

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

**INFORMATIVE DIGEST
FOR CHANGES TO
RULES OF PRACTICE AND PROCEDURE**

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

By the authority vested in it under Labor Code section 5307(a) (see also, Lab. Code, §§ 133, 5309, 5708), and after a duly noticed public hearing conducted pursuant to Labor Code section 5307.4, the Workers' Compensation Appeals Board (WCAB) has adopted and amended various sections of its Rules of Practice and Procedure (Rules) contained in Articles 8 and 13, Title 8, Chapter 4.5, Subchapter 2 of the California Code of Regulations, commencing with section 10300.¹

Under Government Code section 11351, the WCAB is not subject to Article 5 (commencing with section 11346 [Procedure for Adoption of Regulations]), Article 6 (commencing with section 11349 [Review of Proposed Regulations]), and Article 7 (commencing with section 11349.7 [Review of Existing Regulations]) of the rule-making provisions of the Administrative Procedures Act (APA), with the sole exception that section 11346.4(a)(5) [publication in the California Regulatory Notice Register] does apply to the WCAB. Instead, the WCAB's proposed amendments to its Rules are being instituted pursuant to its rule-making power under Labor Code section 5307(a) (see also Lab. Code, §§ 133, 5309, 5708), subject to the procedural requirements of Labor Code section 5307.4. This Informative Digest has been prepared to comply with the procedural requirements of section 5307.4 and for the convenience of the regulated public.

AUTHORITY AND REFERENCE:

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

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW:

The WCAB is adopting and amending Rules relating to lien claims.

Newly adopted Rule 10582.5 relates generally to the procedures for dismissing a lien claim for lack of prosecution.

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

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

¹ Existing WCAB rules that are not being amended or repealed remain in full force and effect.

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

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

Amended Rule 10770 relates generally to the procedures for the filing and service of lien claims.

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

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

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

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

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

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

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

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

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

Newly adopted Rule 10770.1 relates generally to the procedures for lien conferences and lien trials.

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

Section Added: 10582.5.

Rule 10582.5, entitled “Dismissal of Inactive Lien Claims for Lack of Prosecution,” is added.

Rule 10582.5(a) establishes that a lien claim may be dismissed for lack of prosecution if the lien claimant fails to file a declaration of readiness to proceed (DOR) by the earlier of: (1) 180 days after the lien claimant becomes a “party” within the meaning of section 10301(x)(3);² or (2) 180 days after a lien conference or lien trial at which the lien claim was at issue is ordered off calendar.

Rule 10582.5(b) provides that, at least 30 days before a defendant files a petition to dismiss a lien claim for lack of prosecution, it must send a letter to the lien claimant, or its attorney or representative of record, stating its intention to file such a petition.

Rule 10582.5(c) and (d) specify what must accompany any petition to dismiss a lien claim for lack of prosecution. Among other things, the requirements include a declaration that the petitioner made a reasonable and good faith payment on each billing consistent with all applicable existing law(s). (E.g., Lab. Code, § 4603.2(b)(1) and Cal. Code Regs., tit. 8, § 9792.5(c) for medical treatment liens; Lab. Code, § 4622(c) and Cal. Code Regs., tit. 8, § 9794(b) & (c) for medical-legal liens; and Cal. Code Regs., tit. 8, § 9795.4(a) for interpreter liens.)

Rule 10582.5(e) specifies who to serve with a petition to dismiss a lien claim for lack of prosecution.

² Only a party may file a DOR (Cal. Code Regs., tit. 8, § 10250(a).) A lien claimant becomes a party when the injured employee’s underlying case has been resolved or the employee has chosen not to proceed with it. (Cal. Code Regs., tit. 8, § 10301.)

Rule 10582.5(f) provides that a lien cannot be dismissed for lack of prosecution unless the WCAB has issued a 30-day notice of intention to dismiss and the lien claimant either fails to timely object or the written objection, on its face, fails to show good cause.

Rule 10582.5(g) relates to the use of designated service of a notice of intention to dismiss a lien claim for lack of prosecution. (See Cal. Code Regs., tit. 8, § 10500(a).)

Rule 10582.5(h) provides that an actual order dismissing a lien claim for lack of prosecution shall be served only by the WCAB and not designated service.

Rule 10582.5(i) requires that petitions to dismiss a lien claim for lack of prosecution and related documents must be verified under penalty of perjury.

Rule 10582.5(j) provides that section 10582.5 shall become operative on August 1, 2012 but that, except as provided in section 10582.5(k), the section shall apply to all lien claims.

Rule 10582.5(k) excludes certain lien claimants from the application of section 10582.5, including the Employment Development Department (EDD) and governmental entities pursuing lien claims for child support or spousal support.

Section Amended: 10770.

Rule 10770, which has been re-entitled “Filing an Service of Lien Claims,” is amended.

There have been no significant substantive changes to Rule 10770(a), which relates to the format of lien claims.

Rule 10770(b) relates to the filing of lien claims with the WCAB.

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

Rule 10770(b)(3) provides that the service of a lien claim on a defendant, or the service of notice of any claim that would be allowable as a lien, shall not constitute the *filing* of a lien claim with the WCAB.

Rule 10770(b)(4) provides that, where a lien has been served on any party under Labor Code section 4903.1(b), no party shall have an obligation to file that lien with the WCAB if: (1) a good faith partial payment on the lien has been made; (2) the good faith payment was accompanied by a clear written explanation, in conformity with various existing laws, justifying the amount paid and specifying all additional information that must be submitted to receive full payment; and (3) no additional written demand for payment is made by the lien claimant within 90 calendar days.

Rule 10770(c) relates to the service of lien claims by the parties.

Rule 10770(c)(1) requires that all original amended lien claims and all supporting documentation shall be served on specified parties.

Rule 10770(c)(2) specifies what the supporting documentation shall include.

Rule 10770(c)(3) requires a lien claimant to indicate when it is filing an “amended” lien.

Rule 10770(d) specifies what contact information must be included in a lien claim.

Rule 10770(e) defines what is an “amended” lien claim.

Rule 10770(f) imposes specified notification requirements on a lien claimant when its lien has been resolved or withdrawn.

Rule 10770(g) requires that all lien claimants be served with notice of all hearings.

Rule 10770(h) specifies that use of a Social Security number on a lien claim is voluntary, not mandatory.

Rule 10770(i) emphasizes that sanctions may be imposed for violations of this section.

Rule 10770(j) excludes certain lien claimants from the application of section 10770(b)(3), (b)(4), and (c)(2), including EDD and governmental entities pursuing lien claims for child support or spousal support.

Section Added: 10770.1.

Rule 10770.1, entitled “Lien Conferences and Lien Trials,” is added.

Rule 10770.1(a) establishes how a “lien conference” is set and establishes that, when a lien conference is set, *all* unresolved lien claims will be the subject of the lien conference unless otherwise expressly ordered by the WCAB.

Rule 10770.1(b) allows the WCAB to set a lien issue for a hearing other than that requested by a DOR and reiterates the WCAB’s authority to issue 10-day notices of intention under Rule 10888.

Rule 10770.1(c) provides that when a DOR is filed on an issue directly relating to a lien, the DOR must specify that a “lien conference” is being requested and, if another type of hearing is requested or set, it shall still be deemed a “lien conference,” even if only preliminary or intermediate procedural or evidentiary issues are in dispute.

Rule 10770.1(d) establishes requirements regarding the preparation and settlement authority for anyone appearing at a lien conference or lien trial.

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

Rule 10770.1(f) provides if all lien disputes cannot be entirely resolved at a lien conference, the remaining lien issues shall be set for trial except, upon a showing of good cause, there may be a one-time continuance of the lien conference or it may be taken off calendar.

Rule 10770.1(g) essentially applies the discovery closure provisions of Labor Code section 5502(e)(3) to lien conferences.

Rule 10770.1(h) provides that if a lien claimant fails to appear at a lien conference, the WCAB may dismiss the lien after issuing a 10-day notice of intention in accordance with Rule 10562(d)(1). It also imposes certain requirements on a defendant if designated service is used under Rule 10500(a).

Rule 10770.1(i) provides that, if no witnesses are listed in the PTCS at a lien conference, or if no good cause to testify is shown for at least one of the witnesses listed, the WCAB may direct that the lien issues be submitted for decision on the documentary evidence.

Rule 10770.1(j) establishes that, if a lien conference has been ordered off calendar, no DOR on the lien issues can be filed for at least 90 days.

Rule 10770.1(k) provides that when a defendant has been designated to serve a lien claimant with notice of a lien conference or trial (see Cal. Code Regs., tit. 8, §§ 10500(a), 10544), the defendant shall bring its proof of service to the lien conference or trial and, if the lien claimant fails to appear, file it with the WCAB.

Rule 10770.1(l) emphasizes that sanctions may be imposed for violations of this section.

Rule 10770.1(m) excludes certain lien claimants from the application of section 10770(e), (g), and (h), including EDD and governmental entities pursuing lien claims for child support or spousal support.

STATE REIMBURSABLE MANDATE:

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

COST OR SAVINGS TO LOCAL AGENCIES OR SCHOOL DISTRICTS:

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

COST OR SAVINGS TO STATE AGENCIES:

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

COST OR SAVINGS IN FEDERAL FUNDING TO THE STATE:

The new and amended regulations will not affect any federal funding.

DETERMINATION REGARDING SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS:

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

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES:

The WCAB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the WCAB's adoption and amendment of three sections of its rules of practice and procedure.

ECONOMIC IMPACT ON SMALL BUSINESSES:

The WCAB estimates that approximately half of the businesses affected by the WCAB's adoption and amendment of three sections of its rules of practice and procedure are small businesses, either third-party administrators or law firms that handle workers' compensation cases. The WCAB has determined that its regulatory action will not result in a significant, statewide adverse economic impact directly affecting small businesses, including the ability of California businesses to compete with businesses in other states.

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

The WCAB has determined that its adoption and amendment of three sections of its rules of practice and procedure will have no effect on the creation or elimination of jobs or existing businesses within California, or affect the expansion of current California businesses.

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

IMPACT ON HOUSING COSTS:

The WCAB has determined that its adoption and amendment of three sections of its rules of practice and procedure will have no effect on housing costs.

CONSIDERATION OF ALTERNATIVES:

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

AVAILABILITY OF RULES AND RULE-MAKING DOCUMENTS:

Any interested person may inspect a copy of the WCAB's amended Rules, its Final Statement of Reasons, and any supplemental information contained in the Rulemaking File. The Rulemaking File may be inspected by any interested person, and will be available for inspection at the Workers' Compensation Appeals Board, 455 Golden Gate Avenue, Ninth Floor, San Francisco, CA 94102, between the hours of 9:00 AM and 4:30 PM, Monday through Friday, excluding State holidays. Requests for copies of the text of the amended Rules, the Final Statement of Reasons, and any supplemental information contained in the rulemaking file may be made in writing, directed to the following contact person:

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

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

In the event the contact person above is unavailable, or to obtain responses to questions regarding the substance of the amended Rules, inquiries should be directed to:

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

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

In addition, the texts of the new and amended Rules and of the Final Statement of Reasons will be posted on the internet and may be accessed at www.dir.ca.gov/wcab/WCABFinalLienRegs2012.htm.

AUTOMATIC MAILING:

A copy of the texts of the new, amended, and repealed Rules and of the Final Statement of Reasons will automatically be sent to those interested persons on the mailing list of the WCAB, and to all persons who have requested notice of hearing as required by Labor Code Section 5307.4.