

# LITIGATION TIPS FROM A JUDICIAL PERSPECTIVE

BY:  
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## DISCLAIMER

- The opinions expressed here today are not the opinions of the State of California, the DIR, the DWC, the WCAB, or other Judges. They are solely the opinions of the individual Judge presenting the information. Each case is different and should be evaluated accordingly.

## PREPARING STIPS & ISSUES

- A set for each injury
- Fill out the entire form
- Stipulating to amend up until the day of trial violates L.C. 5502 (e)(3)
- “Other issues”???? Ask yourself, is this an issue or an argument?

## QME PANELS

- Judges decide admissibility not the medical unit
- Replacement panels
- Ex-parte communication; Alvarez v. WCAB 75 C.C.C. 817
- L.C 4062.3
- Reg. 31.5

## SUBMITTING C&Rs and STIPS

- ENTIRE FORM MUST BE COMPLETED  
L.C. 5003
- UNPAID MEDICAL BILLS ARE PAID BY  
DEFENDANT L.C. 4600
- SERVICE ON LIEN CLAIMANTS
- GOOD FAITH EFFORTS TO RESOLVE LIENS
- KNOW WHAT THE SETTLEMENT IS BASED ON;  
WHY IT IS ADEQUATE

## PRO PER C&Rs and STIPS

- **P&P Manual Section 1.91**
- **<http://www.dir.ca.gov/wcab/wcab.htm>**
  - 1) All medical reports of trt and QME in order
  - 2) explanation of settlement
  - 3) Ratings of all P&S reports
  - 4) A.W.W if less than Max.
  - 5) All notices sent to e/ee re: settlement
  - 6) All letters to app. Re: QME process
  - 7) Printout of benefits

## SUBSTANTIAL EVIDENCE

- BENSON (74 C.C.C. 113)
- If it is not AMA compliant is it not substantial evidence?

Substantial evidence in workers' compensation generally means evidence that is credible, reasonable, and of solid value, which a reasonable mind might accept as probative on the issues and adequate to support a conclusion. (Braewood Convalescent 48 C.C.C. 566)

## LIEN REPS.

- Reg. 10550
- Authorization to represent the lien holder
- Separate companies must enter a N.O.R.
- Who owns the debt?
- Appearing on multiple cases
- Is the lien on the O.A.R.?
- Sanctions under Reg. 10561(b)(7)

## UTILIZATION REVIEW

- CERVANTES (75 C.C.C. 904)  
L.C 4062(b)  
FORM 233  
Reg. 9788.1  
SERVICE ON A.D., E/EE, A/A TRT DOC.
- TIMELINES
- MEDICAL REPORTS

## PRE-TRIAL CHECKLIST

- ARE THE STIPS & ISSUES READY FOR TRIAL?
- ARE MY EXHIBITS READY FOR TRIAL?
- DO I NEED A TRIAL BRIEF?
- HAVE I DESIGNATED MY RECORDS?
- IS EACH EXHIBIT RELEVANT TO A PENDING ISSUE?
- ARE MY WITNESSES RELEVANT TO THE PROCEEDINGS?

## PRE-TRIAL CHECKLIST (CONTINUED)

- HAVE MY EXHIBITS BEEN SERVED AND DO I HAVE P.O.S. TO PROVE THAT FACT?
- HAVE I PREPARED PROPOSED RATING INSTRUCTIONS/PROPOSED RATING?

## WALK THROUGH DOCUMENTS

- Reg. 10280
  - 1) C&Rs
  - 2) Stips
  - 3) Attorney fees under L.C. 5710
  - 4) Petitions to compel depo or med exam

Check with individual offices as to times and days for walk through documents.

## LITIGATION TIPS FROM A JUDICIAL PERSPECTIVE

BY: HON. CRAIG GLASS

### KNOW YOUR FILE!!!

- What do the reports rate?
- Who are the doctors?
- What is the Date of Injury?
- Who is the carrier?

## READ STIPS AND ISSUES (THAT YOU SIGNED)

- For E-Filed exhibits have the EAMS ID #s listed
- List relevant document as to the issues you intend to prove
- Prepare witnesses
  - 1) eliminate duplicative testimony/witnesses
  - 2) be prepared to answer relevant questions
  - 3) be brief!

## What are you trying to prove???

- What is the game plan?
  - 1) aoe/coe
  - 2) T.T.D.
  - 3) P.D.
  - 4) Medical Care
  - 5) Costs/expenses

## BURDEN OF PROOF

- Who has the burden as to the issue(s) in question?
- Has the burden shifted?
  - 1) Where there is a rebuttable presumption has a “prima facie” case been made?
  - 2) Zone of risk claims-has the burden shifted to the def. as to causation?
  - 3) Do not prove your opponents claim/issue

DO NOT SPEAK OVER THE JUDGE!



WHEN YOU HAVE MADE YOUR POINT  
STOP!



ON A LARGE CASE WITH SIGNIFICANT  
ISSUES PREPARE A BRIEF

- Organizes your thoughts
- Reminds you where you are going with the case
- Directs the course of the case
- Directs the Judge as to the evidence and relevant law

## FOLLOW UP ON THE RESULTS

- F&A issued?
- Calendar appeal?
- Did the Judge address all issues?

## KNOW THE RELEVANT LAWS

- Cal. Code of Regs.
- Labor Code(s)
- Recent Cases

# **ABC'S OF LITIGATING AT THE DISTRICT OFFICES**

## **“A” is for “Application for Adjudication of Claim”**

Complete ONE application for  
Adjudication of Claim for each date of  
injury.

## **“B” is for “Be Prepared”**

The Mandatory Settlement Conference is there for you to attempt resolution or reduction of issues. You must know the issues and your file. Be prepared to address the issues and your positions. Be prepared to identify the relevant witnesses and exhibits if unable to settle.

## **“C” is for “Central Registration Unit”**

Maintains the website list of names and addresses of claims administrators' offices and representatives' offices. New claims administrators' and representatives' offices shall register with CRU. Changes of name, location or address, telephone number, fax number, e-mail address or preferred method of service shall be registered with CRU.

## **Central Registration Unit, cont.**

The fax number for the Central Registration Unit is: 1 (888) 822-9309. The email address for the Central Registration Unit is: [cru@dir.ca.gov](mailto:cru@dir.ca.gov).

## **“C” is also for “Claims Administrator’s Office”**

This is any office location that administers workers’ compensation claims.

## **“D” is for “Document Cover Sheet”**

This is Form 10232.1, which is placed on top of a document or set of documents filed at one time in a specific case.

## **“D” is “Document Separator Sheet”**

This is Form 10232.2, which is the form to be placed on top of each individual document, when one or more documents are being filed at the same time in the same case.

## **“E” is for “Expedited Hearing Calendar”**

Where an injury to any part or parts of body is accepted as compensable and the issues include medical treatment or temporary disability for a disputed body part, the case may be set for Expedited Hearing. However, the assigned WCJ may redesignate the Expedited Hearing as a Mandatory Settlement Conference and handle it accordingly.

## **“F” is for “Filing of Medical Records”**

When filing a Declaration of Readiness to Proceed (DOR) or Objection to DOR, file ONLY the report(s) of any agree medical examiner, any qualified medical examiner, and any treating physician that: (A) are in your possession or control, (B) are relevant to the issue raised in the DOR, and (C) have not been filed previously.

## **“G” is for “Genuine, Good Faith Efforts to Resolve the Dispute**

ALL DORs shall state under penalty of perjury that the moving party has made a genuine, good faith effort to resolve the dispute and shall describe the efforts made on the DOR.

## **“H” is for “Helpful Website”**

[www.dwc.ca.gov/EAMS](http://www.dwc.ca.gov/EAMS) is the website for helpful and detailed information about EAMS, including the EAMS and legacy case number look-up tool, the UAN data base, the OCR handbook, FAQs, the e-form Reference Guide & Instructional Manual, as well as the Public Information Search function.

## **“I” is for “Information & Assistance”**

The I&A Officer can assist the unrepresented injured worker to navigate the workers' compensation process and will explain the options available to the injured worker. I&A Officers make inquiries on behalf of the judges. Any such inquiries require response.

## **“J” is for “Justify Your Position”**

“Justify your position” means setting forth the facts and the law, including citations, if any, in support of your position on an issue. If citing a case, be prepared to state what the case says and how it supports your position.

## **“K” is for “Know Your File”**

Please review your case file before any appearance. This is true whether you are appearing at a hearing or walk-through. Know the issues. Know the medical support for your positions on the issues. Know the medical support for the “other side’s” positions. Be able to explain the bases for your settlement.

## **“L” is for “Legacy Case”**

A Legacy case is a case opened before August 25, 2008 which has a pre-EAMS, or “Legacy Case” number, such as SAC 0744332. An EAMS and legacy case number look-up tool can be found at [www.dwc.ca.gov/EAMS](http://www.dwc.ca.gov/EAMS) which will allow one to identify the legacy case number (if there is one) for a case with an EAMS number or the EAMS number for legacy case.

## **“M” is for “Mandatory Settlement Conference”**

PLEASE use the Mandatory Settlement Conference as an opportunity to discuss and negotiate your case (please see “Know Your Case” and “Be Prepared”). Even if you are unable to settle the case in its entirety, you may be able to narrow the issues. The judge may also be able to assist you in narrowing the issues or maybe even reaching an agreement.

## **“N” is for “Notice of Document Discrepancy”**

This is the notice one may receive if a document is not filed in compliance with the Court Administrator’s rules. The filer will have 15 business days to correct the discrepancy. If corrected within 15 days, or at a later date upon a showing of good cause, it shall be deemed filed on the original date the document was submitted.

## **“O” is for “Optical Character Recognition”**

An Optical Character Recognition (OCR) form is a paper form designed to be scanned so that its information is automatically extracted and stored in EAMS. All filers, except those participating in the e-form trial, are required to file using OCR forms. There is a detailed OCR paper forms handbook that may be found at [www.dwc.ca.gov/EAMS](http://www.dwc.ca.gov/EAMS).

## **“P” is for “Preferred Method of Service”**

This is the method of service you choose for receiving documents from the district office or the appeals board. The preferred method of service shall be the same for all of your active cases. Requests to change the preferred method of service shall be made to the Central Registration Unit.

## **“Q” is for “Quiet in the Courtroom”**

During hearing calendars, please respect those who are appearing before the judge, especially during conference calendars. Keep your voices down, and avoid loud cell phone conversations during conference calendars. Do not interrupt trial proceedings with your conversations. Ringing cell phones are not acceptable.

## **“R” is for “Representatives’ Office”**

This is any office location for a law firm, attorney or representative of a party or lien claimant in a workers’ compensation case.

## **“S” is for “Succinct and Straightforward”**

When arguing a motion at conference or trial, succinctly set forth the facts, and present your position clearly and concisely. Do not make it a habit to argue your point after the judge has made his/her ruling.

## **“T” is for “Trial Preparation”**

Prepare for trial so that, if no settlement is reached, the case can immediately go forward. Know the issues that are to be addressed and make sure the evidence submitted addresses the issues to be decided.

## **“V” is for “Venue”**

After the filing and processing of an initial application or other case opening document, all documents required or permitted to be filed under court administrator or appeals board rules shall be filed at the district office with venue, unless otherwise ordered by a judge or the appeals board. Exception: petitions for reconsideration, removal or disqualification. A petition for change of venue is required when a venue change is requested.

## **“W” is for “Walk-through”**

The requirement that an unrepresented injured worker be present when a walk-through settlement document is presented to the judge unless the settlement has been reviewed with the injured worker by an Information and Assistance officer no longer exists.

**I am “Xtremely” happy  
for “Your” attention  
to this presentation,  
and this is “Z” end.**

# The Mandatory Settlement Conference

Presented and Produced by Judge Lilla Rados

## What is It?



It is **not** a **mandatory trial setting conference**. It is an opportunity for parties to engage in settlement talks. Success is achieved at the mandatory settlement conference if you either settle the case or set it for trial. Any thing else is failure.

What do you need to be  
Prepared?



- A file
- All medical reports and dates of reports you want to list as evidence
- Witness names (need to be able to contact witness to make sure they are available to testify at the trial you will select a date for)
- Be aware of all potential issues and be willing to discuss/address them
- Have your rating ready to discuss with your judge

## How to Avoid Discovery Closure at the MSC



- File a timely objection to the DOR (a timely objection however is no guarantee that discovery will not be closed)

## How to Make Sure Discovery Closes at MSC and Matter is Set for Trial



- Serve all your documentary evidence on your colleague either at the same time as you are serving your DOR or before.
- Send a detailed letter to your colleague, 30 days before filing of the DOR, outlining all your issues and your demand. The list of witnesses should have contact information on it so that your colleague has an opportunity to set the deposition of the witnesses if necessary.
- Be prepared for the MSC.

# The Mandatory Settlement Conference Statement

- Should you come to the MSC with it completed? Would completing the MSC statement jinx your chance of settling the case?



- Preparing the MSC statement will assist you with your preparation for the hearing. It is therefore never a waste of time to prepare such document, even if you do not set the case for trial.
- Complete the MSC statement carefully. Be detailed oriented.
- List all issues.
- Only stipulate to issues you agree with. You will be held to your stipulations.
- List the date of the medical report along with the name of the doctor. **Do not say Dr. X...various reports.**
- List all your witnesses, including the applicant. List the witnesses by name. **Do not say Ogilvie expert or employer witness.**

# What No Judge Wants to Hear



- I have no file. My client just called me this morning and asked me to appear.
- I got the file last night and had no time to review it.
- I cannot reach my client to obtain authority but I can tell you Judge, that I have no authority to stipulate to anything.
- I never thought that anyone would raise Ogilvie.
- Almaraz? What is that Judge?
- I know I can win this case. I have evidence. And I will be sure to list it all on the day of trial.
- I will be calling an expert. I do not know who it is yet but I am sure they are available on the day of the trial.
- It is true that I did not object to the DOR, but I meant to.
- I need a full day for trial. I have a lot of questions to ask since I do not know who my witnesses are. I had to list 20.
- Go ahead. Set me for trial. Close discovery. I will just remove you.

# Evidence



- Evidence is what you use to prove your case. Evidence can be presented live (witness testimony), through documents (medical reports, medical records, wage statements) and through videotape (surveillance).

# Witness Testimony

- Who can testify: applicant, members of the applicant's household, friends of the applicant, those who witnessed the injury, the employer, vocational counselors... just to list a few.
- Who cannot testify: medical doctor
- Know your witness. Do not put a witness to testify at trial who you did not prepare for trial.
- **Do not present repetitive testimony. It is a waste of time and may put your trial judge to sleep.**



## Documentary Evidence

- Medical report from a QME
- Treating doctor reports
- Medical record (make sure either the treating doctor or the QME...whoever it is you are relying on has reviewed these records and commented on them in their final report)
- Wage statement
- Job description
- Rehab Expert reports

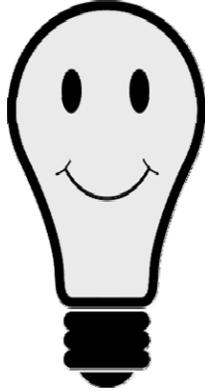


## Surveillance Videotape

- You will need the investigator to testify and to produce the video.
- Make sure you look at the video yourself. Do not take an investigator's word for what the video shows.
- Make sure the person videotaped is the applicant. Make sure the applicant does not have an identical twin. (no kidding here)
- A videotape without a doctor's review is essentially worthless.
- **A long video that does not prove anything does not help your case.**



## Tip of the Day!



Argument is no substitute for evidence. If you have an issue that requires evidence to prove your case, you have to get that evidence and cannot substitute argument in a trial brief or a petition for reconsideration for that evidence.

**Example:** As a defendant, you want to establish that the last year of injurious exposure in a CT case occurred after your employment. You cannot fail to obtain expert medical opinion that such injurious exposure occurred at the later employment and come to trial or petition for recon arguing that it is clear, for example, from applicant's testimony, that he had injurious exposure at the other employment.

# Top Tips for Trial

## DWC Conference 2011

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## #1 –Attend the Hearing

### Failure to Appear At Trial §10241 -

WCJ may:

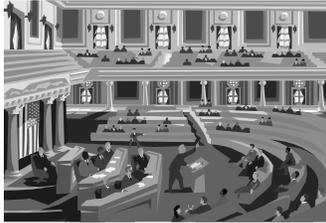
- a. Dismiss the app or LC after NIT to dismiss;
- b. Hear the evidence, and after service of MOH and SOE, with NIT to submit;
- c. Continue or OTOC the matter if good cause is shown for failure to appear;
- d. Any of the above.



**Hint:** The dog ate your hearing notice won't work as an excuse.

2

## # 2 – Be Prepared



### **8 CCR §10550 – Coldiron is codified**

All parties and their clients must be identified.

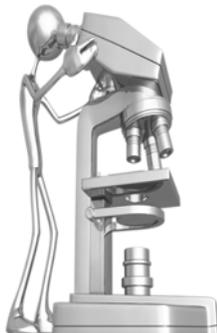
*See Coldiron v. Compuware Corp* (2002) 67 CCC 289  
(*Coldiron I*) and 67 CCC 1466 (*Coldiron II*).

**See also “Zen” materials at page 37.**

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## #3 – Medical Evidence

### **Doctor’s rationale should distinguish between:**



- Causation of **injury** affects **MT**  
(If cause of injury = 1% industrial, IW gets 100% MT needed to treat injury)
- Causation of **disability** affects **PD**  
(If cause of disability = 1% industrial, IW gets 1% of the PD rating payout.)

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## #4 – Burden of Proof Issues

*Rolda v. Pitney Bowes* (2001) 66 CCC 241

(En banc)

1. Did psych injury involve “actual events of employment” (**legal issue** – IW’s b/p)
2. Is there > 50% industrial causation (**medical issue**– IW’s b/p)
3. Were there personnel action(s)? If so, were they lawful, nondiscriminatory & in good faith? (**legal issue** – D’s b/p)
4. Were personnel action(s) the substantial cause (35-40%) of the psych injury (**medical issue** – D’s b/p)



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## #4 – Burden of Proof Issues



### Psych Injury

Industrial Cause: 100%

Non-industrial: 0%

Affects whether she meets §3208.3

### Psych disability

Industrial Factors: 20%

Non-industrial: 80%

Affects apportionment determination

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## #4 – Burden of Proof Issues

Six (6) month employment bar lifted if injury caused by “sudden and extraordinary employment condition” LC 3208.3(d)

See list on page 39 of “Zen” materials for what qualifies and what does not qualify



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## #4 – Burden of Proof Issues



*Washington v. Davis Companies*,  
(2010) 2010 CWC PD LEXIS  
@ 79 (ADJ1323942-Panel)

Rule 9780(h) “reasonable geographic area” for MT = trip from IW’s home in Nevada to Beverly Hills, CA b/c defense failed to “present evidence that similar MT was available closer to IW’s home.”

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## #5 – Expert Witnesses

***Costa v. Hardy Diagnostic***,  
(2006) 71 CCC 1797  
(WCAB en banc) & (2007)  
72 CCC 1492 (WCAB en  
banc)

WCAB held that the 2005  
PDRS is valid.

However, parties may  
introduce evidence at trial to  
rebut a PD rating.



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## #5 – Expert Witnesses

***Costa v. Hardy Diagnostic***, (2006) 71  
CCC 1797 (WCAB en banc)



VR report was excluded from evidence  
because it was not served until the  
day of trial, but expert was allowed to  
testify. VR experts are like  
physicians. If you want their reports  
to be admitted into evidence at trial,  
you need to disclose the witness  
AND the report at the MSC, per  
LC§5502(e)(3).

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## #5 – Expert Witnesses

***Grupe Company v. WCAB (Ridgeway)***,  
(2005) 70 CCC 1232 (3<sup>rd</sup> DCA) The  
DCA discusses when and how to  
present expert evidence.

Parties must list all witnesses at MSC.  
However, unlike physicians, parties are  
not **REQUIRED** to submit a report from  
their VR expert or in any other way  
disclose the contents of the expert's  
testimony at trial.

**Is there a conflict between Costa and  
Ridgeway?**



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## #5 - Expert Witnesses

To reconcile the 2 cases:

***Ridgeway*** = a VR expert's report is  
not mandatory, as is a physician's.

***Costa*** = if a party wants to admit a  
VR expert's report into evidence at  
trial, then the party needs to disclose  
that report at the MSC and provide  
copies for all.



12

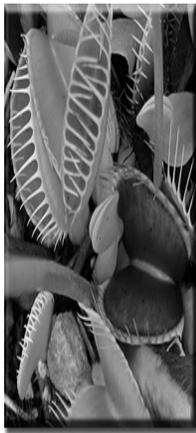
## #5 - Expert Witnesses

- VR's written report helpful.
- Identify report @ *Costa v. Hardy Diagnostic*, (2006) 71 CCC 1797
- Underlying medical opinion must constitute substantial evidence. (See *Escobedo/Gatten* cases.)
- If issue = medication use as labor disabling, VR op must be based on **substantial medical evidence**, and not solely on the self-reporting of the injured worker.



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## #6 – Submission of Evidence



### “Zen” Handout Materials p. 41

WCAB Rule §10629 Describes the Process  
for Filing & Listing of Exhibits

Do not lump all of Doctor Dolittle's reports  
into one exhibit

Each Doctor's report = separate exhibit.

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## #6 – Submission of Evidence

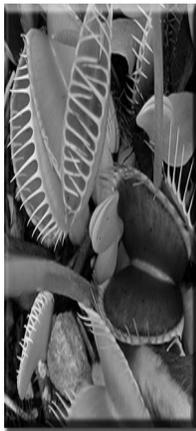


Each Exhibit must have its own separator sheet identifying it as “Exhibit A, B, C, etc.”

Failure to comply may result in file being returned to WCJ per *Hamilton v. Lockheed Corp.* (2001) 66 CCC 473.

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## #6 - Submission of Evidence



### Exceptions (Rule §10629) :

1. Excerpted portions of medical records – Only relevant excerpts of records shall be admitted into evidence.
2. Excerpted portions of personnel records, wage records, and other business records, etc.
3. Explanation of Benefits letters

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## **Zen and the Art of EAMS Litigation**

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# Zen and the Art of EAMS Litigation

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## Chapter 1 – THE BASIC CHAUTAUQUA

Set forth below are the various modules which provide the most current tips for practicing workers' compensation using the Electronic Adjudication Management System (EAMS). These modules are numbered to coincide with the Index on the previous page.

### #1 - All the World is Going Digital Including the State Bar of California

As of March 2010, the monthly State Bar publication will no longer be snail mailed, but will be emailed to all members, giving them up to the minute information immediately it becomes available. Therefore, in order to best serve the community, all State Bar members are required to provide a current email address to facilitate communication with the Bar Association. Cal Rule of Court §9.7 became effective Feb. 1, 2010 and provides:

Rule 9.7. Online reporting by attorneys

**(a) Required information** To maintain the roll of attorneys required by rule 9.6 and to facilitate communications by the State Bar with its members, each member must use an online membership account on a secure system provided by the State Bar to report a current:

- (1) Office address and telephone number, or if none, another address; and
- (2) An e-mail address not to be disclosed on the State Bar's Web site or otherwise to the public without the member's consent.

**(b) Optional information** A member may also use an online membership account to:

- (1) Provide an e-mail address for disclosure to the public on the State Bar Web site; and
- (2) Provide additional information as authorized by statute, rule or Supreme Court directive, or as requested by the State Bar.

**(c) Exclusions** Unless otherwise permitted by law or the Supreme Court, the State Bar may not use e-mail as substitute means of providing a notice required to initiate a State Bar disciplinary or regulatory proceeding or to otherwise change a member's status involuntarily.

**(d) Exemption** A member who does not have online access or an e-mail address may claim an exemption from the reporting requirements of this rule. The exemption must be requested in the manner prescribed by the State Bar.

## **#2 - Top 10 Frequently Asked Questions about EAMS**

### **1. Q: Are the OCR forms mandatory?**

A: Yes, the OCR forms became mandatory Nov. 17. An [instruction manual](#) for completing OCR forms can be found on the DWC website – [www.dir.ca.gov/eams](http://www.dir.ca.gov/eams).

### **2. Q: If I am filing a new application, what needs to be included in the application packet?**

A: The following pages need to be included:

- Cover sheet
- Document separator sheet
- Application for adjudication of claim
- Document separator sheet
- DWC-1
- Document separator sheet
- 4906(g) declaration
- Document separator sheet
- Fee disclosure statement
- Document separator sheet
- Proof of service

Other examples can be found under the “[working in EAMS](#)” section of the DWC Web site. Click on the link and scroll down to the “For OCR form filers” banner.

### **3. Q: If I am filing a new case that has not yet been assigned a case number, do I still write “Unassigned” in the space for the case number?**

A: No. Check the “Yes” box at the top of the document cover sheet indicating a new claim, then leave any spaces for the case number blank. EAMS will automatically assign a case number.

### **4. Q: If an injured worker has two injuries, do I complete two separate cover sheets and would they be given two separate ADJ numbers?**

A. Yes. For instance, if an injured worker had a specific injury to the right wrist on June 6, 2008 and a cumulative trauma (CT) injury to the right wrist, June 6, 2008, both the specific injury and the CT would each require a separate application packet and each would be designated with a separate ADJ number.

### **5. Q: What if the date of injury changes? For instance, a worker injures his back reaching for a file at work on May 24, 2008 and he files a claim form with that specific date of injury. Later, a doctor examines the injured worker and tells him that his injury is NOT a specific injury, but is actually a cumulative trauma to the back, ending on his last day of work, August 4, 2008.**

A: In that case, file an amended application form to reflect the change, but the ADJ number would stay the same. If there was a second injury, then a new application would have to be filed and the injured worker would be assigned a second ADJ number to reflect that new (as opposed to amended) date of injury.

**6. Q: If the injured worker has injured more than five body parts, do I insert Body Part Code #700 in the first slot?**

A: No, be as specific as possible in the first four body part sections. Then, if there are still additional body parts affected, but not listed, insert Body Part Code #700 (“multiple parts more than five major parts”) in the fifth position. The same is true for the other “misc” categories such as #140 – “Face – not specified,” #198 – “Head – multiple injury any combination of above parts,” #300 – “Upper Extremities – not specified,” and #598 – “Lower Extremities multiple parts any combination of above parts.” List specific parts in first four sections, and the general category last. Please do not handwrite specific information such as “left wrist.” That information can go in the explain section on page 3.

**7. Q: In order to complete the line for document type, do I only have 4 choices: “LEGAL DOCS,” “LIENS AND BILLS,” “MEDICAL DOCS,” and “MISC?”**

A: Yes.

**8. Q: What is the “document title” for the following documents: fee disclosure statement, trial brief, report of VR expert?**

A: The titles are as follows:

Fee disclosure statement = Document type “LEGAL DOCS,” Document title “FEE DISCLOSURE STATEMENT”

Trial Brief = Document type “LEGAL DOCS,” Document title “POINTS AND AUTHORITIES”

Report of VR Expert = Document type “MISC,” Document title “CORRESPONDENCE”

**9. Q: If the document is a walk through document for the Judge to sign, is the Judge listed as the “author?”**

A: No, the author of the walk through document is the “uniform assigned name” of the entity who prepared the document for walk through (assuming the entity is a claims administrator or representative).

**10. Q: Do I need a separator sheet before the proof of service? When I serve the entire packet on all the other parties, do I also need to include cover sheets & separator sheets?**

A: When you file the proof of service for one document, you don’t need a separator sheet between the document and proof of service. However, if you are serving MORE than one document, and the proof of service reflects that, you need a separator sheet between each document and the proof of service. It is not necessary to serve the cover sheet and separator sheet when you serve the related documents on the other parties in the case.

### **#3 - Top 10 EAMS User Oops**

#### **1. Ignoring the DWC Website**

The DWC Website has a wealth of information. It should be checked on a regular basis as new information is added daily. The website is located at: [www.dwc.ca.gov/eams](http://www.dwc.ca.gov/eams)

The Website includes a EAMS and legacy case number lookup tool, which allows parties to search for the EAMS case number with their Legacy case number, and vice versa. There is also a plethora of other helpful information available at the site, including but not limited to, the following:

- OCR forms
- Uniform assigned names database for claims administrator offices and representative offices
- Database search for any active workers' comp case

#### **2. Forgetting to read BOTH sets of Regulations (both the DWC & WCAB)**

Both the DWC and WCAB have issued regulations to assist practitioners in navigating EAMS. Both sets of regulations can be found at: <http://www.dir.ca.gov/samples/search/querydwc.htm>

The **DWC regs** range from 8 CCR §10210 to 10297 and cover everything from filing and submitting documents in EAMS to walk through procedures.

For instance, 8 CCR §10232 provides the form and size requirements for all documents filed in EAMS. Failure to follow these guidelines is one of the MOST common errors in EAMS, and results in much delay in the scanning process at the local district offices.

The proposed **WCAB regs** range from 8 CCR §§10301 to 10957 and cover everything from admissibility of evidence to the Recon process.

For instance, 8 CCR §10629 describes how litigants should prepare and file their exhibits for trial. Failure to follow this guideline is one of the MOST common errors in EAMS litigation.

#### **3. FORM SUBMISSION – Use current forms:**

The most common error in form submission is the use of old outdated forms, such as legacy forms or OLD versions of EAMS OCR forms. Use only the most current forms available, which can be found on the DWC website.

In addition, EAMS information is updated regularly on the website. So please use the most current version of all EAMS instruction guides, such as the OCR Forms Handbook. (Check the revision date next to the document on the website to ensure it is the most current version available.)

**And please keep your originals.** Regulation [8 CCR §10236\(b\)](#) requires that, “Only a photocopy or other reproduction of an original document shall be filed [with a district office], and it is presumed the filed document is an accurate representation of the original document.”

Remember, the documents you file with the district office are scanned into EAMS. Eventually, those documents will end up in the shredding machine. Make sure it is the copy that is sacrificed to the shredder, and not the original.

**4. FORM SUBMISSION - Use correct alpha prefix and submit to correct Unit:**

A Compromise & Release (C&R) settles an underlying case. It must be submitted to the **ADJ unit** of the DWC. An RU -122 form settles an injured worker's right to voc rehab. It must be submitted to the **VOC unit** of the DWC. These documents go to different units in the DWC, the C&R to the ADJ unit and the RU-122 to the VOC unit. So the two settlement documents cannot be submitted together using only one document cover sheet, even if they are both dealing with the same injured worker, the same date of injury and the same body part. Each form requires its own document cover sheet, document separator sheets, etc.

**5. Failing to follow the specified format for Data input**

**EAMS is rather sensitive as to how it takes in data from the forms submitted. So it is critical to adhere to the specific EAMS format required. The next several issues deal with incorrectly inputting data into the EAMS forms.**

PLEASE do not include any "special characters" when inputting data on forms, such as dashes, commas, number signs, periods, etc. IF used, the doc will go to the UDQ, and it takes a long time to get out and in the process again. Also, no extra spaces. For example:

	<b>YES</b>	<b>NO</b>
Social Sec Number	553121234	553-12-1234
Addresses	JONES ST 204	JONES ST. #204
Formal Names	MS P D JAMES	MS. P.D. JAMES

**6. Do not insert spaces between the three-letter prefix and the number in case numbers, but do insert a leading "0" if using a legacy case number**

<b>YES</b>	<b>NO</b>
ADJ999777555	ADJ 999777555
SFO0997755	SFO 997755

**7. Use the specific calendar/date format required: - - / - - / - - - -**

<b>YES</b>	<b>NO</b>
05/01/2005	5-1-2005

**8. The EAMS case number is NOT the same set of numbers as the legacy case number.**

SFO0449709 for John Smith will NOT be ADJ449709

(Use the case number lookup tool mentioned in number one above to connect the EAMS case reference number to a legacy case number.)

**9. Filling in the "Author" field on the document separator sheet**

The document separator sheet—the form that tells EAMS what document follows it and how to index the document in the file—requires an "author" to be listed. So who is the author?

The answer depends on who is filing the form and what kind of form follows the document separator sheet. If someone from a claims administrator or a representative office (such as a claims adjuster or an attorney) created the document following the separator sheet, use the uniform assigned name of that claims administrator or representative's office in the author field.

If the document following the separator sheet is written by a party who doesn't have a uniform assigned name, the individual who wrote the report or document, or who is filing the form, is the author.

**Example:** An applicant attorney submits a DOR with a doctor's report.

Separator sheet before the DOR – Applicant atty's UAN = author

Separator sheet before the medical – Doctor = author (such as JOHN SMITH MD - remember, no special characters).

**10. Not realizing that the Central Registration Unit (CRU) is now open for business**

And last, but not least, the number 10 mistake most commonly made by practitioners is not realizing that the DWC's Central Registration Unit (CRU) is up and running.

When completing EAMS forms, all parties must enter their **own** uniform name if they are a claims administrator or a representative **and** they must also enter the **correct** uniform name for all other claims administrators or representatives in the case. If those parties are misidentified, or the uniform name is not correctly entered, the document will be accepted for filing, but when it is determined by the clerk that a party has been misidentified it will need to be corrected, which will take additional processing time.

If a party is not in the database, they should register now by sending a letter on letterhead, with a signature from an authorized individual, to DWC's CRU:

The CRU's e-mail address is: [cru@dir.ca.gov](mailto:cru@dir.ca.gov).

The CRU's fax number is: 1 (888) 822-9309.

The DWC database provides both the EAMS uniform name as well as a numerical identification number. However, always use the name and not the number.

#### #4 - **DWC Goes To the Movies!**

Always eager to both educate and entertain, the DWC has issued its latest video sensation, "OCR Forms Unleashed." This sequel to the ever popular "OCR Forms Gone Wild" has been called derivative of Fellini by some critics, but it's a definite "must see" if you want to file successfully in EAMS.

#### **EAMS Instruction Video:**

This quick-and-easy 10 minute video can be found on the EAMS website at:

[http://www.dir.ca.gov/dwc/EAMS/EAMS\\_OCRfilers.html](http://www.dir.ca.gov/dwc/EAMS/EAMS_OCRfilers.html)

Just click on "Video" and you will learn everything you wanted to know about OCR forms, but were afraid to ask. For those who prefer the screenplay to video, the DWC has also included a transcript version at the same location. You might want to forward the link to your clerical staff and keep a copy on hand for new employees. It includes all sorts of nifty tips and tricks for successfully navigating EAMS. It is designed to help all parties avoid processing delays and Notices of Discrepancies.

#### **Global Search of EAMS Regs:**

If you are not sure why a Notice of Discrepancy might issue, download the EAMS regulations and do a **global search** for "Discrepancy." Or just scroll down to the applicable rule §10222. It's easy to do a **global search** with the word version of the EAMS regs. Easily searchable regs in Word format can be found at:

[http://www.dir.ca.gov/dwc/DWCPropRegs/EAMS\\_regulations/EAMS\\_regulations.htm](http://www.dir.ca.gov/dwc/DWCPropRegs/EAMS_regulations/EAMS_regulations.htm)

#### **FAQs on All Things Related to EAMS**

If you prefer FAQ lists, click on the following link for an updated version of all questions, and more important all answers, related to EAMS:

[http://www.dir.ca.gov/dwc/EAMS/EAMS\\_FAQs.htm](http://www.dir.ca.gov/dwc/EAMS/EAMS_FAQs.htm)

The website contains lots of other new and exciting features as well. Just click on [dir.ca.gov/eams](http://dir.ca.gov/eams) and start exploring!

## **New EAMS Forms:**

One of the biggest changes to occur is the introduction of the new Declaration of Readiness (DOR) form (DWC-CA form 10250.1). (To retrieve all EAMS forms, click “Find a form” on the “I want to...” navigation side bar on the DWC Web site.)

Now there is a new choice when selecting the type of hearing to be set. In addition to the usual hearings (MSC, Status Conference, Rating MSC and Priority Conference), the DWC has also added “Lien Conference.” This will allow district offices to distinguish between lien conferences and regular MSCs and will allow better control over effective and timely settings for each type of conference.

## **QME Panel Requests Simplified:**

QME panel requests have been simplified with two forms also located on the DWC website. (Again, click on “Find a form” on the side bar.) QME form 31.7 is an easy to use one page form, which can be used by parties to request an **additional** QME panel from the Medical Unit. This type of request would occur when the first QME selected is fine, but an additional QME is now needed pursuant to AD rule §31.7.

QME form 31.5 can be used by parties to request a **replacement** QME panel. This type of request is made when a party requests that the first QME selected be replaced pursuant to AD rule §31.5.

The DWC hopes that these changes will more effectively serve the needs of our legal community. If you have any ideas or suggestions for improvement, please send us an email at: [EAMS@dir.ca.gov](mailto:EAMS@dir.ca.gov).

## **#5 – Rulemaking versus Forum**

Have you ever noticed the side bar on the DWC website and wondered, “What’s the difference between “Participate in DWC rulemaking” and “Participate in a DWC forum.” Good question! The latter conjures up images of that classic Sondheim musical, “Funny Thing Happened On the Way to the Forum,” with men in togas chasing scantily clad women around tall white pillars... But you’ll find something all together different if you click on that link.

## **Why You Should Participate in a DWC Forum:**

The DWC forum is a tool for soliciting input from the community before proposed regulations are drafted. The current forum features “EAMS Present Term Solution document repository.” It includes documents explaining the “Present Term Solution,” technical meeting notes, questions, comments and a plethora of other information that is of vital interest to anyone who uses EAMS.

The legal community is an invaluable resource for the DWC. The legal community has the practical experience and the expertise to provide feedback on what works and what doesn't work in the trenches. In order to create a system that operates well for the entire community, it is essential that all stakeholders participate in this rulemaking process.

Please consider sending an email to DWC at [DWCRules@dir.ca.gov](mailto:DWCRules@dir.ca.gov) and request to be placed on the mailing list for notice of formal rulemaking actions. In the body of the email, please include your name, organization name (if any), address and telephone number and **you will be kept up to date on all of the latest changes and developments** with regard to DWC regulations.

### **Why You Should Participate in DWC Rulemaking:**

How does the “DWC Forum” differ from “DWC Rulemaking?” The forum deals with proposed solutions to outstanding issues. The rulemaking process deals with soliciting feedback on proposed regulations that have already been drafted.

If you click on “Participate in DWC Rulemaking” you’ll find every DWC rule that was ever put into effect since 2004.

For instance, if you click on “DWC rulemaking 2009 archive” you will find a section called, “Regulatory area and authority” with a listing of all regulations issued in 2009, including the infamous “EAMS” regulations. If you click on that link, you will be transported to a page with a wealth of information on the subject, including a history from where all of these ideas originated.

### **Word Version of All Regs since 2004 – Great for a Global Search:**

Perhaps, the most helpful bit about this link is the “Word” version of the regulations that allows you to do an easy global search for a key word or phrase. Let’s explore a specific example.

### **Example – Notice of Discrepancy:**

Perhaps you received a Notice of Discrepancy and you want to know how much time you have to cure the defect. First, download the DWC Regs for EAMS onto your desktop. Open the document and click “Control + F” to find “discrepancy.” And voila! There it is! There is an entire discussion on Notices of Discrepancy in 8 CCR 10222(a)(2), which you can cut and paste anywhere. It reads in part as follows:

“....(2)....If the document is corrected within **15 business days**, or at a later date upon a showing of good cause, it shall be deemed filed on the original date the document was submitted.” (Emphasis added.)

But don’t forget to check the WCAB regs on EAMS as well, just in case there is a discrepancy between the “discrepancy regs.”

Hop back onto the DWC website and scroll down the left sidebar of the page until you reach the “LINKS” section. Click on “Workers’ Compensation Appeals Board.” Scroll all the way down until you reach “Laws & Regulations.” Click on the link, “Filing of Documents” and voila! Notices of Discrepancies are discussed in part in 8 CCR 10397(b) as follows:

“(b) ...The Notice of Document Discrepancy shall specify the nature of the discrepancy(ies) and the date of the attempted filing, and it shall state that the filer shall have **15 days** from the service of the Notice within which to correct the discrepancy(ies) and resubmit the document for filing...” (Emphasis added.)

BUT Oops! There **is** a discrepancy with the Notices of Discrepancy. The WCAB deadline is 15 **calendar** days from the service of the notice, whereas the DWC deadline is 15 **business** days. Which one should you follow?

If you look at the Notice of Discrepancy itself, you will find the following, “Per Rules of the Court Administrator, Title 8 California Code of Regulations, section 10222, please correct the discrepancies set forth herein and resubmit, along with this document.” So you’ll probably be safe if you comply with that deadline.

Still, the best practice is to fix the discrepancy, per the instructions and make sure the corrected version is back in the district office within the 15 **calendar** days from service of the Notice, just to be on the safe side.

### **Make Your Voice Count: Comment on Proposed Regs:**

Aside from providing a searchable format of all the regs, since 2004, this link also includes an interactive section. Listed under the title, “Regulatory area and authority” there is a listed of proposed regulations and their status. Some regs have been filed with the Secretary of State, and are currently effective. For instance, did you know that as of October 8, 2010, a brand **NEW DWC 1 Form became effective**? You can check out this new form at:

<http://www.dir.ca.gov/dwc/forms.html>

Still, there are other regulations that have not become final and are still in the comment period process. The DWC relies on the entire legal community to provide feedback on these proposed regulations. Everyone is encouraged to review proposed regs and to make constructive comments. This will ensure optimum service to all parties who utilize the California workers’ compensation system.

## **Chapter 2 – MEDICAL TREATMENT & UR**

### **#6 – MTUS Regs**

#### **Three Paths to Medical Treatment:**

- If at least 1% of cause of the need for MT = industrial, then IW gets 100% of MT needed to treat industrial injury.
- Dr. explains that he needs to treat the non-industrial condition in order to treat industrial condition.
- LC §4600 states that if the employer unreasonably refuses or neglects to provide MT, the IW can go out and self procure MT.

#### **Specific enabling legislation for MTUS regs = LC §4604.5(b):**

(enacted on 4.19.04 by SB899) Extent and scope of MT shall be determined by **Medical Treatment Utilization Schedule (MTUS)**

MTUS replaces prior law - LC§4062.9 - PTP's presumption of correctness

**The MTUS Guidelines are presumed correct.** LC §4604.5(a); 8 CCR §9792.25(a)

A **preponderance** of the **scientific medical** evidence is required to rebut this presumption of correctness.

On 6-15-07, the **1st version** of the MTUS was issued, which was essentially **ACOEM's** (American College of Occupational and Environmental Medicine) Practice Guidelines.

On 7-18-09, the **2nd version** of the MTUS were revised, reorganized and reissued and include excerpts from both ACOEM & ODG (Official Disability Guidelines).

#### **MTUS REGS: §§ 9792.20 – 9792.26**

#### **MTUS was reorganized into 4 general sections:**

##### **Part I: Description of MTUS**

(Definitions §9792.20; Intent §9792.21;  
General Approach §9792.22)

##### **Part II: Clinical Topics §§9793.23.1-9792.23.9**

(One reg. for each body part = ACOEM)

##### **Part III: Special Topics (Only advance to Part III, if instructed to do so in Part II)**

- a. Acupuncture §9792.24.1
- b. Chronic Pain §9792.24.2
- c. Treatment After Surgery §9792.24.3

##### **Part IV: Presumption of Correctness §9792.25**

**MTUS Grading System (See 8 CCR §9792.25 (c)(1)(B))**

**A = Strong evidence-base = one or more high quality studies (HQS)**

**B = Moderate evidence-base = at least one HQS...**

**C = Limited evidence-base = at least one study of intermediate quality.**

**I = Evidence is insufficient or irreconcilable.**

**#7 – Case Law re MT & UR**

*SCIF v. WCAB (Sandhagen)*, (2009) 74 CCC 835 (3rd DCA); 73 CCC 981 (CA S. Ct.)

If IW's disagrees w/UR report, the IW must timely object and may pursue options under LC §4062. **ONLY** the IW may use LC §4062 to resolve the dispute.

The IW may also file for Expedited Hearing on the issue per **Reg. §9792.10(a)(4)**.

**QUERY:** The MTUS/ACOEM standards are always admissible as evidence, (LC §5703(h) & (i)), but if the UR is untimely, may the defense still file a DOR for expedited hearing on the merits or does the IW win by default?

*Cervantes v. El Aguila Food Products*, (2009) 74 CCC 1336

If UR timely denies MT request for back surgery, then D must follow §4062(b) and object within 10 days of the receipt of PTP's request for surgery. 2nd Opinion Process time frame runs **concurrently**, not **consecutively** with UR review.

**AD Rule §9792.6(o) provides:** "If a narrative [request] format is used, the document **shall** be clearly marked at the top that it is a request for authorization. This applies to all MT requests."

If doctor does not label his request with "REQUEST FOR MT AUTHORIZATION," the UR time period is not triggered.

**#8 – MPN Regs:**

MPN Regs - Effective as of October 8, 2010

§§9767.3, 9767.6, 9767.8, 9767.12, 9767.16, 9880, 9881, 9881.1, 10139

Make sure you are using new current versions of:

- Notice to employees
- Claim form (DWC 1)
- Notice of potential eligibility

## **Chapter 3 – QME PROCESS**

### **#9 – QME Regs:**

QME regs were issued effective 2.17.09.

Text and explanation of the regulations – Site easy to use for global search:

[www.dir.ca.gov/dwc/DWCPropRegs/qme\\_regulations.htm](http://www.dir.ca.gov/dwc/DWCPropRegs/qme_regulations.htm)

Or view one at a time:

<http://www.dir.ca.gov/samples/search/querydwc.htm>

Medical Forms are listed by subject matter, and then in alphabetical order:

[www.dir.ca.gov/dwc/forms.html](http://www.dir.ca.gov/dwc/forms.html)

Scroll all the way down PAST the OCR forms to the “legacy forms” section where you will find QME and related MT forms.

DWC has several FAQs list including ones for Medical Questions:

<http://www.dir.ca.gov/dwc/medicalunit/faqiw.html>

### **#10 – The QME Process**

Most people are surprised to learn that the DWC Medical Unit is not yet integrated with EAMS. Because of that, here are some special considerations practitioners need to know in order to effectively communicate with the Medical Unit. In addition, the DWC issued QME regulations on February 17, 2009. Therefore, the following 10 practice tips may be helpful on the subject of Panel QMEs.

#### **Requesting a Panel QME:**

1. To request a Panel QME for a represented injured worker, parties must provide all of the following on Form 106:
  - Identify the disputed issue;
  - Attach proposal for Agreed Medical Evaluator;
  - Designate specialty (using specialty codes)
  - State specialty of the treating physician; and
  - State specialty preferred by the opposing party.

(Similar information should be provided on Form 105, which is the appropriate form for an injured worker who is not represented.)

2. Use the medical specialty codes on all requests for QME panels, including the initial request, as well as any subsequent request for a new QME panel. In order to avoid confusion, and to ensure the correct QME Panel is designated, parties must use the medical specialty codes, such as MPA for pain medicine, or PSY for psychology, or MPD for psychiatry. These Codes can be found at page 3 of the forms to Request a QME Panel (Form 105 & Form 106.)
3. Per QME Reg 8 CCR §151, a document is not deemed received until it has been received by the Medical Unit. If you have not received a QME Panel within 30 days, you should wait at least an additional 5 days (for a total of 35 days) before you approach a WCJ for an Order requesting an initial Panel QME. (See 8 CCR §31.1(c).)

**Requesting a NEW Panel QME:**

4. Use one of the following four options to request a new QME panel, (after an initial QME Panel has been assigned):
  - Replacement QME - unrepresented injured worker - 8 CCR §31.5
  - Replacement QME - represented injured worker - 8 CCR §31.5
  - 2nd QME - unrepresented injured worker - 8 CCR §31.7
  - 2nd QME - represented injured worker - 8 CCR §31.7
5. Include the number of the **FIRST** Panel QME that was initially assigned in the case. This number should be placed in the caption as well as in the body of the Request and Proposed Order for a new QME Panel. A sample caption should include:

**WCAB Case No(s).**

**Existing QME Panel No.**

**Date(s) of Injury**

**RE: REQUEST FOR REPLACEMENT QME PANEL**

**(Designate: Represented IW OR Unrepresented IW)**

Since the Medical Unit is not linked with EAMS, the ADJ number means nothing to them. You might as well be giving them your high school locker combination. But if you provide the QME Panel number from the initial assignment, that will substantially increase your odds of not being assigned the same panel for a second time. Plus, this is helpful data which will enable the Medical Unit to easily identify the injured worker and timely assign a new and appropriate QME panel.

6. Include ALL of the following information in the body of your request and proposed Order:
  - What was the first specialty that was requested
  - What is the current specialty that is being requested
  - The reason a new QME panel is necessary
  - ZIP code (home or work) of the injured worker
  
7. If you are objecting to a doctor's report based on a technicality such as a late report or canceling an appointment and then rescheduling beyond the deadlines, you should object to the QME's report BEFORE it has been issued.

**Request for Replacement QME Panel:**

8. You do not need a judge's order to request a replacement QME panel, but you do need one of the 16 fact patterns as set forth in 8 CCR §31.5.

**Request for 2nd QME Panel in a Different Specialty:**

9. If good cause exists, as defined in 8 CCR §31.7, you may need to request a 2<sup>nd</sup> QME panel. For instance, a WCJ may find good cause and issue an Order for a second QME panel. The parties may agree a second QME in a different specialty is warranted, or the first QME may make that recommendation.
  
10. All Requests and Orders for Panel QMEs should be sent to the DWC Medical Unit.

Either FAX to:           DWC Medical Unit  
                                  (510) 286-0693

Or mail to:               DWC Medical Unit  
                                  P.O. Box 71010, Oakland, CA 94612

## #11 – Doctor/Party – Ex Party Communications

### What would you do in the following hypothetical?

Let's say Judge Whopper appointed Dr. Zeus as a "regular physician" to determine the injured worker's level of Whole Person Impairment (WPI) in a case you are handling. Neither the treating doctor's report, nor the Panel QME's report, constituted substantial evidence on the issue of permanent disability (PD). So, pursuant to [LC §5701](#), Judge Whopper appointed Dr. Zeus to address the PD issue.

Judge Whopper wrote a letter to Dr. Zeus explaining the situation and telling him that all of the medical evidence was enclosed for his review and consideration.

Unfortunately, Judge Whopper's clerk forgot to include a few critical medical reports in the envelope, before he sealed it up and sent it on its way. When Dr. Zeus read the letter from Judge Whopper, he noticed that a few reports were missing. Dr. Zeus gave you a call and asked if you would send him copies of the missing reports. What should you do?

- (a) Hang up the phone without saying a word.
- (b) Have a long discussion with Dr. Zeus about your slant on the case.
- (c) Restrict your conversation to procedural issues only, but tell Dr. Zeus you'll have your assistant send him the missing reports by overnight mail, and that you'll also copy opposing counsel with a duplicate package of reports.

If you did anything but choice "(a)" – "hang up the phone without saying a word," you might be in violation of [AD Rule §10718](#). And, according to the panel decision of *Oseguera v. Links* (2010) [2010 CWC PD LEXIS 60](#), Dr. Zeus' report may well be stricken from the record.

### **Ex Parte Communication Rules for "§5701 regular physicians":**

[AD Rule §10718](#) provides: "All correspondence concerning the examination and reports of a physician appointed pursuant to [Labor Code Section 5701](#) or [5703.5](#) shall be made through the Workers' Compensation Appeals Board, and no party, attorney or representative shall communicate with that physician *with respect to the merits of the case* unless ordered to do so by the Workers' Compensation Appeals Board." (Emphasis added.)

[AD Rule §10718](#) tells us that the attorney can't call up the doctor and chat about the case, or even offer to provide additional medical reports. But in the *Oseguera* case, it was the doctor who phoned the attorney, not the other way around. Regardless, the WCAB still found that act violated [AD Rule §10718](#) and tossed the report.

[AD Rule §10718](#) limits violations to ex parte communications that are "with *respect to the merits of the case*." Does that mean that ex parte communications are permissible if they are administrative or procedural, in nature and not substantive? Apparently not, according to the panel in the *Oseguera* case. In that case, the *doctor called the defense attorney* to ask for the missing medical records, that the Judge had forgotten to enclose with his letter. There was no allegation in that case that there had been a substantive

communication on the merits of the case between the doctor and attorney. However, there was an ex parte telephone call between the doctor and the defense attorney, of which the applicant attorney was not a participant.

The doctor in the *Oseguera* case should have requested the records from the judge, and not from one of the attorneys in the case. And the attorney should have told the doctor that he was prohibited from talking to him ex parte. The attorney should have instructed the doctor to address all questions to the judge in the case.

### **Ex Parte Communication Rules for AMEs & QMEs:**

Would the result be different if the doctor is an AME or QME, rather than a [§5701](#) physician? The pertinent rule for AME/QME communications would be LC [§4062.3\(f\)](#) which prohibits ex parte communications between a party and the AME or QME.

[LC §4062.3\(e\)](#) allows parties to send their “AME/QME” letters to the doctors, as long as they also serve a copy on opposing counsel. This would not be considered an ex parte communication, since all parties are aware of all information that is being communicated. (See also [AD Rule §35\[g\]](#).) If a party communicates ex parte with the AME or QME, the opposing party may obtain a new doctor to evaluate the injured worker. (See also [AD rule §35\[k\]](#).)

The language of [LC §4062.3\(e\)](#) appears to prohibit all ex parte communication between the physician and the parties, including *both* substantive and procedural requests. In fact, [LC §4062.3](#) has stringent kicker language tacked on at [LC §4062.3\(g\)](#) which warns that if there is an ex parte communication, not only will the medical report be tossed, but the offending party may be tossed in workers’ comp jail as well!?! [LC §4062.3\(g\)](#) provides that the party making the prohibited communication may be charged with contempt and may be liable for all costs related to obtaining a new medical evaluation.

See also *Alvarez v. WCAB*, (2010) 75 CCC 817.

## **Chapter 4 – DISCOVERY PHASE & BEYOND**

### **#12 - Jurisdiction**

1. §5410 – New & Further w/in 5 yrs DOI (S/L)
2. §5803 – Reopen - good cause w/in 5 yrs DOI (J)
3. §5804 – Alter Award w/in 5 yrs DOI (J)

**Practice Note**>>> Statute of limitations can be waived. Jurisdiction can **NOT** be waived

*Sarabi v. WCAB (Narsi's Hofbrau)* (2007) 72 CCC 778 (5th DCA) WCJ correctly awarded TD payments 5 years after date of injury, since IW filed a timely Petition to Reopen.

### **#13 - Why is Venue So Vexing?**

One of the most common issues that occur with EAMS has to do with those elusive venue statutes and regs: LC §§[5501.5](#), [5501.6](#) and 8 CCR §§[10409](#), [10410](#), [10411](#), [10412](#), [10210](#) (jj), [10301](#)(gg) & [10232](#)(a)(9).

It all starts with the “Application for Adjudication of Claim” which can be found on the DWC website:

[www.dir.ca.gov/dwc/forms.html](http://www.dir.ca.gov/dwc/forms.html)

Once you open the form on your computer, there are three venue choices:

- County of residence of injured worker (IW)
- County where the injury occurred
- County of employee’s attorney

Once the venue box has been selected, the applicant must then enter the correct venue office code. For a complete list of those codes, you need to pull up page 7 of the Document Cover Sheet, which can also be found on the DWC Website.

### **Objecting to Venue under LC §5501.5**

The venue selection choice is drawn verbatim from LC §[5501.5](#). If the applicant selects the attorney’s office location as the venue, the employer may object to that, and force venue back to either the venue where the IW lives or where the injury occurred.

Although LC §[5501.5](#) provides that the employer’s objection *must* be filed within 30 days of receipt of the LC §[5401.5](#) information request form, employers might find that a little hard to do, since LC §[5401.5](#) doesn’t exist any more. Oops! But no worries, the WCAB

figured that one out a while ago and drafted 8 CCR §[10410](#) to provide that an employer, or more likely an insurance carrier, may object to the third venue choice.

**Practice Tip >>>** In order for an objection to be valid, objecting parties should strictly comply with 8 CCR §[10410](#), which means they must object within 30 days of receipt of the notice of the adjudication number and choice of venue. ***Plus, the party must state in the objection “under penalty of perjury the date when the notice of the adjudication number and venue was received.”***

### **Choice #2 = Place of Injury, not Place of Business**

Occasionally, parties misconstrue choice #2 as being the location of the employer’s business, which is often synonymous with the county where the injury occurred, but not always. A childcare placement service might have a primary place of business in San Francisco. However, if one of their employees has been injured while caring for a child in Santa Rosa, the Santa Rosa District Office (SRO) would be the correct choice for venue, not San Francisco (SFO).

### **What if there is no office in the County of Venue?**

Alternatively, what is the correct venue choice if the IW lives in and was injured in Danville in Contra Costa County? There is no district office in Contra Costa County. Would venue default back to the employer’s place of business in San Francisco, where there is a district office? Apparently not, LC §[5501.5](#)(d) provides that in such a case, venue would be appropriate at the district office “nearest” ***any*** of the three venue choices stated above. Most likely, Oakland (OAK) would be the correct venue. However, if the IW’s attorney’s place of business was in San Mateo county, the San Francisco office (SFO) or even the San Jose office (SJO), whichever was closer, might be the appropriate choice. If this latter venue was chosen, the employer would have the same right to object as stated above.

### **Walk-Throughs & Venue**

This wacky venue issue most often arises when a party attempts to walk through a settlement document at a district office that does not have proper venue and they can’t understand why the clerk at the front desk is being so unreasonable and won’t process their walk-through request. Well, there’s a reason for that. It can be found in 8 CCR §[10280](#)(g) which provides:

**“A walk-through document may be acted on only by a workers’ compensation administrative law judge at the district office that has venue.”**

It’s possible, that in a hardship case, the presiding judge (PJ) may make an exception to this rule. However, the clerk at the front desk does *not* have authority to do that.

### **Objecting to Venue under LC §[5501.6](#)**

There is one last option for a party who is unhappy with the applicant's choice of venue. Under LC §[5501.6](#), an IW or defendant may petition for a change of venue for good cause, such as the convenience of the parties and the witnesses.

There was once a practice of entertaining motions for change of venue only after a DOR was filed and the case was ready for trial. However, several regs have been issued that tweak that process a bit.

Regulation §[10411](#) states that the PJ of the office that currently holds venue must act on a Petition to Change Venue within 30 days after filing of the Petition. "Act" means that within 30 days of filing, the PJ must grant or deny the change of venue or serve notice that a status conference will be held to give the parties an opportunity to be heard on the issue. Once venue has been changed, all further matters must be determined at that office. (8 CCR §[10412](#).)

#### #14 – **Service in EAMS:**

Mahatma Gandhi once said, "The best way to find yourself, is to lose yourself in the service of others." Extrapolating on that maxim, the best way to lose your case, is to find yourself serving others in violation of EAMS service rules. To make sure you are EAMS compliant when it comes to service of documents, please review the following three top tips.

#### **Tip #1 – Serve Documents to Parties By Mail Unless Otherwise Agreed**

##### Email v. Snail Mail:

Many offices are going totally digital these days. Hence, they opt to receive service by EAMS in the form of email. Since EAMS gives parties a choice to be served by mail, FAX or email per Reg §10218, many parties assume they can service their documents on opposing counsel by email as well. But WCAB Reg §10505(b) says otherwise. It provides: "...service of any document shall be made by first-class mail or by an alternative method...which is limited to: (i) use of express (overnight) or priority mail; or (ii) use of a bona fide commercial delivery service."

The only exception to this rule is when the receiving party has **previously** agreed to a form of service other than mail. WCAB Reg §10505(g). It's probably prudent to get that agreement in writing.

##### CD ROM v. Paper document:

Similarly, people in paperless offices prefer to serve documents in the form of a CD ROM as opposed to serving paper documents. That is not specifically authorized by the current regulations.

But, what if the receiving party has agreed to receive the docs in that manner? In fact, some parties actually prefer to receive the docs in a CD ROM format rather a paper

format. That might be viable by written agreement, given the language of WCAB Reg §10505(g) which states, “By prior agreement of the parties or lien claimants, or where authorized or requested by the receiving party or lien claimant, service of any document may be made by methods other than the designated preferred method of service.”

### **Tip #2 – “Plus 5 Days For Mailing” Applies Even if it’s Not Mailed**

If a document is served by FAX or email, when is service complete? CCP§1013(a) states that for service by mail, service is complete at time of deposit, plus 5 days for mailing. But, what if service is not by mail? What if the parties choose service by FAX or email, does CCP§1013 still apply? Yes, it does.

Reg. §10507 allows for five days for mailing even if the document is served by fax or e-mail. However, does the same rule apply if the document is personally served? No, Reg. §10507(a), is almost a carbon copy of CCP§1013 and both specify that the “plus 5 days for mailing” rule applies for any method **EXCEPT for personal service.**

So if a Judge hand-serves the parties an Order immediately after a hearing, the parties have twenty days, **not twenty-five** days to file a Petition for Reconsideration from that Order. (This shortened time limit is due to the fact that the Order was personally served on the parties and was not served by mail.)

### **Tip #3 – When to Use Separator Sheets for Proofs of Service**

When you file a proof of service for one document, you do not need a separator sheet between the document and proof of service. However, if you are serving MORE than one document, and the proof of service reflects that, you DO need a separator sheet between each document, including the proof of service.

**It is not necessary to serve the cover sheet** and separator sheet when you serve the related documents on the other parties in the case.

For additional rules on service, see WCAB Service Regs §§10500 (Service by WCAB) 10505 (Service by parties), 10507 (Time limits), 10508 (Extensions of time), and 10510.

### **#15 – Ex Parte Communication**

Regs §§10213 & 10324

- All docs filed must be served on all parties.
- Discussion of merits of case must include all parties.

#16 - **Notices of Discrepancy:**

The “Notice of Discrepancy” is a new form that has crept into our legal community with the advent of EAMS. Some people are still not familiar with how it works. So let’s look at a hypothetical chronology of when the form might be generated.

- 4/1/09** Judge Jim issued his Findings and Award (F&A) in favor of the injured worker, John Smith.
- 4/27/09** Donna Defense filed her Petition for Reconsideration with the wrong case number listed. This was the last possible day to file a Petition for Reconsideration of Judge Jim’s F&A.
- 4/29/09** The clerical staff at the district office was not able to match up the document with the correct John Smith case. Therefore, a Notice of Discrepancy was issued.
- 5/14/09** Donna Defense re-filed the Petition for Recon, with the correct case number, 15 days after the Notice was mailed to her.

**Query:** Will the WCAB dismiss the Petition as untimely, and state that it lacks jurisdiction to decide the issue on the merits?

There are actually two regulations that address this issue:

**Appeals Board Rule - 8 CCR §10397(b)** states in part: “A document ... may be rejected for filing if it does not contain a combination of information sufficient to establish the case or cases to which the document relates... If a document is rejected in accordance with this subdivision, the Court Administrator shall (issue) a Notice of Document Discrepancy, that the document has not been accepted for filing. The Notice of Document Discrepancy shall specify the nature of the discrepancy(ies) and the date of the attempted filing, and it shall state that the filer shall have 15 days from the service of the Notice within which to correct the discrepancy(ies) and resubmit the document for filing. ***If the document is corrected and resubmitted for filing within 15 days, or at a later date upon a showing of good cause, it shall be deemed filed as of the original date the document was submitted.***” (Emphasis added.)

**Court Administrator’s Rule - 8 CCC §10222(a)** states in part: “If a document is not filed in compliance with the court administrator's rules, either because it does not comply with the procedural requirements or with the place of filing requirements, the court administrator may in his or her discretion take the following actions:

- (1) Correct the defect and file the document; or
- (2) Notify the filer that the document is not accepted for filing by service of a Notice of Document Discrepancy. The Notice shall state the discrepancy, the date of the attempted filing, and provide the filer with 15 business days from service to cure the discrepancy.

*If the document is corrected within 15 business days, or at a later date upon a showing of good cause, it shall be deemed filed on the original date the document was submitted.* (Emphasis added)

The interesting distinction between the two regulations is that the Appeals Board Rule §10397 allows for a period of “15 days” to re-file the corrected document versus “15 *business* days” allowed by the Court Administrator’s Rule §10222. “15 days” generally means 15 consecutive days, including holidays. A “business day,” on the other hand, is defined in CC§9 as every day that’s not a holiday. It generally includes Monday through Friday. (Holidays are defined in CC§7.) So the time limits for the two regulations are a bit different.

Fortunately, there is a catch all phrase in both regulations, which allows the corrected document to be resubmitted after the 15 day period upon a showing of good cause. This language will allow the WCAB to retain jurisdiction and WCAB discretion may be used to determine whether or not the document should be determined timely filed.

Another issue that applies to both regulations is whether CCP§1013(a) applies. CCP§1013(a) states that service is complete at time of deposit in the mail, plus 5 days for mailing. So does that mean that the deadline for re-filing corrected documents is 15 days from the date the Notice of Discrepancy was issued, plus an additional five days for mailing? Probably the answer is yes, per 8 CCR §10507 which is basically CCP§1013(a) verbatim.

Regardless, the best practice is to do what Donna Defense did in this case. Parties should file the corrected document within 15 calendar days from the issuance of the date of the Notice of Discrepancy. This is the earliest possible mandated date given any interpretation of either of the regulations. That way, you can be sure that the document will be considered timely and a determination will be made on the merits.

#### **#17 – How to Request a DEU Rating:**

By: Jill Comyford, Chuck Ellison & Colleen Casey

The Unprocessed Documents Queue (UDQ) is where documents are sent when they can’t be processed. To avoid the UDQ and to keep your cases on track, it’s important to comply with the filing requirements.

To assist parties in properly completing all forms, there is an entire section on the DIR website dedicated to completing OCR (Optical Character Recognition) forms. Specific examples of the most commonly filed forms can be found at:

<http://www.dir.ca.gov/dwc/EAMS/SampleFiles/>

Instructions for each form can be found by clicking on this link and scrolling down the selection of documents until you find the form you need to complete. Click on the link to that form, and you'll find all the information you need to be EAMS compliant and to avoid the dreaded UDQ.

An unusually high number of "Requests for Consultative Ratings" and "DORs for a Rating MSCs" end up in the UDQ. (DORs are Declarations of Readiness to Proceed and MSCs are Mandatory Settlement Conferences.)

In addition, many DEU (Disability Evaluation Unit) ratings are requested, but after the forms are scanned into EAMS, a DEU rater often does not receive the task requesting that an injured worker's impairment be rated. The most common error appears to be that the ADJ box is incorrectly checked on certain Separator and Cover Sheets, instead of the DEU box. These problems and many others are easily solved by following the checklist and the step by step instructions set forth below.

Also, for best results, we recommend that parties submit a DOR at the same time they submit their Request for Consultative Rating. This will assist the DEU in preparing ratings for reports that are desired by the assigned hearing date. This will avoid delays at the time of hearing and assist workload allocation for the DEU.

Documents MUST be assembled in the order listed in order to ensure EAMS compatibility.

### **I. Checklist for filing a DOR for a Rating MSC:**

Your filing package will consist of the following in this order:

- Document Cover Sheet
- Document Separator Sheet for DOR
- Declaration of Readiness form
- Document Separator Sheet for Medical Report
- Medical Report
- Document Separator Sheet for Proof of Service
- Proof of Service

#### **DOCUMENT COVER SHEET**

- "Is this a new case?" – check the box "NO"
- If you are requesting the rating to include companion cases, check the box "Companion Cases Exist" otherwise, leave it blank
- "Walkthrough" – check the box "NO" (see Reg 10280) – if the District Office is accepting DORs on a walk-through basis, and you are submitting it as such, check the box "YES"
- "More than 15 Companion Cases" – check ONLY if there are more than 15 companion cases that you need included for performing a rating
- "DATE" – enter the date you are preparing the DOR

- “CASE NUMBER 1” – Enter the EAMS ADJ case number. You cannot file a DOR unless an ADJ product delivery case exists. A DOR is not a case opening document
- Do NOT list: SSN, Type (specific or CT) of injury, DOI or the body parts. Leave those fields BLANK. They are NOT necessary when you have an EAMS Case Number
- Check the box “ADJ”
- If and only if there are companion cases to be included in the rating MSC, for each one, list ONLY the EAMS ADJ case number

### **DOCUMENT SEPARATOR SHEET FOR DOR**

- Product Delivery Unit: select ADJ
- Document Type: select LEGAL DOCS
- Document Title: select DECLARATION OF READINESS TO PROCEED
- Document Date: enter the date you are preparing the DOR
- Author: enter YOUR Uniform Assigned Name only (unless you are an unrepresented injured worker)

### **DECLARATION OF READINESS TO PROCEED**

- Enter the ADJ case number, the injured worker’s first and last name and the employer information
- Check the correct box for your role (Employee, Applicant, Defendant, Lien Claimant) – It is mandatory that you check one box
- Check the box “Rating MSC”
- Check ONLY the boxes for: “Permanent Disability” and “Future Medical Treatment” (see \* footnote on the form)
- Enter the doctor’s name in the format JOHN JONES MD and date of report – you can enter ONLY one doctor’s name and report date. If there is more than one (1) report to be rated, note that in the large text box on page 2 of the form, listing the name(s) of the doctor and the date of the report(s)
- “Name of declarant or name of the law firm of the declarant” – Enter ONLY your UAN – do not enter an individual’s name (unless you are an unrepresented injured worker) – If you are a lien claimant, enter your company name
- Enter your address and phone number – be sure to use the address as shown on the online database and the date you are preparing the form.
- Sign

**NOTE: File a medical report(s) ONLY if it is not already in the case**

### **DOCUMENT SEPARATOR SHEET FOR MEDICAL REPORT**

- Product Delivery Unit select ADJ
- Document Type select MEDICAL DOCS

- Document Title select the appropriate ONE: AME REPORTS, QME REPORTS or ALL MEDICAL REPORTS (All Medical Reports does not mean to attach “all” medical reports – it is to be used when the report is not by either an AME or QME, for example, when it is the treating doctor’s report)
- Document Date enter the date of the report
- Author enter the name of the doctor in the format JOHN JONES MD (no punctuation or special characters like periods, slashes, apostrophes or commas)
- IF AND ONLY IF YOU ARE ATTACHING MORE THAN ONE MEDICAL REPORT, REPEAT THESE STEPS FOR EACH MEDICAL REPORT

**\_\_\_ DOCUMENT SEPARATOR SHEET FOR PROOF OF SERVICE**

- Product Delivery Unit select ADJ
- Document Type select LEGAL DOCS
- Document Title select PROOF OF SERVICE
- Document Date enter the date you prepare the DOR
- Author enter YOUR Uniform Assigned Name only (unless you are an unrepresented injured worker)

## II. Checklist for filing a Request for Consultative Rating:

**This Request is to be used ONLY in cases where the injured worker is represented**

**NOTE: Once there is an ADJ case number, you can only submit this form – you cannot submit a Request for Summary Rating**

Your filing package will consist of the following in this order:

- \_\_\_ Document Cover Sheet
- \_\_\_ Document Separator Sheet for Request for Consultative Rating
- \_\_\_ Request for Consultative Rating form
- \_\_\_ Document Separator Sheet for Medical Report
- \_\_\_ Medical Report
- \_\_\_ Document Separator Sheet for Proof of Service
- \_\_\_ Proof of service

### \_\_\_ **DOCUMENT COVER SHEET**

- “Is this a new case?” – check the box “YES” if there is no DEU Product Delivery Unit. If a DEU Product Delivery Case already exists, check the box “NO”
- If you are filing this as a DEU case opening document, you cannot request a consultative rating on companion cases – each case requires its own separate Request for Consultative Rating – do NOT check the box “Companion Cases Exist” – leave it BLANK
- “Walkthrough” – check the box “NO” (see Reg 10280) – if the District Office is accepting Request for Consultative Rating on a walk-through basis, and you are submitting it as such, check the box “YES”
- Do NOT check the box “More than 15 Companion Cases” even if there are
- “DATE” – enter the date you are preparing the Request for Consultative Rating
- “CASE NUMBER 1” – if filing this as a case opening document, LEAVE THIS BLANK. If a DEU Product Delivery Case already exists, enter the case number.
- If this is a case opening document list: SSN (optional), Type (specific or CT) of injury, DOI and the body parts. If a DEU Product Delivery Case already exists, LEAVE THESE FIELDS BLANK
- Check the box “DEU”

### \_\_\_ **DOCUMENT SEPARATOR SHEET FOR REQUEST FOR CONSULTATIVE RATING**

- Product Delivery Unit: select DEU
- Document Type: select DEU FORMS
- Document Title: select REQUEST FOR CONSULTATIVE RATING
- Document Date: enter the date you are preparing the Request for Consultative Rating
- Author : enter YOUR Uniform Assigned Name only

## \_\_\_ REQUEST FOR CONSULTATIVE RATING

- Check the box “Mail-in” or “Walk-in”
- Enter the SSN (optional)
- Enter the Date of Birth of the injured worker
- Enter the case number you put on the Document Cover Sheet. You may list actual companion case numbers on this form but as noted above, do NOT list them on the Document Cover Sheet
- Enter the DOI – if it is a CT, enter the start date – remember, the Document Cover Sheet has the correct DOI and supersedes what is on the form
- Enter the injured worker’s name
- Enter the injured workers’ occupation
- Enter the Insurance Claim Number (optional)
- Enter the date of the medical report
- Enter the doctor’s name in the format JOHN JONES MD (no punctuation or special characters like periods, slashes, apostrophes or commas)
- The form has space for three (3) medical reports – if there are more than three (3) that are to be rated, prepare an addendum, listing the date and name of the doctor. The addendum page will immediately follow the form without a separator sheet
- If the ADJ case has been set for hearing, enter the date of the hearing and check one box for the type of hearing. If the ADJ is NOT set for hearing, LEAVE THESE BLANK
- **At the present time, only the UAN for a REPRESENTATIVES’ OFFICE can be entered in the “Rating Requested by” and “A copy of this request has been served on” fields. Do NOT enter anything other than a UAN for a representatives’ office. If you are a claims administrators’ office filing the form or if you are serving a claims administrators’ office, LEAVE THESE FIELDS BLANK. There is a change request pending to correct this and once in place, these instructions will be updated.**

**NOTE: File a medical report(s) ONLY if it is not already in the case**

## \_\_\_ DOCUMENT SEPARATOR SHEET FOR MEDICAL REPORT

- Product Delivery Unit: select DEU
- Document Type: select MEDICAL REPORTS
- Document Title: select the appropriate ONE: AME, DEFAULT QME (REPRESENTED WITH DOI ON/AFTER 1-1-05), PANEL QME (NON-REPRESENTED ALL DOI), REPRESENTED QME (REPRESENTED WITH DOI BEFORE 1-1-05) or TREATING PHYSICIAN
- Document Date: enter the date of the report
- Author : enter the name of the doctor in the format JOHN JONES MD (no punctuation or special characters like periods, slashes, apostrophes or commas)
- **IF AND ONLY IF YOU ARE ATTACHING MORE THAN ONE MEDICAL REPORT, REPEAT THESE STEPS FOR EACH MEDICAL REPORT**

**NOTE: if you only use the proof of service that is part of the form itself, you do not have to attach a separate proof of service**

**\_\_\_ DOCUMENT SEPARATOR SHEET FOR PROOF OF SERVICE**

- Product Delivery Unit: select DEU
- Document Type: select MISC
- Document Title: select TYPED OR WRITTEN LETTER (note, that there is a change request pending to add proof of service to the DEU document title list)
- Document Date: enter the date you prepare the Request for Consultative Rating
- Author : enter YOUR Uniform Assigned Name only

### III. Checklist for filing a Request for Summary Rating – QME (DEU 101) or Treating Physician (DEU 102):

**This Request is to be used ONLY in cases where the injured worker is unrepresented – but if there is an ADJ case number, you must use the Request for Consultative Rating**

Your filing package will consist of the following in this order:

- \_\_\_ Document Cover Sheet
- \_\_\_ Document Separator Sheet for Request for Summary Rating
- \_\_\_ Request for Summary Rating form
- \_\_\_ Document Separator Sheet for Medical Report
- \_\_\_ Medical Report
- \_\_\_ Document Separator Sheet for Proof of Service
- \_\_\_ Proof of service

#### \_\_\_ **DOCUMENT COVER SHEET**

- “Is this a new case?” – check the box “YES” if there is no DEU Product Delivery Unit. If a DEU Product Delivery Case already exists, check the box “NO”
- If you are filing this as a DEU case opening document, you cannot request a summary rating on companion cases – each case requires its own separate Request for Summary Rating – do NOT check the box “Companion Cases Exist” – leave it BLANK
- “Walkthrough” – check the box “NO” (see Reg 10280) – if the District Office is accepting Request for Summary Rating on a walk-through basis, and you are submitting it as such, check the box “YES”
- Do NOT check the box “More than 15 Companion Cases” even if there are
- “DATE” – enter the date you are preparing the Request for Summary Rating
- “CASE NUMBER 1” – if filing this as a case opening document, LEAVE THIS BLANK. If a DEU Product Delivery Case already exists, enter the case number.
- If this is a case opening document list: SSN (optional), Type (specific or CT) of injury, DOI and the body parts. If a DEU Product Delivery Case already exists, LEAVE THESE FIELDS BLANK
- Check the box “DEU”

#### \_\_\_ **REQUEST FOR SUMMARY RATING FORM**

- Be sure to enter information in all the fields. Select the correct address and city for the DEU location from the drop down list. If there is a field for which you do not have the correct information, leave it blank
- Enter the UAN for the claims administrators’ office – be sure to use their address as shown on the online database
- If you are attaching a job description or job analysis, it immediately follows the form without a Document Separator Sheet

**NOTE: File a medical report(s) ONLY if it is not already in the case**

## \_\_\_ DOCUMENT SEPARATOR SHEET FOR MEDICAL REPORT

- Product Delivery Unit, select DEU
- Document Type, select MEDICAL REPORTS
- Document Title, select the appropriate ONE: AME, DEFAULT QME (REPRESENTED WITH DOI ON/AFTER 1-1-05), PANEL QME (NON-REPRESENTED ALL DOI), REPRESENTED QME (REPRESENTED WITH DOI BEFORE 1-1-05) or TREATING PHYSICIAN
- Document Date, enter the date of the report
- Author, enter the name of the doctor in the format JOHN JONES MD (no punctuation or special characters like periods, slashes, apostrophes or commas)
- IF AND ONLY IF YOU ARE ATTACHING MORE THAN ONE MEDICAL REPORT, REPEAT THESE STEPS FOR EACH MEDICAL REPORT

**NOTE: if you only use the proof of service that is part of the form itself, you do not have to attach a separate proof of service**

## \_\_\_ DOCUMENT SEPARATOR SHEET FOR PROOF OF SERVICE

- Product Delivery Unit: select DEU
- Document Type: select MISC
- Document Title: select TYPED OR WRITTEN LETTER (note, that there is a change request pending to add proof of service to the DEU document title list)
- Document Date: enter the date you prepare the Request for Consultative Rating
- Author : enter YOUR Uniform Assigned Name only

### #18 – Regulations for Lien Claims:

Verification for filing Lien or App: §10770.5(c)  
The verification shall be in the following form:

“I declare under penalty of perjury under the laws of the St of Cal that one of the time periods set forth in Rule 10770.5(a) has elapsed and, if an application is being filed, that venue is proper... and that I have made a diligent search and have determined that no adjudication case number exists for this IW and this DOI. To that end, I have made a diligent search consisting of the following efforts (specify):”

**Failure to attach verification to Lien or App may = sanctions.**

Verification for filing DOR: §10770.6(c):  
The verification shall be in the following form:

“I declare under penalty of perjury under the laws of the St of Cal: (Check at least one box)

- that the underlying case has been resolved.
- that at least six months have elapsed from the date of injury and the injured worker has chosen not to proceed with his or her case. In determining that the injured worker has chosen not to proceed with his or her case, I have made a diligent search consisting of the following efforts (specify):”

**Failure to attach verification to DOR may = sanctions.**

**#19 – Duty to Develop the Record:**

Preferred process for developing the record – *McDuffie v. LA*, (2002) 67 CCC 138 (WCAB en banc) Discovery closes @ MSC §5502(e)(3)

See *Barajas v. Chocolates*, (2009 CWC PD Lexis @ - AA failed to object to DOR, didn't object at MSC, and failed to produce 3 yr old ML. Therefore, WCAB granted D's Petition for Removal and directed WCJ to close discovery and set for trial.

**Conflict of Duty of WCJ to develop the record versus mandate to close discovery:**

*Costa v. Hardy Diagnostic*, (2006) 71 CCC 1797, (en banc)

*Telles Transport v. WCAB*, (2001) 66 CCC 1290.

*Kuykendall v. WCAB* (2000) 65 CCC 264

*McKernan v. WCAB* (1999) 64 CCC 986

*Novela v. WCAB*, (2009) 74 CCC 1394 (4th DCA writ denied.) After granting Defendant's Petition for Recon, WCAB appointed a regular physician pursuant to LC§5701 to examine IW.

## Chapter 5 - SETTLEMENTS

### #20 - Issues to consider before submitting a settlement doc for approval:

- Are medical reports in file? Bring extra copies of P&S report, and the one that supports the settlement
- Is PD indicated and accurate?
- If no QME, include proof that IW got notice of QME option
- If C&R – Is amount sufficient for FMT?
- If Stip – has FMT box (yes or no) been checked?
- Has IW RTW? w/ or w/o restrictions?
- Document – properly executed? (See *Marchese v. Home Depot*, (2009) 37 CWR 282.)

### #21 - Compliance with Labor Code §4658 & Reg §10117

One of the most common errors parties encounter when submitting Stipulations with Request for Award is failing to comply with 8 CCR § 10117 which is the regulation for handling “Return to Work” matters.

LC §4658 is the Labor Code Section which explains how parties should calculate permanent disability. Specifically, LC §4658 (d)(3)(A) provides, “If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent.”

Therefore, for dates of injury after January 1, 2005, if permanent disability payments are decreased 15% because the IW has returned to work per LC4658(d)(3)(A) , then parties must establish compliance with 8 CCR 10117 in order to have their proposed Stipulated Awards approved. To prove compliance, parties may file either a completed copy of Form 10118 (Notice of Offer of Regular Work) or 10133.53(Notice of Offer of Modified or Alternative Work). Failure to include one of these forms in the proposed package may result in the matter being delayed and set for an adequacy hearing, until the Judge receives some sort of proof that the parties have complied with 8 CCR §10117(b)(3).

Both forms, along with lots of other helpful information on EAMS can be found on the DWC website by clicking on the link:

<http://www.dir.ca.gov/dwc/forms.html>

#22 – **Stipulations:**

**Stipulations - §5702 & §10496** - “Awards and orders may be based upon stipulations of parties in open court or upon written stipulation signed by the parties.”

Judge may set aside stips after notice and an opportunity to be heard. (Reg §10497)

**LC §5002 provides:** “A copy of the release or compromise agreement signed by both parties shall **forthwith** be filed with the appeals board.” Once all parties have signed the C&R, it should be filed ASAP with the WCAB. However, it is not “valid” until an Order issues approving the C&R. (See §5001.)

#23 – **Walk, Don’t Stumble, Through the Walk-Through Reg. 10280:**

A “walk-through” is defined in Reg. §10280(a) as “a document that is presented to a workers' compensation administrative law judge for immediate action.” Following the directions set forth in this regulation is the key to a successful “walk-through.” So, let’s walk through each of the 10 steps of the walk-through rule, Regulation §10280.

1. The first document filed with the WCAB, in any given case, is called a “case opening document.” Usually, a case opening document is the application for adjudication. However, sometimes, the settlement document is the “case opening document.” If that’s the case, then it is necessary to submit the settlement (that is the case opening document) before noon on the day prior to your intended walk-through day. (See §10280(d)(1)(A).) It must be designated as a “walk-through” document and it must be filed only at the district office that has venue. (See §10280(g).) This will give the staff at the district office adequate time to set up the file on this case, assign an ADJ case number and scan the documents into EAMS. This rule doesn’t apply if the case has already been opened, and has an EAMS ADJ number attached to it. If your case has an EAMS ADJ number, you may “walk-through” your document on the same day it is filed, but the rules set forth below still apply.
2. Make sure your document is one of the following which is permissible for the “walk-through” process: (See §10280(c).)
  - Compromise and release
  - Stipulations with request for award
  - Petitions for attorney’s fees for representation of the applicant in vocational rehabilitation
  - Petitions for attorney’s fees for representation of the applicant at a deposition
  - Petitions to compel attendance at a medical examination or deposition.

**PRACTICE TIP>>>** Some attorneys have attempted to walk-through documents such as a Petition for Sanctions or a Petition for Dismissal and are quite surprised when they are turned away. Others have tried to walk-through “Emergency Petitions for Stay,” unaware that submission of these types of documents are subject to a completely different set of rules, pursuant to Reg. §10281.

3. All walk-through documents must be accompanied by the appropriate EAMS forms, such as the document cover sheet and the document separator sheet. In addition, for all settlement documents, the proof of service must show that the document was served on all parties, including any lien claimants whose liens have not been resolved. (See Reg. §10280(d)(1).
4. As discussed above, a walk-through document must be processed only at the district office that has venue. (See Reg. §10280(g).) For venue rules, review the following venue statutes and regs: LC §§[5501.5](#), [5501.6](#) and 8 CCR §§[10409](#), [10410](#), [10411](#), [10412](#), [10210](#) (jj), [10301](#)(gg) & [10232](#)(a)(9).
5. If the assigned walk-through judge is unavailable, it is perfectly permissible to ask the Presiding Judge (PJ) for a possible reassignment to another judge. (See Reg. §10280(e).)
6. It should be noted, however, that “judge shopping” is strictly prohibited. Therefore, if a judge has reviewed a document, and has declined to approve it for some reason, any further action on that document must be taken by the original reviewing judge.
7. If you are walking through a document in a case where a particular judge has previously taken testimony, your walk-through document must be presented to that judge for approval. (See Reg. §10280(h).)
8. For the above situations, under certain circumstances, such as the retirement of the original judge, it may be appropriate to ask the PJ for permission to have the document acted upon by another judge, but that would be the exception, not the rule. (See Reg. §10280(h).)

9. If you try to walk-through either a “Petition for Attorney’s Fees” or a “Petition to Compel Attendance,” don’t expect to get a final order on the day of the walk-through. When approving these types of petitions, the judge is required by Reg. §10280(i) to issue a 10 day “self-destruct” Notice of Intent Order in compliance with Reg. §10349. (Reg. §10349 defines an “Notice of Intent Order” as one which is null and void if a party files an objection within 10 days from service of the order. The party must set forth in their objection good cause as to why the Order should be rendered null and void.) So it’s important to calendar this to determine the date that your order becomes final.
  
10. Finally, present your walk-through document during the appropriate business hours which are: from 8 a.m. to 11 a.m. and 1 p.m. to 4 p.m. on court days. If you arrive at 11:30 a.m., you may be asked to walk your document through during the afternoon session. If you arrive at 4:30 p.m., you may be asked to walk your document the next court day.

## **Chapter 6 - Top Tips for Trial**

### **#24 – Failure to Appear**

If a party fails to appear for trial, the WCJ has the following options per §10241:

- a. Dismiss the application or lien claim after issuing a Notice of Intent to dismiss;
- b. Hear the evidence, and after service of Minutes of Hearing and summary of evidence, issue a Notice of Intent to Submit the case for decision;
- c. Continue the matter or issue an Order taking the matter off calendar if good cause is shown for failure to appear;

### **#25 – Know Your Client - Coldiron Has Been Codified**

Using a paperless adjudication system mandates, more than ever, the need to identify all parties and their clients in any given action. The WCAB issued en banc decisions on this issue back in 2002 named, *Coldiron v. Compuware Corp* (2002) 67 CCC 289 (*Coldiron I*) and 67 CCC 1466 (*Coldiron II*).

| On Nov 17, 2008 the Coldiron case was codified in the regulation, 8 CCR §10550.

The Coldiron case began on January 13, 1995, when Cheryl Coldiron injured her back while working at Compuware Corporation. The employer hired Gallagher Bassett, a Third Party Administrator, (TPA), to resolve the claim. Gallagher Bassett, in turn, hired defense counsel to represent them in the case.

Defense counsel was under the impression that Compuware, the employer, was permissibly self-insured and was therefore his “real” client for purposes of litigation. It wasn’t until six years *after* the date of injury and one month *after* Judge issued her Findings and Award, (finding Compuware solely liable,) that defense counsel was told that his “real” client was Reliance Insurance. Reliance Insurance had been the actual entity that held the workers comp policy for the time period covered for the date of Cheryl Coldiron’s injury on January 13, 1995. Oops!

How did this happen? No one knows why exactly, but the confusion may have resulted from the fact that Compuware had a “high self-insured retention” rate. This means that in some cases, they are permissibly self-insured, and in some cases they are covered by insurance companies, like Reliance. Also, Compuware hires a TPA to handle all the claims. So, by the time the defense attorney is hired by the TPA, he or she is often not sure who the real client is. Is it Compuware, permissibly self-insured? Or is this one of the cases where Compuware is covered by insurance? And if so, which insurance company is liable for the claim?

The Commissioners held that the TPA has a duty to furnish this information to everyone.

In the *Coldiron case, supra*, the WCAB commissioner's wrote, "Fundamental to the establishment of workers' compensation liability and the prompt delivery of benefits awarded to eligible injured workers is the designation of the responsible and liable entity. The responsible entity must be divulged at the earliest opportunity, and certainly no later than the commencement of the litigation process and formal proceedings. More specifically a third-party administrator must inform the Board and its counsel, if any, no later than at least the commencement of any litigation in the case, who the third-party administrator's client is, whether a self-insured employer or an insurance carrier. In this manner, no confusion can result as to the liable entity, against whom an award for benefits will be made. It avoids unnecessary delays in the prompt delivery of benefits awarded."

The WCAB also held that if the TPA fails to provide this information, they may be subject to sanctions, under LC §5813.

When drafting the rules to implement EAMS, the holding in the Coldiron case was deemed important enough to codify as 8 CCR §10550, which mandates that all parties shall identify the "**full legal name**" of their client. Failure to provide this information may result in sanctions pursuant to 8 CCR §10211 and LC §5813, as is true for all intentional violations of the rules of the court administrator.

For those interested, 8 CCR §10550 reads as follows:

§10550. Proper Identification of the Parties and Lien Claimants.

Whenever any party or lien claimant (or any attorney or other representative for a party or lien claimant) either (i) files any Application for Adjudication, Answer, stipulated Findings and Award, Compromise and Release, lien claim, petition or other pleading with the Workers' Compensation Appeals Board or (ii) states its appearance on the record at any hearing before the Workers' Compensation Appeals Board (including but not limited to stating its appearance on any pretrial conference statement, appearance sheet, or minutes of hearing), the party or lien claimant, or its attorney or other representative, shall comply with the following requirements:

- (a) each party or lien claimant shall set forth its full legal name, and each attorney or other representative shall set forth the full legal name(s) of the party or parties he, she, or it is representing;
- (b) if an adjusting agent or third-party claims administrator is appearing, it shall disclose: (1) whether it is appearing on behalf of an employer, an insurance carrier, or both; (2) the identity or identities of the party or parties it is representing; and (3) if it is representing an insurance carrier, whether the policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity or entities actually liable for the payment of compensation;
- (c) if an insurance carrier is appearing, it shall disclose: (1) whether it is appearing solely on its behalf, or also on behalf the insured employer; and (2) whether its policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity actually liable for the payment of compensation; and

(d) if a lien claim is being filed or amended, or if a lien claimant is appearing, the lien claimant shall state whether it is the original owner of the alleged debt or whether it has purchased the alleged debt from the original owner or some subsequent purchaser.

## #26 – **Burden of Proof Issues**

*Escobedo v. Marshall*, (2005) 70 CCC 604 (en banc) set forth: “The reasonable medical probability” standard which is the basis for substantial evidence. See also *E.L. Yeager Constr’n v. WCAB (Gatten)*, (2006), 71 CCC 1687.

*Almaraz v. Environmental Recovery*, (2009) 74 CCC 1084 (WCAB en banc) states, “a physician may utilize any chapter, table, or method in the Guides to assess WPI, provided that his or her opinion constitutes substantial evidence.”

### **Doctor’s rationale should distinguish between:**

- Causation of **injury** affects **MT**  
(If cause of injury = 1% industrial, IW gets 100% MT needed to treat injury)
- Causation of **disability** affects **PD**  
(If cause of disability = 1% industrial, IW gets 1% of the PD rating payout.)

### **Psych Burden of Proof - *Rolda v. Pitney Bowes* (2001) 66 CCC 241 (En banc)**

- Did psych injury involve “actual events of employment” (legal issue – IW’s b/p)
- Is there > 50% industrial causation (medical issue– IW’s b/p)
- Were there personnel action(s)? If so, were they lawful, nondiscriminatory & in good faith? (legal issue – D’s b/p)
- Were personnel action(s) the substantial cause (35-40%) of the psych injury (medical issue – D’s b/p)

**Sudden & Extraordinary List** - Six month employment bar lifted if injury is caused by “sudden and extraordinary employment condition – 3208.3(d):

### **What does qualify:**

- A tree trunk falling on a logger while suspended 40 feet in the air *Campos v. WCAB*, (2010) 75 CCC 565 (*unpublished op*), (1<sup>st</sup> DCA)
- “Thriller” car accident – *CIGA v. WCAB (Tejera)*, (2007) 72 CCC 482
- Richocheting nail into IW’s eye – *Valdez v. Pinnacle Builders, Inc.* (2006) 2006 Cal Wrk Comp PD LEXIS 16
- Customer pushing a cart into IW’s leg, *Home Depot v. WCAB, (Greer)*, (1998) 63 CCC 1073

### What does NOT qualify:

- A Barking Dog – *Cohen v. Sheridan Assisted Living, Inc; SCIF*, (2010) 2010 Cal. Wrk. Comp PD LEXIS 228
- A hit from the bucket of a backhoe *Castillo v. J. Johnson & Company, Inc., SCIF*, 2010 Cal Wrk Comp PD LEXIS 223
- Kicking a conveyor Belt *Lopez v. Superior Forge, SCIF*, 2010 Cal Wrk Comp PD LEXIS 242
- Falling stack of boxes in shipping area *Ott v. Kohl's Department Store, Liberty Insurance Corporation*, (2010) 75 CCC 811
- Lifting heavy doors – *Garcia v. WCAB*, (2009) 74 CCC 810
- Fall off a ladder – *Villicana v. WCAB*, (2008) 73 CCC 317
- Fall off a Ladder – *Puga v. WCAB*, (2007) 72 CCC 195 (unpublished 5<sup>th</sup> DCA)
- Fall off a roof by a roofer – *Bayanjargal v. WCAB*, (2006) 71 CCC 1829
- Falling lumber in store, *Matea v. WCAB, (Home Depot)* (2006) 71 CCC 1522
- Reaction to cortisone treatment, *Cuevas v. WCAB*, (2005) 70 CCC 479
- Prep of protocols for crisis hotline – *Murad v. WCAB*, (2001) 66 CCC 1223
- Confrontation w/ supervisor – *Brown v. WCAB*, (1997) 63 CCC 56
- Confrontation w/supervisor – *Curtis v. WCAB*, (1994) 59 CCC 927

### #27 – Expert Witness Evidence

*Costa v. Hardy Diagnostic*, (2006) 71 CCC 1797 (WCAB en banc) & (2007) 72 CCC 1492 (WCAB en banc)

WCAB held that the 2005 PDRS is valid. However, parties may introduce evidence at trial to rebut a PD rating. VR report was excluded from evidence because it was not served until the day of trial, but expert was allowed to testify. VR experts are like physicians. If you want their reports to be admitted into evidence at trial, you need to disclose the witness AND the report at the MSC, per LC§5502(e)(3). If you fail to list the report on the 5 pager, it will probably not be admitted into evidence.

*Grupe Company v. WCAB (Ridgeway)*, (2005) 70 CCC 1232 (3rd DCA) The DCA discusses when and how to present expert evidence. Parties must list all witnesses at MSC. However, unlike physicians, parties are not REQUIRED to submit a report from their VR expert or in any other way disclose the contents of the expert's testimony at trial.

#### To reconcile the 2 cases:

*Ridgeway* = a VR expert's report is not mandatory, as is a physician's.

*Costa* = if a party wants to admit a VR expert's report into evidence at trial, then the party needs to disclose that report at the MSC and provide copies for all.

If the issue is medication use as labor disabling, VR's opinion must be based on substantial medical evidence, and not solely on the self-reporting of the injured worker, and not solely on VR's opinion. *Begay v. Hooper Holmes, Inc.*, (2010 Cal. Wrk. Comp PD LEXIS 221).

**#28 – Submission of Evidence - Each Medical Report is a Separate Exhibit:**

Prior to EAMS, parties filed all reports from a single doctor under a single exhibit designation. All of Doctor Zeus' reports were Exhibit "A," all of Doctor Zhivago's reports were Exhibit "B," all of Doctor Zena's reports were Exhibit "C," etc. That was fine when everything was on paper, but now all documents are digital. It's quite a task for Judge Jane or Commissioner Cal to find Dr. Zeus' 3/17/09 AME report in FileNet, if that report is lumped in with seven other medical reports of Dr. Zeus.

That's why they invented [8 CCR §10629\(d\)](#). This rule requires each medical report be identified as a separate exhibit with its own separator sheet. That way when Dr. Zeus' 3/17/09 AME report gets scanned into EAMS, it will be easy for everyone to pull up his report and review it.

There are three exceptions to the rule:

- (1) Excerpted portions of medical records.
- (2) Excerpted portions of various types of business records.
- (3) Explanation of Benefits (EOB) letters.

If you happen to have an exhibit that is one of these exceptions, such as a dozen or so pages of excerpted medical records from Happy Valley Hospital, the entire packet would be considered a single exhibit. But please make sure it only includes the exact pages that are necessary and relevant to your burden of proof for the issue at hand.

The rule also requires that all parties create and serve a list of the exhibits they plan to offer as evidence at trial. Each exhibit on the list should be identified by author, date, and title, such as "the 3/17/09 medical report of John Zeus, M.D. (3 pages)."

In addition, the list should identify each exhibit per the directions of [8 CCR §10629\(e\)](#) as follows: "Each exhibit listed must specify an exhibit number or initial that identifies it and the party, parties, or lien claimant offering it (e.g., Applicant's Exhibit 1, 2, 3, etc.; Defendant's Exhibit A, B, C, etc.; Lien Claimant's AA, BB, CC, etc.; Joint Exhibit XX, YY, etc.)."

It's important to comply with these guidelines to avoid confusion and problems at both the trial and the appellate level. If parties do not comply with this rule, the file may be returned to the WCJ to develop the record if necessary and to make sure all of the exhibits are entered properly. (*Hamilton v. Lockheed Corp.* (2001) [66 CCC 473](#))

## #29 - Sealing the Record

The Fifth DCA issued an *unpublished* opinion on July 27, 2007 in the case of **City of Turlock v. WCAB**, (STK09YYZZZ) (2007) 72 CCC 931, affirming the decision of the WCJ that the injured worker's Hepatitis C was work related. (**California Rules of Court, Rule 8.1115(a) prohibits courts and parties from citing or relying on opinions not certified for publication.**) However, the above opinion is illustrative and pertinent to EAMS Reg 8 CCR §10272.

The DCA agreed with the Judge's legal analysis. However, the DCA did not agree with the Judge that the record in this case had been sealed. The DCA acknowledged that the Judge (and the parties) *thought* the record had been sealed. In footnote 2, the DCA reiterated the language of the WCJ as stated in the Minutes of Hearing as follows:

“It is noted for the record that in light of the mechanism of injury and the type of injury herein, the file has been sealed with the designation that is indicated above . . . . At all times, when this matter is not either with the reporter or in actual litigation before the Judge, the file will be sealed and will be placed with the PJ's secretary under the 'YYZZZ' designation.”

The DCA took issue with the injured workers' assertion on appeal that the record had been sealed. The injured worker had complained that the defendant had violated the confidentiality seal of the workers' Compensation Judge by "carelessly and recklessly" filing documents with the District Court of Appeal bearing the injured worker's name.

The DCA was sympathetic, but could see no way around the fact that the record had not been sealed according to the legal requirements for such practice. The Court explained that pursuant to Cal Rules of Court, Rule 2.550(c), "[C]ourt records are presumed to be open." In order to adequately seal the record the Judge must make express findings of fact pursuant to Rule 2.550(d). That was something the Judge did not do in the **City of Turlock** case.

The DCA decided that there was no legal authority in this case that could allow the matter to remain confidential. They decided to honor the injured worker's privacy, but stated the following, “**Without sealing this court's records**, we will respect the decision of the WCJ and not refer to Applicant by name.”

When developing the regulations for the Electronic Adjudication Management System, privacy was an overriding concern. It was decided that the procedure for sealing records must be bullet proof.

Therefore, 8 CCR §10272 was drafted to mirror Rule 2.550(d) (the rule referred to above by the 5<sup>th</sup> DCA). Section (d) of the Rule 8 CCR §10272 provides as follows:

“(d) The presiding workers’ compensation administrative law judge (PWCJ) or the appeals board may order that a document be filed under seal or sealed only if he, she, or it expressly finds facts that establish:

- (1) There exists an overriding public interest that overcomes the right of public access to the record;
- (2) The overriding public interests supports sealing the record;
- (3) A substantial probability exists that the overriding public interest will be prejudiced if the record is not sealed;
- (4) The proposed sealing is narrowly tailored; and
- (5) No less restrictive means exists to achieve the overriding public interest.”

(The “it” in the above regulation, presumably refers to the Appeals Board and not the beloved character, cousin “It,” from the Addams Family.)

Rule 8 CCR §10272 sets forth the exact procedure a PWCJ shall follow when sealing the record in order to guarantee an injured workers’ right of privacy.

The PWCJ or WCAB may order the record sealed on his or her own motion. In the alternative, a party may request the record be sealed by filing with the district office, a Petition with a memorandum of points and authorities and a supporting declaration. If the PWCJ approves the request, and makes the above findings of fact as are required by law, the record will be sealed and it will not be made available for public inspection, regardless of whether it is in paper or electronic form.

Rule 8 CCR §10272 will ensure at all levels of the litigation process, that the injured workers’ privacy will be protected.

### #30 – **Inter- Vivos Claims**

***SCIF v. WCAB (McMahon)*** (2007) 72 CCC 37 (*non-published* 1st DCA)

WCAB had awarded death benefits to IW’s estate per LC §4702(a)(6)(B), but DCA held that statute unconstitutional since Cal. Const. art XIV, §4, only allows benefits to be paid to IW’s dependents or State of California. See also ***Six Flags v. WCAB (Rackchamroon)*** (2006) 71 CCC 1759.)

### #31 – **Vexatious Litigants**

Reg §10782 sets forth the procedure for declaring a person to be a vexatious litigant.

***Kristian Von Ritzhoff v. Ogden Entertainment Services***, (2009) ADJ4599548, 74 CCC 1010; 2009 Cal. Wrk. Comp. LEXIS 194

## **Chapter 7 - Recon and Beyond**

### **#32 - Tips for Filing Petitions for Reconsideration**

Electronic filing of documents has provided an opportunity for the WCAB to revamp their rules on Petitions for Reconsideration. Failure to follow these rules may result in denial of your argument, or worse, the imposition of sanctions. AD Rule 10561 allows the WCAB to impose sanctions on its own motion for a variety of actions including the violation of any of the Regulations set forth below. (See *United States Fire Ins v. WCAB, (Palafox)*, (2010) 75 CCC 547, *Ezra v. WCAB*, (2008) 73 CCC 391.) So it is prudent to become familiar with the guidelines for filing your Petition for Reconsideration to maximize your chances for success.

#### **1. Adhere to Form and Size Requirements – Rule 10232:**

EAMS Rule 10232 sets forth the proper format of documents to be submitted in EAMS. This rule includes documents filed at the district office level, but also at the Appeals Board level for the WCAB Commissioners. Among other things, this Rule requires that documents be printed on white paper with black ink and that documents include a standard legal caption with the ADJ number. Documents, including Petitions for Recon, must also adhere to the 25 page limit per Rule 10232(a)(10). Succinct argument is always more effective than lengthy ones, which brings to mind the famous quote, which I believe is attributed to Samuel Clemens and can be paraphrased as something like, “I’m sorry I had to write you such a long letter. I didn’t have time to write you a short one.”

#### **2. Newly Discovered Evidence:**

WCAB Rule 10842 states the contents of the Petition for Recon must be based on evidence already admitted into the record. Parties are not to provide new evidence in their Petition for Reconsideration unless it is “newly discovered.” WCAB Rule 10856 clarifies that, “(w)here reconsideration is sought on the ground of newly discovered evidence that could not with reasonable diligence have been produced before submission of the case or on the ground that the decision had been procured by fraud...”

If a party makes this allegation and attaches “new” evidence, Rule 10856 requires they also provide an offer of proof supporting their claim which includes:

“(a) the names of witnesses to be produced;  
(b) a summary of the testimony to be elicited from the witnesses;  
(c) a description of any documentary evidence to be offered;  
(d) the effect that the evidence will have on the record and on the prior decision; and  
(e) as to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.”

### **3. Tell the WCAB Where They Can Find Your Evidence:**

Attorneys are encouraged to zealously pursue their client's rights during the appeals process. And they are entitled to provide their "spin" on the facts of their case. However, parties are required to provide a "fair" and accurate statement of all the material evidence, and not just the evidence that supports their position. They must provide a summary of ALL evidence relevant to the issue in question. (See WCAB Rule 10842 and Rules Prof. Conduct, Rule 5-200(A) and (B).)

Also, the parties must explain in detail how the evidence fails to justify the findings. (WCAB Rule 10852)

This is not a *Tomb Raider* treasure hunt or an Agatha Christie mystery. This is all about making it as easy as possible for the judge and/or commissioners to find the evidence that proves your position is the correct one. So if you file a Petition for Reconsideration, make sure you comply with [8 CCR §10842](#)(b). That is the one that requires you to support your "evidentiary statements by *specific references to the record.*"

The Rule provides the following examples:

- (a) "Summary of Evidence, 5/1/08 trial, 1:30pm session, at 6:11-6:15" or
- (b) "the 6/16/08 report of John A. Jones, M.D., at p. 7, Apportionment Discussion, 3rd full paragraph [Defendant's Exh. B, admitted at 8/1/08 trial, 1:30pm session]"
- (c) "the 6/20/08 depo of William A. Smith, M.D., at 21:20-22:5 [Applicant's Exh. 3, admitted at 12/1/08 trial, 8:30am session]"

Hence, on key medical issues, direct the WCAB to the exact page and line in the doctor's deposition, where the doctor states that "reasonable medical probability" supports the correctness of your argument.

### **4. Attachments that are Already in the Record**

When preparing a Petition for Reconsideration, parties try to make it as easy for the commissioners to review a pertinent piece of evidence. They believe that by attaching that document, such as a portion of a particularly persuasive medical report, they will increase their chances for success. In fact, they may have ruined them. Rule 10842(c) specifically prohibits parties from attaching copies of documents that have already been received into evidence. Often the extra copies are simply detached and thrown in the recycle bin. However, parties have also been sanctioned for doing this, especially if they ignored a first warning prohibiting such action.

### **5. Supplemental Petitions**

From time to time, parties are sometimes asked by the Commissioners to provide supplemental petitions on a particular issue in question. However, parties should never submit a supplemental petition unless they are asked to do so. If an issue arises that must be brought to the commissioner's attention immediately, the parties should request an

opportunity to submit a supplemental petition, and only submit the document after receiving permission to do so. (See Rule 10848.)

## **6. Sanctions – LC 5813 & AD Rule 10561:**

As stated above, adhering to all the Regulations substantially increases your chances of success with your Petition for Reconsideration. It also helps you to avoid unwanted mandated appearances at commissioner’s conferences to discuss a Notice of Intent to Impose Sanctions. Parties are often caught off guard after filing a Petition for Reconsideration, when they receive an Notice of Intent to sanction for violating a rule they did not even know existed. The best practice is to become familiar with all of the Rules and Regulations related to filing documents with the WCAB to insure the best results for your client and yourself.

**7. Correctly Label Your Petition:** If you are filing a Petition for Reconsideration (or any type of Petition, such as a Petition Change of Venue), make sure that you select the correct “Document Title” on the “Document Separator Sheet.” **And make sure that your caption includes the term “Petition.” Please do NOT refer to it as “Request for Reconsideration” or a “Request for Change of Venue.”**

The correct designation of the “Document Title” on the “Document Separator Sheet” tells EAMS that this document must be sent **immediately** to a particular Judge or Presiding Judge for review, in the form of a task for that judge. If the title is incorrectly selected the document will not be linked to a task for that judge, and review of the document may be delayed, as the judge will not know it exists.

## **#33 – Who is Bound by What?**

- **Cal. Const., art. VI, §14** defines decision as that which determines causes and “shall be in writing with reasons stated.” Therefore a Grant of a Writ of Review is not a “decision.”
- **Cal Rule of Court §8.1115(d)** states published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.
- **8 CCR §10341** states that **WCAB en banc** decisions are citable and binding precedent on WCAB. (See *City of Long Beach v. WCAB(Garcia)* (2005), 70 CCC 109, fn. 5 *Gee v. WCAB*, (2002) 67 CCC 236; fn. 6. See also Govt. Code, §11425.60(b).)
- **WCAB Significant Panel decisions** are citable, but are not binding precedent.

- **CWCR panel** decisions are citable, but are not binding precedent. (See *Griffith v. WCAB*, (1989) 54 CCC 124, 145 at fn. 2. See also *Smith v. WCAB*, (2000) 65 CCC 277, page 280 at fn. 2.)

WCAB **en banc decisions** remain in effect unless and until the DCA or Supreme Court overrules or stays the decision per LC §5956.

See *Diggle v. Sierra Sands Unified School District*, (2005) 70 CCC 1480. However, *Diggle is a SPD, not an en banc. Diggle* is not binding precedent on WCJs, but see requirements of undertaking on stay orders of DCA, LC §§6000 – 6002.

See also Civil court procedures = CCP §1072, *Sloan v. Court Hotel*, (1945) 72 Cal. App 2nd 308 and *Johnson v. WCAB*, (1984) 49 CCC 716.)

LC §5956: The filing of a writ with the DCA does not automatically stay a WCAB decision, but the DCA may stay the operation of the order if it decides to do so.