

STATE OF CALIFORNIA

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS

PUBLIC HEARING

DIVISION OF THE WORKERS' COMPENSATION

PROPOSED REGULATIONS for the EAMS

RONALD REAGAN STATE BUILDING, AUDITORIUM

300 SOUTH SPRING STREET

LOS ANGELES, CALIFORNIA

MONDAY, JULY 14, 2008

10:07 A.M.

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

APPEARANCES

Susan Gard, Hearing Moderator

Minerva Krohn, Counsel, DIR

Jim Fisher, Counsel, DIR

Kevin Star, Court Administrator

Maureen, Gray, Regulations Coordinator, DIR

SPEAKERS

David Robin, Attorney at Law - 4600 Group

Corey A. Ingber, Attorney at Law - Zenith Insurance Company

Linda E. Atcherley, Legislative Chair - California

Applicants' Attorneys Association

Ronald Diller, Southern California MedLegal Consultants

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

1 PROCEEDINGS

2 MODERATOR GARD: Good morning everyone.

3 Thank you for coming today. We're going to go ahead and
4 get started. This is the hearing on the Division of the
5 Workers' Compensations Proposed Regulations for the
6 Electronic Adjudication Management System, or EAMS.

7 I'm Susan Gard, Chief of Legislation and
8 Policy for Administrative Director Carrie Nevans.
9 Carrie is unable to be present today, and I'm appearing
10 at this hearing on her behalf, acting as moderator to
11 preside over the submission of oral testimony.

12 Other staff present here today are Kevin Star,
13 Court Administrator; Jim Fisher, Staff Counsel; and
14 Minerva Krohn, Staff Counsel for the Division of
15 Workers' Compensation.

16 MS. KROHN: Good morning.

17 MODERATOR GARD: Thank you, Minerva. Maureen
18 Gray, the Division's Regulations Coordinator is present
19 and has been assisting people getting signed in. We're
20 very grateful to Maureen for making the arrangements for
21 the hearing this morning, as always.

22 This hearing is being recorded, and a
23 transcript will be posted on our website where it can be
24 viewed by the public. The hearing will continue as long
25 as there are people present who wish to comment on the

1 regulations, but will close at 5:00.

2 Currently we only have three people signed up
3 to give oral testimony, so we may have a short hearing
4 this morning. If the hearing continues into the lunch
5 hour, we will take at least an hour's break for lunch.

6 Written comments will be accepted up until
7 5:00 p.m. at the Division's offices at 1515 Clay Street,
8 Suite 1800, Oakland, California on Tuesday, July 15th,
9 2008. You will also be free to submit comments via
10 e-mail and fax up until that time. The restrooms are
11 out the door and to the right near the elevators.

12 The purpose of this hearing is to receive
13 comments on the proposed amendments to the regulations,
14 and both the Administrative Director and Court
15 Administrator welcome any comments you have about them.
16 All your comments, both given here and today -- both
17 given here today and those submitted in writing, will be
18 considered by the Administrative Director and Court
19 Administrator in determining whether to adopt these
20 regulations as written or to change them.

21 Please restrict the subject of your comments
22 to the specific regulation and to any suggestions you
23 have for changing it. Also, while we don't have a ton
24 of folks here today so we'll be more liberal about this,
25 if you could limit oral testimony to around 10 to 15

1 minutes. We will submit -- we will accept any testimony
2 that you submit in writing of any length.

3 We will not enter into discussions this
4 morning, although we may ask for clarification if we
5 need to regarding a question or comment you're asking --
6 you're providing.

7 When you come up to give your testimony,
8 please give Maureen Gray your business card, if you have
9 one, so we can get the correct spelling of your name in
10 the transcript.

11 Please speak into the microphone, which is at
12 the podium here, and before starting your testimony,
13 please identify yourself for the record; then please
14 state the section that you will be commenting on.

15 So with that I'm going to commence asking for
16 testimony, and I -- I will need those sheets, but I know
17 the first person on the list is David Robin from the
18 4600 Group.

19 MR. ROBIN: Thank you for having us here for
20 the public commentary. My name is David Robin. I'm an
21 attorney with the 4600 Group. The 4600 Group represents
22 group health providers, health insurance companies who
23 provide medical treatment for nonindustrial conditions,
24 generally provided as an employee benefit through the
25 employer.

1 I am here offering public comment on only two
2 sections, 10240 and 10241, which affect my clients
3 directly. It affects the Appeals Board and the party
4 participants as well. The original or the current rule
5 governing appearances -- excuse me. I'm just a little
6 disheveled for the moment.

7 The original rule governing -- or the current
8 rule governing on appearances is Board Rule 10563, which
9 just as -- on the side, 10563 appears to remain in
10 effect, even with the proposed Board Rules 10240 and
11 10241. So there is a conflict. The issue is lien
12 claimants with liens of \$2,500 or greater having to
13 appear at every hearing.

14 10 -- do I need to read 10240? I trust you
15 all know it as well as I do, but it says you have to
16 appear at every hearing if your lien is \$2,500 or
17 greater. And by definition in 10210, a hearing is a
18 pretrial conference, an AOE/COE, any of the Discovery
19 conferences, up to and including MSCs and trials.

20 Liens don't get resolved at any of those
21 conferences, other than possibly MSCs and possibly
22 trials. We appear throughout the state, so I think I
23 have good credibility to state that even in MSCs when
24 cases are -- cases-in-chief are set, liens are rarely
25 settled at that point.

1 There -- there might be the ability to
2 negotiate something and we follow through having to come
3 back to a lien conference, but rarely, rarely in this --
4 in this era are liens settled at the same time as
5 cases-in-chief.

6 There -- there's impact -- I've sent to
7 Maureen a written -- I'm sorry. I just sent it out last
8 night. I finally got around to doing it, so it will hit
9 you -- and I have, I think, all of your e-mail
10 addresses, and if you want my written sent directly to
11 you, I will. But last night as I was scrolling down, I
12 was trying to think of the things that -- that are a
13 problem with this, and the impact is that initially, if
14 the appearance, the hearing, is not going to impact the
15 lien, it says that we may contact the WCALJ, and if that
16 ALJ allows us to not appear, then we do not have to
17 appear.

18 I -- I foresee immediately all judges being
19 swamped with telephone calls, correspondence, faxes; and
20 once EAMS is going in, it's going to just be
21 electronically through -- through those things, and in
22 really short order. No one's going to pay attention to
23 these. If I'm a judge, I'm not going to address 50
24 requests a day to not appear on conferences that have --
25 that are meaningless. It's going to take up too much

1 time for the judge, for the secretary, for the automatic
2 call system, and how judges will ultimately review their
3 EAMS correspondence on a daily basis.

4 If you do not get excused from the appearance,
5 even from something as a pretrial conference on -- on
6 anything, one of the remedies under 2 -- under 10241(b)
7 is dismissal with prejudice of the lien. Now, that's a
8 lien that's -- you know, as an example, a lien that all
9 the medicals and virtually everything is -- is
10 compensable about the lien, and it's only waiting until
11 the conclusion of the case before the Defendant's
12 employer reimburses. But if you do not appear at a
13 conference, it has no relevance to the lien.

14 It is technically available under the rules,
15 under the culmination of 10240 and 10241 that the -- a
16 notice of intent to dismiss with prejudice, with
17 prejudice is available, thereby denying really due
18 process to the lien claimant.

19 As far as the underlying substantive issue,
20 which is that they -- they paid for the treatment. I'm
21 speaking now of my clients who -- who must accept
22 treatment, even if it is alleged to be industrial and
23 not part of their contract of coverage.

24 If the workers' compensation carrier
25 administrator puts into a delay or denied status under

1 Solberg versus -- I forget who. But the Solberg case
2 says that -- that the health insurance industry is
3 primarily responsible, so they must pay this and the
4 remedy is to file a lien under 4903.1.

5 Now it's adding the burden of having to appear
6 at every single conference regardless or suffer having a
7 dismissal with prejudice for not appearing at a
8 conference that has no impact on the resolution of the
9 lien at that time.

10 We want to resolve our liens. Don't -- you
11 know, there's no -- there's no desire on -- on our
12 industry to want to add a burden to stretch things out,
13 but ours is more of a passive initially, and then when
14 the case matures and the case-in-chief is beginning this
15 and getting into the position of resolving, we become
16 more active. And it's through dialog with defense
17 attorneys and applicant attorneys, and with service in
18 medical, that allows us to know when the case is ready.

19 And we do a -- I think generally we do a
20 pretty good job of regulating, self-regulating on that,
21 and appearing. I -- I would like to point out that the
22 10241, the standards for requiring appearances now
23 places it greater on the lien claimant who has a lien of
24 \$2,500 or more than even the applicant, because the same
25 -- the same section, 10241 states an applicant need only

1 appear at MSCs or trials, unless otherwise ordered by
2 the judge. It's -- it's too high a burden.

3 One of the things I was speaking to Mr. Fisher
4 about before walking in is that besides the impact of
5 having all these people at the Board -- and it impacts
6 the size because we all know the boardrooms aren't --
7 aren't really that large, and really packing it with a
8 lot of people makes it really difficult. I mean,
9 physically, steric hindrance, if you might, to get
10 things done.

11 I mean, the Boards are not really large -- the
12 boardrooms aren't very large, and you can only look at
13 some lien conference schedules when it's really packed
14 to see how it is. And if you invite people or require
15 people to be there all the time, the boardrooms are
16 going to look that way each and every time.

17 It's difficult enough to -- to -- for
18 case-in-chief parties, for applicant defense counsel to
19 find space to work, and if you pump all these people in
20 there who have really not much to do on the case, it
21 really slows down the process rather than accelerate it.

22 If you invite them, they will come. And if
23 they come to all the appearances, they're going to want
24 to participate in the trials. Generally, the cases now
25 that liens are deferred, case-in-chief either resolves

1 by settlement or it goes to trial.

2 If it goes to trial, the lien claimant shows
3 for the trial -- after the amnesty and shows for the
4 trial, and the lien issue has not been deferred, the
5 lien claimant is going to participate. And judge --
6 judges throughout the state give wide latitude in
7 participation, particularly on AOE/COE issues, and it's
8 going to be a lot of people, taking a lot of testimony
9 that's probably redundant; and from my years as a
10 defense attorney, I don't think I would want someone who
11 has an issue that's a medical treatment only issue
12 asking questions generally about AOE/COE questions.

13 I know applicant attorneys feel the exact same
14 way. I've asked them about that in this, and uniformly
15 it's, I don't want them there. That's uniformly. I
16 have not heard anybody say, oh, yes, I want a lien
17 claimant sitting at my counsel table as well. It just
18 doesn't work that way.

19 As I said, very often cases-in-chief, even if
20 they go to trial, the Board -- the Board wants to
21 streamline and get -- and get things moving. If you
22 invite them, I think it's going to be hard to bifurcate
23 liens each and every time if you've had people come to
24 appearance after appearance after appearance and it goes
25 to trial and then they say, well, we're going to

1 bifurcate the lien and we'll deal with you afterwards.

2 It's -- it's really emasculating. It takes --
3 you know, you're there the whole time and then they say,
4 we'll deal with you after the case. So people are going
5 to want to be there, but at the same time, if you give
6 people -- if you give lien claimants enough time, they
7 generally resolve their liens. To keep them in the
8 appearance tract ultimately causes them to have to
9 prepare and have witness or testimony available at the
10 time of the case-in-chief on the issues of
11 reasonableness of the treatment and reasonable -- and
12 appropriateness of the billing, and defense counsel will
13 have to have that as well.

14 So it means for every trial that potentially
15 is there because people -- because the lien claimants
16 have been caused to be at every appearance, they're
17 going to want to be involved in the case-in-chief trial,
18 which necessarily means that you're going to have
19 probably more witnesses listed who are actually going to
20 have to be called, if the case goes to hearing, to
21 testify to the appropriateness or the lack of
22 appropriateness of the treatment or to the
23 appropriateness of the billing per fee schedule versus
24 not being fee schedule. So you have more bodies again
25 in a trial.

1 Generally how I see it work now, and as I
2 said, I have been an attorney since 1980. I have been a
3 defense counsel for number of years. I've represented
4 lien claimants for 20-plus years through the 4600 Group.
5 I counted last night how many closed files we have. We
6 have 42,000 closed files at the 4600 Group. So we have
7 been doing this a good, long time, and it's my real
8 experience that liens get deferred. And that's -- I
9 think that's a good thing, as far as the Appeals Board
10 to move things a long. Let the case-in-chief resolve
11 either by settlement, stipulation of CNR, or it goes to
12 F&A, in which case there's a general finding -- and this
13 is the rule. There's a general finding on the lien
14 subject to -- subject to proof and subject to
15 feasibility of fee schedule. And that promotes a lien
16 conference, and at the lien conference the vast majority
17 of these things settle.

18 I -- I -- I hope that there's been good
19 polling throughout the state on how this works. I think
20 Grover Beach has a great way of doing it. They run
21 their own little -- they have their own rules, and at
22 the time of the settlement, if you're not there, Judge
23 Lacover or whoever else is there, will issue just a
24 Notice of Intention one way or the other. If he's
25 looked at it, it's a Notice of Intention to Award, or

1 it's a Notice of Intention to Deny, which you respond to
2 and you out- -- you respond to and you need a lien
3 conference, or you generally resolve it in those ten
4 days. I think that's a real nice way that it works.

5 It gives you that opportunity. It gives a
6 little time deadline. And if it doesn't, it -- you file
7 your DOR and you get your lien conference and you show
8 up. But this is -- I think that's the natural order of
9 how liens really do work.

10 We've already addressed in years past that
11 liens should not drive the system; that the
12 case-in-chief is the important thing. And because of
13 that, lien claimants will not file a DOR while
14 case-in-chief is still pending, and that will defer.
15 And the remedy for most lien claimants will be interest
16 under 4603.2, and if it's a denial that's without merit,
17 possibly penalty. And that's why doctors and hospitals
18 can still provide treatment on a lien basis.

19 When they start having to work at appearing at
20 everything, I think that doctors and hospitals will
21 begin to drop off of doing work on a lien basis because
22 they're already constricted on the cost amount on the
23 fee schedule, and if they -- if the doctors and
24 hospitals who generally provide on a lien basis
25 continually have to pay for counsel to show up, I think

1 it's going to reach a point where they just won't be
2 involved with that. It will limit access to treatment
3 that's not on disputed cases or disputed body parts.

4 Those who have health insurance will default
5 to my clientele, which will increase the burden on the
6 health insurance industry, where it shouldn't be in the
7 first place, because we're -- we're the last resort for
8 -- sometimes we're the first resort, but we're generally
9 the last resort when claims are denied or on delayed
10 basis. They'll run it through their group health and
11 take care of it that way until -- until a work comp
12 administrator accepts the claim.

13 And everyone -- it's just going to impact --
14 it's going to impact -- I know it's going to impact my
15 clients' industry. It's going to impact the Board by
16 bringing all these people here and forcing them to be
17 there more often. They're going to want to be more
18 involved in -- at a time when -- when it should be
19 really focused on the applicant and defendant only.

20 I applaud the fact that you're trying to move
21 the lien issue up and get these things done, but I have
22 looked at this every which way, and I don't see a
23 happy -- I don't see a happy result out of this for
24 anybody. I don't see it for the Board; I don't see it
25 for the employers; and I don't see it for injured

1 workers.

2 When -- I'm going to conclude soon because I'm
3 just -- stream of thought, but when we go to the Board
4 on a conference and we're going to get another date, we
5 all pick up our files, we go down to the calendar and we
6 all look at our calendars and see which -- which date is
7 going to be available for us. We now throw in three
8 lien claimants or four lien claimants -- in southern
9 California they're going to be four or five lien
10 claimants. You throw those four or five people in,
11 along with the injured worker, attorney, and the defense
12 attorney, and there's going to be no consensus of a
13 continued date. If there is, it's not 30 days; it's
14 probably 45 to 60 days, which slows down everything for
15 the Board. And ultimately it's going to wind up that no
16 one can agree, there's a window of dates that the Board
17 will give you and it's going to be -- and because the
18 line is going to be forming behind you, it's going to
19 be, we'll just send you out a date on notice; and people
20 are going continue to have -- have -- have problems
21 making dates and arranging schedules.

22 If -- if they're not necessary at most -- at
23 most appearances, you shouldn't invite them. You should
24 just let them wait until the real parties -- the
25 parties. Not the lien claimants, you know. 10 -- 10210

1 defines parties as the injured worker and the defendant,
2 not a lien claimant. You should let the parties work
3 out what they have to work out, and then the lien
4 claimants will fall in right towards the end where they
5 belong.

6 Thank you for your time. I appreciate you
7 allowing me to make comment, and I hope that I make some
8 impact on your decision-making.

9 MR. STAR: Thank you very much.

10 MODERATOR GARD: Thank you, Mr. Robin. The
11 next person signed up to give oral testimony is Corey
12 Ingber from Zenith. Do I have that correct?

13 MR. INGBER: Good morning. Corey Ingber.
14 You're close.

15 MODERATOR GARD: Thank you. Thank you.

16 MR. INGBER: Good morning. My name is Corey
17 Ingber. Yesterday afternoon I was demonstrating the
18 drag-in, and it too didn't recognize my name, so I
19 appreciate it.

20 I work for Zenith Insurance Company. I am
21 Claims Counsel, and I have been employed with Zenith for
22 about 11 years. And we have a staff counsel in nine
23 offices through California, and we do much of our work
24 legally inside in staff counsel.

25 I'm here to tell you that we appreciate the

1 opportunity to speak, and I also applaud your turning
2 towards technology. We, too, are in the process of
3 trying to become paperless with lawyers who often don't
4 want to go paperless. So the metaphor now is they have
5 a laptop instead of a file cabinet. Some day I will
6 convince our lawyers that instead of shlepping 40 pounds
7 of luggage on wheels, we'll have a universal laptop that
8 has everything inside.

9 I want to be brief, and I will. I will not
10 speak at length, but I want to address a couple of the
11 rules, hopefully from a practitioner's perspective. I
12 began doing workers' compensation in 1980, and it's been
13 a long time. There's been a lot of changes. Nothing
14 that I remember is still in force, which is probably a
15 good thing.

16 But anyway, I would like to turn your
17 attention briefly to Rule 10211 of the Court's Rules,
18 Court Administrative Rules. We believe that a
19 compliance with these rules is essential to have
20 judicial effectiveness and to ensure that everyone
21 before the Board honors the rules that there's going to
22 be some level of uncertainty in the beginning, which I
23 think will require a deal of discipline, but I believe
24 that the imposition of sanctions, which appear to be
25 somewhat mandatory based on a violation of these rules,

1 may well extend beyond the scope of the sanction statute
2 under Labor Code 5813.

3 My concern and our concern is that while
4 individual local rules are proscribed, they do occur, in
5 fact, by custom if not by practice, in various Boards.
6 Our firm, which is known as Trentum Leap (ph), covers
7 most of the Boards in California, and I know from
8 experience and from my practice efforts that certain
9 judges and certain Appeals Boards still do things their
10 way, even though they're not really local rules.

11 My concern is that any infraction or any
12 violation of these rules might be deemed a bad faith
13 sanction, which might then open up the Pandora's Box to
14 litigating sanctions. And I respectfully suggest that
15 the Court Administrator's Rules be confined to the
16 administration part and let the Appeals Board issue
17 their own sanctions.

18 I think they have the power now. I think each
19 WCAB judge is fully empowered and entitled not only to
20 impose direct and hybrid (ph) contempt, but also to
21 impose sanctions if there's any willful or failure
22 deliberative effort to circumvent these rules. So I
23 just think the operating rule that says that the
24 violation here is a sanctionable offense, probably goes
25 beyond the scope of the Court Administrator's rules

1 because I think technically -- I could be wrong. I
2 usually am. That's why I argue against myself. But the
3 Court Rules, I believe the Court Rules are out of the
4 aegis (ph) of the WCAB. The Court Administrator is not
5 part of the WCAB, and I don't think the Court
6 Administrator actually has the power to sanction through
7 these rules, but I do think the judges do; and they
8 should be encouraged to do so, if in fact there's good
9 cause. But I don't think the remedy should be initiated
10 from an actual rule that may not be viable.

11 The next rule is 10252(b), as in boy, and
12 that's the expedited hearing section, which I think is
13 intended to facilitate what would obviously be a number
14 of treatment requests and requests for TD that should be
15 adjudicated timely. Our specific concern, though, is
16 with the alleged expansion of this expedited hearing
17 rule to encompass what may be unintended mischief of a
18 broad level.

19 Specifically, 10252(b) would seemingly permit
20 an applicant's attorney to allege a body part or an
21 existing body part in the case could be disputed, and
22 that disputed body part could then be the subject of a
23 DOR for treatment of TD on that body part, which may
24 forgo the opportunity of the defense to conduct
25 Discovery and have due process. And here's why.

1 Disputed body parts are very difficult to detect
2 sometimes.

3 Some lawyers will file an application that
4 says back and other body parts. And there's no general
5 demurrer on a motion to strike to an application. We
6 don't have that privilege, and I'm glad. But we don't
7 often have the ability to call out what those other
8 parts are. Or, a new body part could manifest simply
9 within the narrative confines of the treating doctor's
10 report.

11 Even though you think you've got a back claim,
12 the doctor now wants to treat or psych or for the lower
13 extremity, and so a new body part could be alleged that
14 way. If the applicant is using their selected physician
15 within the Zenith network, or any network, that doctor
16 has virtual control over the treatment course of that
17 case, subject to UR.

18 If that doctor, on an admitted back case,
19 suddenly decides two days ago to recommend treatment for
20 the psych, the applicant's attorney would then make a
21 perfunctory demand for treatment for the psych, and we
22 would not have the ability to conduct enough Discovery
23 to know whether or not we should or should not admit
24 that treatment. And if an expedited hearing statute is
25 permitted, we could then be in the untenable position of

1 having to go to the Appeals Board facing either a
2 hearing on that issue at that time or a conversion of
3 that hearing to a MSC where Discovery would be closed
4 off.

5 So I think that that part of the statute or
6 that part of the rule is beyond the purview of the
7 expedited hearing statute. I think that the other issue
8 is that applicant's attorneys may be selectively
9 encouraged to demand treatment and -- under a TD on
10 cases where there are disputed body parts where
11 Discovery is already commencing or is set to commence,
12 and this may forgo, it may cut off, it may short-circuit
13 the defense ability to conduct Discovery in a disputed
14 body part.

15 And not to belabor it, but these disputed body
16 parts could also come up in the last paragraph of a
17 report or in the applicant's deposition testimony where
18 for the first time he or she says, I also have problems
19 with my knee.

20 There is no formalized way in workers'
21 compensation of raising an additional body part. It's
22 done sometimes by the original application. It can be
23 done by the minute application. It can be done by a
24 medical report. It can be done by simply the
25 applicant's attorney demanding treatment for a part that

1 you didn't admit. And there is no formal process in
2 workers' compensation under the Napier case for actually
3 denying an additional body part. It's not like a new
4 claim form. It's not like an separate rejection.

5 So if you admit any part of the underlying
6 workers' compensation claim, then there is no specific
7 process in the code or in the regs for denying a body
8 part. And if there's no specific process, then how can
9 we empower applicant's attorneys to go to court and get
10 a hearing on treatment for a part of the body that
11 you're not in -- you're not -- that you're disputing.

12 So I respectfully ask you to take that part
13 out and make it align and conform that rule to the
14 enabling statute, which is 5502(b) so that they're in
15 alignment, because I think this particular piece of it
16 is beyond the purview of the statute.

17 And finally, my last comment is directed to
18 Rule 10281. When I first read it, I didn't understand
19 why it was there, but then in context with 1025(b), I
20 realized why. It seems to me that 10281 is probably
21 going to be a remedy most likely utilized by a defense
22 entity trying or even frantically endeavoring to turn
23 off, cut off, or slow down an attempt to get through an
24 expedited hearing.

25 So the way I envision this is we have an

1 admitted back case, there's a demand for treatment for
2 the neck and knee. We deny those parts of the body.
3 The applicant's attorney sends in a letter followed by a
4 DOR, and now what do we do. We have two remedies under
5 these proposed rules.

6 Number one, we can file a timely objection to
7 the DOR together with our evidence that's relevant, but
8 if we don't have any medical evidence that's relevant,
9 we're filing an objection. And there's no forum,
10 particularly for an objection to DOR; but what we have
11 to tell you is under oath, and it must be under the
12 penalty of perjury, the rules are crafted in a way to
13 empower the local Boards to review each and every DOR.

14 I don't know if that's being done. I don't
15 hear that it ever has been done uniformly. In fact,
16 what we see now and what we've seen in every day
17 practice, is when somebody files a DOR, that case is put
18 on calendar irrespective of the basis for the objection.
19 The DOR may have no validity. It may be unfair on its
20 face. It may be incomplete. But whether or not it's
21 reviewed, those matters are automatically set for
22 conference, and you're obligatorily required to come
23 down and then fight the matter once you're there.

24 Secondly, by availing ourselves of this
25 emergency stay procedure, it's going to create a

1 cumbersome and very laborious system where we have to
2 come up with ex parte notice and declarations to come in
3 and have a hearing on the hearing.

4 In other words, the way this is written is
5 that you don't get a stay; you get a denial or you get a
6 hearing on your request for a stay. So we've added now
7 another layer of hearings, superimposed on this
8 expedited hearing statute.

9 So I urge you to take these two statutes,
10 align them back and see if you can simplify them and
11 make them both in conformity to the enabling statutes
12 that I referred to. And otherwise, I commend you on
13 your efforts to take technology and place it in a system
14 that has long had, by my last count, about 12 pounds of
15 reform. I haven't weighed the current rules. But I
16 thank you for your allowing me to be here and for the
17 jokes that didn't go over well. Thank you.

18 MR. STAR: Thank you.

19 MODERATOR GARD: Thank you very much. The
20 next person on the list to provide testimony is Linda
21 Atcherley.

22 MS. ATCHERLEY: Linda Atcherley, on behalf of
23 the California Applicants' Attorneys Association. And
24 despite all our go-rounds, Mr. Star, I do commend you on
25 the system. I do commend you on the enormity of the

1 task that's being undertaken, and I do commend the
2 entire Division on trying to promulgate the regulations
3 that will effectuate the system.

4 Having said that, we've gone through the
5 entirety of these regulations, and there are just a few
6 comments. We are providing written comments, so I'm not
7 going to go through the -- all of the 15 pages worth of
8 written comments here today. I just want to hit on a
9 few, some of which we have already talked about right
10 now.

11 We'll start with, first, the difficulty of
12 really imaging paper and a paperless system with a
13 system that isn't live even internally and how that's
14 going to impact your practice. So, you know, some of
15 the comments or the fears or anticipations may never
16 come to be, but certainly we have tried to exercise
17 their imaginations to try to anticipate problems and cut
18 them off at the pass, as it were.

19 So starting with 10216, destruction of the
20 paper that's filed once it's scanned in within 14 days.
21 The problem is we have neither a live system, nor a
22 working system. We have legacy files, and I would say
23 that at least for the first -- I mean, you're still
24 doing things for up to a year past the go live date and
25 after that. And I would say that we probably want, you

1 know, at least six months for those rather than 14 days
2 where that paper actually exists because there's also
3 rules regarding and anticipating that these may not be
4 available and prolong periods of system on availability.
5 And you either have a choice then of not being able to
6 access things on the computer, the judge on day three of
7 a three day trial and the judge doesn't have any of his
8 notes because they're in the EAMS system; he doesn't
9 have the exhibits because they have all been destroyed,
10 which means that either people are reconstructing Board
11 files in the middle of a trial and then the date -- you
12 know, the delays inherent in that.

13 So I would just say that -- I would just say
14 that, you know, in terms of destroying paper right away,
15 you might want to think about a longer time period. And
16 also, we know that there's paper in the legacy files and
17 that you're just scanning documents as they -- for the
18 legacy files as they come in, but there's still an error
19 rate; and so I would just like you to consider maybe a
20 longer period before destroy the actual paper. And I do
21 know that you're overflowing paper. I mean, I'm down at
22 the Board. I see where those stacks of paper are. So
23 -- and I, unfortunately, have contributed mightily to
24 that paper problem.

25 So, also in terms of viewing files, which is

1 Rule 10270, you know, obviously a legacy file will
2 exist, but then what do you do when -- how -- you know,
3 the rule's not really clear what you do in this interim
4 period where not all external users are able to view
5 files on the electronic system.

6 I just raise that as an issue as maybe the
7 rules should -- some of these rules are written as if we
8 had a working system, and maybe they should be written
9 more like interim rules.

10 Here's where we come to the applicant's side
11 of the issue that was raised by Zenith. The DOR and
12 expedited hearing process, these are Rules 10250, 10251,
13 and 10252. And I'm just going to talk about them all
14 together because they work together. I looked at the
15 statistics of the Division's website, and in 2007,
16 335,599 DORs were filed. And that was up from 2006 and
17 up through -- up every year since 2001, except for 2005
18 and 2006. But it's gone up about 100,000 DOR filings
19 since 2001.

20 Now, I don't know whether there's inherently
21 more problems that aren't engaged with the Division's
22 problems, but more issues that arise with SB899, et
23 cetera. But they have always been around 300,000 DOR
24 filings, historically. So around '93, '94 we had a
25 problem where DORs were being routinely screened and

1 rejected.

2 And just remember, in 2000 -- in 1993, '94
3 there was no two-year cap on TD, and there was no
4 limitation on some of the medical treatment like we have
5 now, the time limits for UR, and other medical legal
6 processes. So when a DOR gets rejected and is screened
7 because insufficient attempts have been shown on the
8 face of the Declaration of Readiness to Proceed, we
9 believe that this also is mischief because the injured
10 workers are not risk tolerant, nor are they time
11 tolerant. And I don't believe that there's any
12 statistics showing an abuse of filing of the Declaration
13 of Readiness to Proceed.

14 The Discovery problems that were talked about
15 by Zenith -- by the way, a very good company and
16 actually does its Discovery in a timely manner, but that
17 doesn't extend industry-wide unfortunately. The only
18 time sometimes I get a response at all is if there is a
19 living existing claims examiner on the file is when I
20 file a DOR. And then the objection comes in. Oh, we
21 haven't completed Discovery. And sometimes we're three
22 years into the file. Oh, we need to find out what's
23 happening.

24 So without -- you know, every time, if you
25 take out of the DOR because you have an objection that

1 somebody needs to do Discovery, that also provides
2 mischief. And when the person's running out of time and
3 running out of benefits, I don't -- I think that the --
4 I think that the injured worker ought to get the benefit
5 of that one.

6 And so the old rule says that a statement that
7 good faith attempts were made to resolve a dispute and
8 that no response was made within 15 days, was sufficient
9 to satisfy a requirement for good faith on the expedited
10 and the Declaration of Readiness to Proceed.

11 The disputed body part. The expedited -- by
12 the hearing. Personally, I think that's a wonderful
13 thing because, you're right, there is kind of a hold but
14 now we have Sam Hagen and utilization review where
15 clearly the claims examiner is supposed to, within a
16 very tight deadline, when a doctor's report or request
17 for authorization comes through requesting a modality of
18 medical treatment, they're supposed to, according to the
19 supreme court, respond within the time limits of 4610
20 and 4616.

21 So -- and if they -- and if they do do that,
22 then we're not in an expedited hearing because the code
23 requires that if that was denied, that then the
24 applicant has to go through the medical legal process
25 under 4062. So there's no reason here, no serious

1 Discovery issue on the expedited hearing.

2 The reasons in the rule were for severely
3 complicated cases where there's multiple testimony and
4 multiple issues being decided where it might be moved
5 over to a conference instead of an expedited hearing
6 right at that time.

7 I have had expedited hearing with 31 different
8 modalities of medical treatment that were requested by
9 the AME and the treating physician, and were subject to
10 a prior Order on the case. That case was tried as an
11 expedited hearing. It took three days. We didn't have
12 to go to pretrial conference or anything else. The
13 judge did a great job and it ended up with one more
14 Order for medical treatment, and that case is still
15 ongoing.

16 So, you know, all I would say is that probably
17 this change -- the only thing I would object to is that
18 you have the ability to change from an expedited hearing
19 which has very strict, statutory deadlines for the
20 decision, for the hearing, for everything else, onto a
21 process which doesn't have those hearings and those
22 deadlines. And so I think that --

23 MR. FISHER: Ms. Atcherley, can I stop you
24 there for a second. I wasn't sure, when you made that
25 switch. I sort of lost you when you said that the case

1 involving the 31 modalities, that was filed as an
2 expedited hearing and it went --

3 MS. ATCHERLEY: It was filed --

4 MR. FISHER: And it went straight to an
5 expedited hearing and the judge handled that. And I'm
6 not sure -- I think I lost it a little bit when you were
7 making that transition.

8 MR. ATCHERLEY: Okay. That is a really
9 bizarre example because most of the expedited hearings
10 actually settle at the time of the expedited hearing.
11 But if you want to know about that case, there was a --

12 MR. FISHER: No. I was just trying to figure
13 out what point you were trying to make when you made the
14 transition from the objection.

15 MS. ATCHERLEY: Well, the point -- right. The
16 point I was trying to make is that not every complicated
17 expedited hearing needs to be converted to a status
18 conference or pretrial conference or something else
19 which just doesn't -- you know, you're ready to go to
20 trial, you have your medical evidence, the defendants
21 have their medical evidence; you're ready to go to
22 trial. And putting it over to a status conference or
23 putting it over to another type of conference, I don't
24 think really helps or effectuates the underlying
25 expedited hearing statute.

1 Where you have got temporary disability and
2 medical treatment, people can't really wait on those two
3 modalities. If you need a liver transplant, you don't
4 need 50 hearings before some decision is made. If you,
5 you know, are waiting for special medications, it may be
6 life-threatening to, even though it's a complicated
7 issue, to set it over.

8 I think that if there's insufficient evidence,
9 that the judge has other tools available to them to make
10 determinations or augment records to do what he wants
11 during that hearing. So that's the only point I was
12 making is that all these things have an opportunity --
13 you know, when you look at a system that has 338,000
14 DORs filed -- and they don't -- the website doesn't
15 distinguish between the two, expedited; but I would
16 suspect that far more regular DORs are filed probably 2
17 to 1 than an expedited.

18 The expedites probably settled at a rate of
19 almost 2 to 1 or 9 out of 10 expedites got settled, so
20 they don't take up much more time; but that's the only
21 time that you can get somebody in front of you to
22 authorize the modality of treatment. So I think these
23 statutes -- we need to be really careful about
24 prescreening or putting more requirements in when
25 they're really the only effective way to get cases moved

1 on and settled.

2 A lot of cases let the MIC (ph), so they're
3 pretrial conferences or the expedited hearings, which is
4 why I think there's 138,000 decisions made, but there's
5 338 DOR and 333,421 hearings. So we have a very
6 successful rate of resolving issues at the hearings.

7 Okay. 10229, this section requires that
8 attorneys fill out all these forms that are not going to
9 be available -- they're available on the website, but
10 they aren't part of the E-filing procedure right now.
11 That 10229 requires that attorneys, unlike unrepresented
12 injured workers or unrepresented or uninsured employers,
13 that they have to fill out all these forms, either by
14 computer or typing. I have one typewriter in the closet
15 in my office. We have many computers, but this is not
16 the kind of form you download and then you slide into
17 your computer and sort of jury-rig the things. And I
18 don't think they want us to do that anyway because to do
19 that really will make it -- the scanning inefficient and
20 may cause a lot more errors. Filling it out on --
21 filling it out on the website, I tried one that I could,
22 which was an arbitration form. It took a long time and
23 it was difficult to move between fields.

24 But the comment I want to make here is that
25 other Court Rules allow -- like Superior Court Rules

1 allow people to do it in neat block printing. And I
2 understand the scanning errors and the pick-up errors,
3 but particularly with regard to documents like the
4 Minutes of Hearing and the documents -- the Compromise
5 and Release, stipulations, Request for Award of all
6 types, some of these need to be filled in by writing.

7 I know that Zenith is going to have computers
8 for all their people to bring down with all their
9 information loaded, but you know, I -- unless you
10 brought a -- you can have a -- all the computers you
11 want and all the data you have, you can't print them
12 without a printer, which means everybody is coming down
13 with a printer and there's no place. Maybe there's some
14 huge Board somewhere, but the practical effect is that
15 the San Diego Board, it's just a boardroom, except for
16 the presiding department. It's about the size of my
17 dining room, which is not large. So it's about 10X12.
18 In that 10X12 room we have a podium, we have a little
19 wrap to get up to the judge's desk, we have several
20 desks, chairs aligned; and there's really no way for
21 every 40 or 50 attorneys or more to sit down and fill
22 out documents, including the Minutes of Hearing and
23 those types of things without doing them in handwriting.

24 Now, we have had a few very courageous judges
25 in the past that have filled out the Minutes of Hearing

1 and they go back in the back and they fill out their
2 Orders, and your sitting in line with three or four
3 cases and the courageous judge is not the best typist in
4 the world, and so you're spending 15 minutes a case for
5 the typing. And I just think that, you know,
6 administrationwise, maybe you would want to make --
7 amend this rule a little bit to allow handwriting at
8 least of certain forms that are usually filled out down
9 at the Board. Especially the Compromise and Release to
10 stipulations, the Request for Award.

11 You know, sometimes the application. I have
12 had people tell me they do the applications down at the
13 Board when they need to open up a new Board file for
14 some reason. So we just want a little bit of
15 consideration for actually hand filling out the forms,
16 despite the fact that we're attorneys.

17 This cover sheet is like really long, so my
18 question to you is, with regard to the forms, if there's
19 any way we don't have to file a cover sheet or you have
20 a different cover sheet that's for subsequent documents
21 -- I mean, I understand all this information that's
22 coming in with an initial application, and then it's not
23 really clear whether if you have three applications,
24 three days of injury, you need one cover sheet for each
25 of them, even though all dates of injury and case

1 numbers and everything is on the case -- is on the cover
2 sheet.

3 So if you had -- I mean, I know you have this
4 separator sheet, which is simple. And then if you had
5 some sort of a subsequent cover sheet to use, because
6 all that information should be in the case file. And I
7 notice there are nice little scan bars on most of the
8 these documents which identify the document itself as
9 being Compromise and Release, stipulations, et cetera.
10 So it doesn't say you need a cover sheet to identify the
11 document that you're filing. There may be some other
12 purpose. If some information changes, you know, perhaps
13 you're required to file yet another form, but we have
14 another form for updating the -- the sheets, you know,
15 the service sheet or the -- you know what it's called.
16 The little thing that sits on the inside that shows all
17 the parties and their address.

18 So, and then the last area is return to work.
19 You have these regulations on return to work, which are
20 pretty much based on existing statute. We're in the
21 middle of, like, day 18, really day five of some
22 proposed changes to the legislation regarding return to
23 work and the vouchers and provisions of vouchers and how
24 you use the vouchers.

25 So in regard to these particular regulations,

1 it might be a little bit premature to start moving these
2 through when the underlying statute may be changed. And
3 seriously changed, in fact. But notwithstanding that,
4 one -- Rule 10116.8(a), the definition of alternate work
5 conflicts with the statute. The statute says that
6 alternate work must be with the at-injury employer, not
7 somewhere else, and the regulation says that either at
8 the at-work employer or with some other employer if the
9 work was seasonal. And I read the statute a couple of
10 times. It's just not there.

11 Similarly, Sub E of the same regulation has a
12 new definition for essential functions. And Sub -- you
13 know, this doesn't occur in the statute, and I'm not
14 sure that regulatory exists to add things that really
15 aren't in the statute or the statute is pretty clear.

16 And then Sub H, these are the uses of the
17 voucher. Again, this is something that's specifically
18 discussed at the Return to Work Advisory Group meetings
19 and, you know, pretty much is going to be changed,
20 assuming anything happens.

21 And then Sub L talks about pursuant to an
22 award, we just wanted to clarify paragraph 3 so that it
23 reads, a stipulation or Compromise and Release approved
24 by the Workers' Compensation Administrative Law Judge or
25 the Workers' Compensation Appeals Board.

1 And here's the last one, hopefully. Walk
2 through documents, Regulation 10280. There's a
3 requirement that you serve the Compromise and Release
4 before filing it with the Board. Now, you know, usually
5 you walk things through within a 24-hour period or a
6 couple day period, and then you have to reserve the
7 whole document anyway on all parties appearing in the
8 Board file with the Order of the judge.

9 So considering that at some point people are
10 going to be getting service by mail, by e-mail, by fax
11 and God knows what, I think this is kind of a torturous
12 -- and the service isn't guaranteed even to reach
13 everybody that's on the official Board service list. So
14 I think it's -- I think it's an unnecessary burden, and
15 I just think that it would be easier to file the DOR and
16 continue the procedures the way we -- file the
17 Compromise and Release or stipulations, walk through the
18 way we have and then serve everybody on the official
19 address list. It just seems better. I mean, otherwise
20 you're doing two -- the same thing within a 24-hour
21 period or a little bit more.

22 And that's it. Thank you very much.

23 MR. STAR: Thank you.

24 MODERATOR GARD: Thank you, Ms. Atcherley.

25 Okay. We have a couple more folks who have come in, and

1 so far one more who signed up to provide testimony. So
2 for those who came in a little bit later, please, when
3 you come up to give your testimony, give Maureen Gray,
4 our Regulations Coordinator, your business card, if you
5 have one, so we can get the correct spelling of your
6 name in the transcript.

7 Please speak clearly into the microphone here
8 at the podium, and before starting your testimony,
9 please identify yourself for the record; then please
10 state the section that you will be commenting on. So
11 Ron Diller is the next person scheduled to testify.

12 MR. DILLER: Good morning. My name is Ron
13 Diller, the Southern California Medical Legal
14 Consultants, Incorporated, and I would like to just
15 comment on 10240 and 10241 and -- in that I want to
16 concur with David Robin's earlier testimony on these
17 issues.

18 It would appear that this is a good thing.
19 You want to move the cases forward, give the lien
20 claimants more opportunity to resolve the case by being
21 present at all of the hearings. That sounds good, but
22 sometimes well-intentioned actions have unintended
23 consequences.

24 In the real world of lien claimant
25 representation, which I have been doing for 22 years. I

1 have represented group health insurance companies,
2 counties, medical providers, hospitals, the whole gamut
3 of lien claimants for many years. And from my
4 experience, when -- if you're going to require all lien
5 claimants to be at every appearance and have a
6 consequence of their lien being denied completely with
7 prejudice of not making an appearance, it would be very
8 naive to think that the defendants are not going to use
9 that to their benefit.

10 Meaning, you're trying to move the cases
11 forward, but in reality the defendants are the ones that
12 are in control of whether the case gets settled or not
13 with the lien claimant. They're the ones with the
14 money. So if they -- once they figure that out, they'll
15 just simply not negotiate with anybody hoping that you
16 won't make the next hearing, hoping you won't make one
17 of the hearings. They would be foolish to settle with
18 you early when there's a great opportunity for them to
19 just be rid of you with no further discussion if you
20 just don't make it to a future hearing. They have no
21 incentive now to settle the case with you if you put --
22 this has the opposite effect of what you're trying to
23 promote.

24 If you're trying to promote settlements, all
25 this will do is delay settlements and give the

1 defendants a -- a free pass on otherwise compensable
2 liens. That's so unfair that -- that I agree with
3 David, it will have an impact on the availability of
4 medical care for injured workers. Once -- once medical
5 providers realize the impact of that, they're not going
6 to want to do -- take workers' comp patients because
7 there is a reality. There's a direct cost associated
8 with making every appearance.

9 And if you've got an expedited hearing on an
10 issue of temporary disability, I assure you lien
11 claimants of any size aren't attending those now because
12 there's no reason to. They aren't going to -- I have
13 never settled a case -- a lien at an expedited hearing.
14 Ever in 22 years. And we have done thousands and
15 thousands of them. It's not going to happen. It's
16 going to have unintended consequences that are going to
17 cause more of a problem than what you're trying to fix.

18 That's it. Thank you.

19 MR. STAR: Thank you, sir.

20 MODERATOR GARD: Thank you, Mr. Diller. That
21 is -- do we have any other folks that have signed up to
22 provide testimony? That is all the people we have who
23 signed up to provide oral testimony. If there is anyone
24 else who wishes to testify, now is the time to do so.

25 Okay. If nobody else is here to testify,

1 we'll close the hearing. And the opportunity to file
2 written comments will continue to be open until 5:00
3 p.m. tomorrow, Tuesday, July 15. Those comments, again,
4 should be delivered to the Division of Workers'
5 Compensation at 1515 Clay Street, 18th floor in Oakland.

6 Last call.

7 So, on behalf of the Administrative Director
8 and the Court Administrator, I extend our thanks for
9 your attendance today and the input you have given us,
10 and thank you to our staff for their work here this
11 morning. The hearing is now closed.

12 MR. FISHER: Thank you.

13 MR. STAR: Thank you very much.

14 (Whereupon, the Division of the Workers'
15 Compensation Proposed Regulations for the EAMS Public
16 Hearing adjourned.)

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1 CERTIFICATE OF SHORTHAND REPORTER

2 I, TERRIE CULP-SMITH, a Shorthand Reporter, do
3 hereby certify that I am a disinterested person herein;
4 that I reported the preceding in shorthand writing from
5 the tapes that were provided to me; that I thereafter
6 caused my shorthand writing to be transcribed into
7 typewriting.

8 I further certify that I am not of
9 counsel or attorney for any of the parties to said
10 proceeding, or in any way interested in the outcome of
11 said proceedings.

12 IN WITNESS WHEREOF, I have hereunto
13 set my hand this 16th day of July 2008.

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Terrie Culp-Smith

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Shorthand Reporter

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