposed modified version of Rule 10451.3 and has made some minor non-substantive amendments to it.

In addition, however, the WCAB has changed Rule 10451.3(a) to provide that an interpreter may file a petition for costs relating to "services other than those rendered at a medical treatment appointment or medical-legal examination," rather than "services other than those rendered at a medical treatment appointment, medical-legal examination, *or medical-legal deposition*" (italics added), which is what modified proposed Rule 10451.3(a) had provided. The reason for this change is the language of Labor Code section 5710, which relates to "the deposition of witnesses" (Lab. Code, § 5710(b)(5)) and provides that if "the injured employee or [other] deponent does not proficiently speak or understand the English language," the employee or other deponent is entitled to the services of an interpreter who is certified or deemed certified in accordance with specified provisions of the Government Code. Thus, the legislative provision for interpreters at the depositions of injured employees and others is set out in a separate and specific statute, and is *not* included in the statutes relating to interpreters at medical-legal examinations. (Lab. Code, §§ 4600(f), 4620(d).) This indicates, therefore, that interpreter services at depositions are *not* subject to IBR, which relates only to disputes over the amount payable under an official fee schedule after the medical-legal procedures of section 4622 have been exhausted. (Lab. Code, §§ 4603.6(a), 4622(b)(4).) However, although interpreter services at the deposition of an injured employee or other deponent may be sought through a petition for costs, the interpreter services are expressly subject to any fee schedule adopted by the Administrative Director. (Lab. Code, § 5710(b)(5); see also § 5811(b)(2)(A).)

The WCAB received more public comments regarding Rule 10451.3 than it did on any other of its proposed Rules.

The overwhelming majority of these comments came from interpreters or organizations representing interpreters.

Many comments from interpreters consisted of complaints about the provisions of SB 863. However, the WCAB is bound to apply the law as enacted by the Legislature. Accordingly, complaints regarding SB 863 should be directed to the Legislature. Similarly, many comments from interpreters suggested that they would be driven out of business and/or that there would be a dearth of interpreters available for injured employees at medical treatment appointments, medical-legal examinations, and other settings. In essence, these comments suggested that, since many interpreter liens are small (i.e., \$150 or less), interpreters could not afford to provide services in light of the \$150 fee they would have to pay to file a lien claim (Lab. Code, § 4903.05(c)(1)) and/or the \$335 fee they would have to pay for IBR. (Lab. Code, § 4603.6; Cal. Code Regs., tit. 8, § 9792.5.7(d)(1)(A) & (B).) The WCAB is sympathetic to the interpreters' concerns; however, once again, these concerns should be directed to the Legislature.

Some interpreters or organizations representing them assert that, based on the legislative history of SB 863, they are mandatorily entitled to payment for their services and, therefore, if a defendant breaches its duty to make a mandatory payment, then the interpreter should be able to file a petition for costs. In making this assertion, they focus on the language of: (1) section 4600(f), which provides that interpreter services at a medical-legal examination “shall be provided by the employer”; (2) section 4600(g), which provides that “the employer or insurance carrier shall pay for interpreter services” rendered at a medical treatment appointment; (3) section 5710(b)(5), which provides that “the employer shall pay for the services of a language interpreter” at the deposition of an injured employee or other deponent; and (4) section 5811(b)(2), which provides that “[i]nterpreter fees that are reasonably, actually, and necessarily incurred shall be paid by the employer” when interpreter services are rendered at a deposition, a WCAB hearing, a medical treatment appointment or medical-legal examination, or certain other settings. These commentators correctly state that these statutes provide that the defendant “shall” pay for interpreter services. However, they misapprehend the meaning and effect of this “shall” language. Many statutes state that the defendant “shall” provide or pay for certain benefits, including, among others: (1) section 4600(a), which states that medical treatment “shall be provided by the employer”; and (2) section 4621(a), which provides that the injured employee “shall be reimbursed for his or her medical-legal expenses.” Yet, as discussed more thoroughly in the SSOR (pages 15-19), this language does not mean that providers of medical treatment or medical-legal goods or services can simply file a petition for costs if a defendant does not pay or does not fully pay the provider’s billing. The same holds true for interpreters who provide services at medical treatment appointments and medical-legal examinations.

It appears that many interpreters misunderstand their rights under SB 863 and the WCAB’s new Rules. Accordingly, the WCAB will provide this brief summary for the benefit of the interpreters as well as other members of the workers’ compensation community. The WCAB emphasizes that many of the principles discussed apply to all medical treatment and medical-legal providers, not just interpreters.

First, the final version of Rule 10451.3 does not preclude an interpreter from filing a petition for costs for services rendered at a *deposition* (e.g., the deposition of an injured employee or a lay witness who does not proficiently speak or understand English, or the deposition of a physician or other expert witness where the deposition is attended by a pro per injured employee who does not proficiently speak or understand English). For interpreter services at a deposition, a lien claim is not required and the interpreter will not be subject to a lien filing fee if it elects not to file a lien. Moreover, services rendered at a deposition are not subject to IBR although, of course, any official fee schedule in effect on the date of the services shall be applied.

Second, with respect to disputes over medical-legal expense claims by interpreters (e.g., the medical-legal evaluation of an injured employee who does not proficiently speak or understand English), the WCAB observes that the filing of a lien — and the payment of the corresponding lien filing fee — is not required, regardless of the nature of the dispute:

- (a) If the medical-legal dispute is over an issue *other than* the amount payable under an official fee schedule in effect on the date the interpreter’s services were provided, and if the interpreter has both timely requested second review (Lab. Code, § 4622(b)(1)) and timely objected to the defendant’s final written determination after second review (Lab. Code, § 4622(c)), then *the defendant* is obligated to file a DOR and a Petition for Determination of Non-IBR Medical-Legal Dispute (Lab. Code, § 4622(c); WCAB Rule 10451.1(c)(2).) Moreover, if the defendant breaches any of its duties under section 4622 relating to a non-IBR medical-legal dispute, then the interpreter may file a DOR and a Petition for Determination of Non-IBR Medical-Legal Dispute (WCAB Rule 10451.1(c)(3)). Again, in both of these scenarios, a lien is *not* required and, if one is not filed, a lien filing fee need not be paid. Furthermore, the dispute is not subject to IBR and, therefore, the IBR fee does not come into play.
- (b) If the medical-legal dispute *does* relate to the amount payable under an official fee schedule in effect on the date the interpreter services were provided, the interpreter still does *not* need to file

a lien and, if a lien is not filed, the interpreter does not pay a lien filing fee. Moreover, if an interpreter asserts that the defendant has waived any objection to the amount of its bill because the defendant allegedly failed to comply with the relevant requirements, timelines, and procedures set forth in sections 4622, 4603.3, and 4603.6 and the AD's related Rules, then this is a non-IBR issue (WCAB Rule 10451.1(c)(1)(D); see also WCAB Rule 10451.1(f)(1)(A)) and, as just discussed, an IBR fee does not come into play, at least initially. [NOTE: *An interpreter who makes such an assertion in bad faith will be subject to sanctions of up to \$2500 and a minimum of \$500, and liable for the defendant's attorney's fees and costs. (WCAB Rule 10451.1(g)(2); see also Lab. Code, § 5813; WCAB Rule 10561.)*] Of course, if no such assertion is made, or if the assertion is resolved against the interpreter, then an IBR fee must be paid. However, if the interpreter prevails on its medical-legal bill, then the defendant will be liable to the provider not only for the additional amount found owing, but also for reimbursement of the IBR fee (Lab. Code, § 4603.6(c)) as well as statutory penalties and interest (Lab. Code, § 4622(a)). Furthermore, if the defendant's failure to timely and properly pay was a result of its bad-faith actions or tactics, the defendant will be subject to sanctions of up to \$2500 and a minimum of \$500, and it will be liable for the interpreter's attorney's fees and costs (WCAB Rule 10451.1(g)(1)).

Third, with respect to disputes over medical treatment appointment claims by interpreters, the WCAB observes:

- (a) If the only issues in dispute are subject to IBR and/or IMR, then the interpreter does *not* need to file a lien claim and, if a lien is not filed, then the interpreter does not have to pay a lien filing fee. This is because IBR and IMR determinations are not made by the WCAB (Lab. Code, §§ 4603.6(a)-(e) & (g), 4610.6(a)-(g) & (i)) and, although such determinations are subject to limited review by the WCAB on appeal (Lab. Code, §§ 4603.6(f), 4610.6(h)), these appeals are initiated by the filing of a petition (WCAB Rules 10957, 10957.1) and the petition may be placed on calendar through the filing of a declaration of readiness (DOR) even if no lien has been filed (WCAB Rules 10957(i), 10957.1(j); see also 10301(dd)(3) & 10250(c)(1) [an IBR or IMR appellant is a "party" and, therefore, it may file a DOR even if it is not a lien claimant]). Furthermore, if an IBR or IMR dispute is resolved in favor of the interpreter, the defendant is directly liable to the provider for the additional payment (Lab. Code, §§ 4603.6(c), 4610.6(j)) and, therefore, the payment to the provider is not by a lien against the employee's compensation (Lab. Code, § 4903).
- (b) Also, although a lien must be filed and a lien filing or activation fee must be paid for any medical treatment dispute not subject to IMR and/or IBR (Rule 10451.2(c)(2)(B)), the interpreter will be entitled to reimbursement of the lien filing or activation fee (plus statutory interest) if the conditions of Labor Code section 4903.07 have been met.
- (c) Further, if the interpreter prevails at IMR or IBR, then the interpreter will be entitled to penalties and interest under, respectively, section 4603.2(b)(2) and 4622(a). In addition, for IBR, the interpreter will be entitled to reimbursement of the IBR fee. (Lab. Code, § 4603.6(c).)
- (d) Moreover, as with any workers' compensation dispute, an interpreter who has filed a lien with the WCAB can seek sanctions, attorney's fees, and costs if it establishes that the defendant has engaged in bad faith or frivolous actions or tactics with respect to its lien. (Lab. Code, § 5813; WCAB Rule 10561; see also WCAB Rule 10451.1(g)(1).)

The interpreters, however, were not the only ones who submitted comments regarding proposed modified Rule 10451.3. Most of the concerns raised were already thoroughly addressed in the SSOR, which the WCAB has incorporated into this FSOR. Accordingly, those concerns will not be addressed further.

7. Section Added: 10451.4 (entitled “Petition to Enforce Independent Bill Review Determination”).

The WCAB is making a minor substantive modification to Rule 10451.4(f) to add the following italicized language: “The petition to enforce may include a request for penalties and interest in accordance with Labor Code section 4603.2(b) *and/or section 4622(a).*” This change is being made because IBR can be undertaken regarding an “amount payable” dispute over a medical treatment expense or a medical-legal expense (see Lab. Code, §§ 4603.3(e)(4), 4622(b)(4); see also § 4603.6) and, therefore, the penalties and interest provisions relating both to medical treatment expense (Lab. Code, § 4603.2(b)) and medical-legal expense (Lab. Code, § 4622(a)) should apply. The WCAB’s failure to include reference to section 4622(a) penalties and interest was due to inadvertent oversight.

8. Section Added: 10608 (entitled “Service of Medical Reports, Medical-Legal Reports, and Other Medical Information”).

The WCAB is modifying Rule 10608(c)(6) to change its first sentence as follows: “When the petition [by a non-physician lien claimant for medical information] is filed, a copy shall be concurrently served on ~~each party~~ the injured employee (or the dependent(s) of a deceased injured employee) and the defendant(s) or, if represented, ~~the~~ their attorney or non-attorney of record ~~for the represented party.~~” This change has been made because, if the term “party” had been left in the Rule, this could have been interpreted to require that the petition be served on any “party” as defined by Rule 10301(dd), including non-petitioning lien claimants and others who have no direct interest in the dispute.

CCWC’s public comments contend that Rule 10608(b) unnecessarily requires the service of medical reports and medical-legal reports on physician lien claimants before they become “parties.” The WCAB disagrees. Preliminarily, Rule 10608(b) only requires service of these reports when a physician lien claimant has “requested” such service. More importantly, the WCAB observes that: (1) as soon as the lien claimants in a case become “parties,” a DOR for a lien conference may be filed by any lien claimant (Rule 10770.1(a); see also Rules 10250(b) & 10301(dd)); (2) a lien conference will be set whenever a DOR is filed on any lien issue, even if a physician lien claimant who requested service of reports was not the one filing the DOR (Rule 10770.1(a)); (3) the DOR can trigger the immediate service of a notice of a lien conference and, although the date of the lien conference ordinarily will be at least 60 days after the notice of hearing (Rule 10770.1(a)(5)), a lien conference could conceivably be set earlier (see Lab. Code, § 5502(a); Rule 10544); and (4) discovery closes on the date of the lien conference (Rule 10770.1(h) [formerly, Rule 10770.1(g)]). Therefore, to protect the due process rights of physician lien claimants, it is inappropriate to provide that they are not entitled to request service of medical reports and medical-legal reports until they become “parties.”

9. Section Added: 10608.5 (entitled “Service by Parties and Lien Claimants of Reports and Records on Other Parties and Lien Claimants”).

The WCAB has changed Rule 10608.5(a) to read as follows: “~~In order to promote cost-effective and efficient discovery and information exchange, Except as provided in subdivision (b) below, document service between parties and lien claimants may be effected by CD-ROM, DVD, or other electronic media. This shall include sending attachments by e-mail, but only if there has been a prior agreement between the parties or lien claimants that e-mail may be utilized to serve documents including e-mail attachments, except as provided in subdivision (b) below. Production in PDF/A format shall be the preferred form of service. Indexing of documents and Bates stamping of pages shall also be preferred.~~” The WCAB decided to limit the service of documents by e-mail only to situations where there has been a prior agreement because; (1) as pointed out by SCIF, many large insurance carriers have “thousands of email addresses, most of which have nothing to do with claims handling [, and] [a]n important document could sit in an obscure email inbox while an important deadline passes”; and (2) as pointed out by CWCI, there should be prior agreement because “[e]-mail communication can be disrupted by firewall security, the size of the file being sent, and delivery to erroneous addresses.” The WCAB decided to

eliminate the last two sentences of proposed Rule 10608.5 because, as pointed out by CCWC, the references to “preferred” methods of service have no regulatory effect.

10. Section Amended: 10770 (entitled “Filing and Service of Lien Claims”).

Based on a suggestion in the public comments of The 4600 Group, the WCAB has changed Rule 10770(d)(2) to provide that a lien claimant that is “an entity described in Labor Code sections 4903.05(c)(7) or 4903.06(b)” is not required to file “proof of ownership of the debt.” These entities are health care service plans, group disability insurers, self-insured employee welfare benefit plans, health and welfare funds, and publicly funded nonindustrial medical benefit programs that the Legislature has seen fit to exempt from lien filing and activation fees. The WCAB concludes that these entities rarely, if ever, sell their accounts receivable to third parties and, therefore, it would be a waste of the WCAB’s resources to process proofs of ownership from these entities, as well as wasteful to the entities themselves.

The WCAB has also changed Rule 10770(h) as follows: “When a lien claimant notifies the Workers’ Compensation Appeals Board in writing that its lien has been resolved or withdrawn, the lien claim shall be deemed dismissed with prejudice by operation of law. Once a lien claim has been so dismissed, the lien claimant shall be excused from appearing at any noticed hearing.” This change is indirectly based on a suggestion of The 4600 Group. Although the WCAB believes that there are potential problems regardless of how this language might be framed, the WCAB sees no reason why a lien claimant should appear at a noticed hearing when, based on its withdrawal of its lien, the lien has been dismissed with prejudice by operation of law. This may cause some confusion at lien conferences if the lien withdrawal is not reflected in EAMS; however, it is hoped that, at least in many instances, the defense counsel can advise the WCJ that the lien has been withdrawn. Moreover, the worst that might happen is a WCJ will unnecessarily issue an order dismissing or a notice of intent to dismiss the lien. The 4600 Group suggests that a lien claimant be excused from appearing “if it has a signed Order from the WCJ resolving the lien issue.” However, once a lien claimant has such a signed Order, it necessarily is excused from appearing. The 4600 Group also suggests that the lien claimant be excused from appearing “if it has a signed settlement agreement.” The WCAB disagrees because, under Rule 10770(g), a lien is not “resolved” unless payment in accordance with an agreement has been made. There are too many instances where a settlement appears to have been effectuated, but the settlement falls through for one reason or another, and until the settlement has been finalized by payment a lien claimant must still appear. Otherwise, it may unnecessarily result in an additional lien conference.

11. Section Amended: 10770.1 (entitled “Lien Conferences and Lien Trials”).

The WCAB has amended Rule 10770.1(l) as follows: “If a party defendant ~~was is~~ designated to serve ~~a lien claimant with~~ notice of a lien conference or lien trial under sections 10500(a) and 10544, that party the defendant shall bring a copy of its proof of service to the lien conference or lien trial and, if another party the lien claimant fails to appear, ~~the defendant shall file that~~ the proof of service shall be filed with the Workers’ Compensation Appeals Board.” The reason for this change is that, on occasion, it is a lien claimant that is designated to serve notice of a lien conference or lien trial, not the defendant.

In their public comments, both AdvoCal and The 4600 Group express concerns about the provisions of Rule 10770.1(a)(2) regarding where “a lien conference may be set.” The concern of The 4600 Group can be easily addressed. By its own terms, Rule 10770.1(a)(2) applies only to “a lien conference,” and not to a “lien trial.” AdvoCal asks that the Rule be amended to place “reasonable limitations” on where a lien conference may be set without an order changing venue, “such as the 75-mile range in the Code of Civil Procedure for a deposition witness.” The WCAB, however, concludes that this issue need not be addressed by Rule. Instead, if a lien claimant or defendant receives a notice of hearing setting a lien conference at a district office that it believes is unreasonably far from the office where the case is venued, that lien claimant or defendant has the remedy of filing a petition for removal (see Lab. Code, § 5310; Rule 10843).

CWCI and CCWC each ask the WCAB to strike the provision of Rule 10770.1(c)(2) that gives the WCJ the discretion to conduct a search within EAMS to determine whether a lien claimant made prior timely payment of a lien filing fee or lien activation fee. Both CWCI and CCWC assert that this provision unnecessarily attempts to regulate what a WCJ “may” do and that this is more properly a WCJ training issue. The WCAB disagrees. The provision makes it clear to parties and lien claimants (not just to WCJs) that a WCJ is not required to conduct an EAMS search to confirm prior timely payment. Moreover, the Rule also expressly provides that the failure to conduct a search “shall not be a proper basis for a petition for reconsideration, removal, or disqualification,” which clearly is not simply a WCJ training issue.

12. Section Added: 10959 (entitled “Petition Appealing Medical Provider Network Determination of the Administrative Director”).

Based in large part on the public comments submitted by CWCI, CCWC, the Pacific Compensation Insurance Company (PacificComp), the WCAB has modified Rule 10959(a) as follows:

Any aggrieved person or entity may file a petition appealing a determination of the Administrative Director (AD) to: (1) deny a medical provider network (MPN) application; (2) revoke or suspend an MPN plan; (3) place an MPN plan on probation; (4) deny a petition to revoke or suspend an MPN plan; or (5) impose administrative penalties relating to an MPN ~~against an MPN or against an insurer, employer, or other entity providing MPN services.~~

~~For purposes of this section, an “aggrieved person or entity” shall include, but is not necessarily limited to, an MPN, an MPN applicant, an insurer, an employer, or any other entity that provides or seeks to provide MPN services. It shall also include, but is not necessarily limited to, an injured employee or a group of injured employees complaining alleging that the AD failed to act in accordance with the MPN regulations regarding third party petitions for suspension or revocation and should have suspended or revoked a previously approved MPN plan.~~

With respect to the change in the first paragraph, the WCAB concludes it is sufficient to refer to administrative penalties “relating to an MPN.” As PacificComp points out, under Labor Code section 4616(a), the insurer, employer, or other entity that establishes an MPN *is* the MPN. However, if a situation ever arises in which penalties may be imposed against an employer or an insurance carrier that utilizes a third-party MPN, the “relating to an MPN” language will be broad enough to address the situation.

With respect to the deletion of the second paragraph, the WCAB concludes that it is not necessary to define “aggrieved person or entity,” as used in the first paragraph. California statutes frequently refer to an “aggrieved” party, person, or entity without trying to flesh out, even in part, what the term “aggrieved” means. (E.g., Lab. Code, §§ 5900(a), 5903, 5911.) Accordingly, the WCAB concludes that the question of whether a person or entity filing an MPN appeal can be deemed “aggrieved” should be determined on a case-by-case basis.

13. General Comments

This FSOR has focused on the most significant changes to the WCAB’s Rules made subsequent to those discussed in the SSOR. The FSOR does not specifically note many relatively minor, nonsubstantive changes. The FSOR also does not specifically refer to some public comments that resulted in substantive rule changes based on those comments. Moreover, as stated at the outset, the FSOR incorporates the SSOR and, therefore, the FSOR does not specifically address public comments that the WCAB believes were adequately addressed in the SSOR.