

April 16, 2013
Michael McClain
General Counsel
California Workers' Compensation Institute

Mr. Sullivan:

On behalf of the members of the California Workers' Compensation Institute (the Institute), please find attached the Institute's written testimony on the latest proposed WCAB Lien regulations together with the related Exhibit A as noted on the comments.

Thank you for considering our comments.



California Workers' Compensation Institute
1111 Broadway Suite 2350, Oakland, CA 94607 • Tel: (510) 251-9470 • Fax: (510) 251-9485

April 16, 2013

VIA E-MAIL: WCABRules@dir.ca.gov

Neil P. Sullivan
Assistant Secretary and Deputy Commissioner
Workers' Compensation Appeals Board
Attn: Annette Gabrielli, Regulations Coordinator
P.O. Box 429459
San Francisco CA 94142-9459

RE: Comments on proposed Lien Regulations

Dear Mr. Sullivan:

These comments on the revisions to the Board's Rules of Practice and Procedure to implement Senate Bill 863 provisions regarding lien litigation and procedures are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 80% of California's workers' compensation premium, and self-insured employers with \$36B of annual payroll (20% of the state's total annual self-insured payroll).

Insurer members of the Institute include ACE, AIG, Alaska National Insurance Company, AmTrust North America, Chubb Group, CNA, CompWest Insurance Company, Crum & Forster, Employers, Everest National Insurance Company, Farmers Insurance Group, Fireman's Fund Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, Pacific Compensation Insurance Company, Preferred Employers Insurance Company, Springfield Insurance Company, State Compensation Insurance Fund, State Farm Insurance Companies, Travelers, XL America, Zenith Insurance Company, and Zurich North America.

Self-insured employer members are Adventist Health, Agilent Technologies, City and County of San Francisco, City of Santa Ana, City of Torrance, Contra Costa County Schools Insurance Group, Costco Wholesale, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, Foster Farms, Grimmway Enterprises Inc., Kaiser Foundation Health Plan, Inc., Marriott International, Inc., Pacific Gas & Electric Company, Safeway, Inc., Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Southern California Edison, Sutter Health, University of California, and The Walt Disney Company.

Recommended Changes are indicated by *italicized* and underline and ~~strikeout~~.

Introduction

The Institute's members appreciate the efforts made by the Board to bring discipline and order to the litigation of liens in the workers' compensation system. SB 863 has instituted sweeping change to the adjudication of medical treatment, billing disputes, and liens. These statutory changes obligate the WCAB to redefine its role in the determination of these disputes precisely and clearly in order that these new adjudicative mechanisms mesh as the Legislature intended.

It is axiomatic that an agency's authority to regulate the law administered by it requires the agency to implement, interpret, or make specific the statutes that it enforces. The Board's Rules of Practice and Procedure must be geared to implementing the policy decisions enacted by the Legislature, must be reasonably necessary to effectuate the purpose of the statute, and cannot be in conflict with the statute.

Relevant to the Board's proposed regulations, the statutory scheme was significantly altered for the adjudication of the medical necessity of specific treatment through the independent medical review (IMR), the determination of billing disputes through the independent bill review (IBR), and the new statutes relating to the adjudication of liens that include filing and activation fees, a new statute of limitations, and the preclusion of the assignment of liens. Within these statutory schemes for IMR and IBR, the WCAB and the WCALJs have no jurisdiction, except in limited circumstances on appeal (Labor Code sections 4610.6(h) and (i); 4603.6(f)). The statutes are clear and the express legislative intent provides the supporting rationale.

The statutory scheme of SB 863 is very specific and very directive. IMR is the primary mechanism for determining medical treatment disputes. IBR is the primary means of resolving medical billing disputes. Both processes have narrowly crafted procedures for appealing decisions to the WCAB. With regard to liens, the statute specifically states that "liens and claims for costs" are subject to the administrative fees, the statute of limitations, and the prohibitions against assigning liens to third parties. There is no provision in the statute for circumventing these restrictions with a "petition for costs" directly to the appeals board.

The strict application of the lien provisions was intended to solve a significant problem, 600,000 open liens, “Zombie liens”, and the merchandizing of accounts receivable to collection agencies. The Legislature estimated the cost of our wildly out of control lien procedures to be upwards of \$120 million. It has already been reported that some lien claimants are dismissing their liens and filing “petition for costs” at the District Offices, whether their expenses fall under section 4903 or not (Exhibit A). It is not appropriate and the statute does not permit the appeals board to provide an alternate path for resolving medical treatment disputes, medical payment challenges, or liens.

In the Senate Floor Analysis of SB 863, legislative staff noted that “the purpose (of the filing fee) is to provide a disincentive to file frivolous liens.” The appeals board appears to be opening a channel by which any lien claimant may simply file a “petition for costs” in order to avoid the payment filing fees, the legislatively mandated disincentive to file frivolous liens.

The Institute generally agrees with the commentary provided by the Chamber of Commerce and the California Coalition on Workers' Compensation (CCWC) (the Coalition) and specifically concurs with their request for the WCAB to provide language that distinguishes section 4903 liens from costs under section 5811, the applicability of lien filing/activation fees, and the limited role that the appeals board has regarding IMR and IBR. The WCAB’s jurisdiction over liens and cost claims is limited under SB 863 to matters that are not related to medical treatment or medical-legal issues. The statute makes no distinction as to the way in which a claim for cost is presented. It is the character of the claim that determines the applicable procedure. The Board’s Rules of Practice and Procedure must acknowledge and affirm the primacy of the new statutory adjudication mechanisms.

In the commentary from Chamber of Commerce and CCWC, they cite both the Senate Floor Analysis and the CHSWC study of the lien crisis. The Senate Floor analysis demonstrates the scope and urgency of the problem and indicates how the Legislature viewed the potential statutory solutions:

“Lien Reforms. The current lien system in workers' compensation is out of control. There is no effective statute of limitations, because case law has developed tolling rules that result in most billing matters remaining alive indefinitely. In addition, the method of resolution requires formal litigation in an already overcrowded workers' compensation court system. There are presently hundreds of thousands of backlogged liens, possibly in excess of a million, and many of these are related to long-since closed cases. One of the concerns most often expressed by employers is that liens get filed by providers for months of treatment when the employer had no idea that there was any treatment being provided. The bill seeks to avoid these situations by mandatory notice by providers to the employer, an expedited hearing process to determine if the provider has a right to be treating the injured worker, and a prohibition against paying bills submitted in violation of these rules.

But lien abuse is not limited to treatment for which the employer has no notice. For example, it has become common for third parties to purchase old receivables from providers, who often billed at (higher) usual and customary rates but were properly paid according to established fee schedules. These third parties then file liens in an effort to leverage settlements. Another example of lien abuse involves a provider filing a lien for excessive amounts after being paid, again with the hope of obtaining a settlement. Nuisance-value settlements are rampant because the workers' compensation courts simply don't have time for these minor matters when crucial right to benefits issues are the priority cases. To address this growing volume of problem liens, the bill proposes to re-enact a lien filing fee, so that potential filers of frivolous liens have a disincentive to file. This approach worked well in the past before it sunset (due to the DWC's inability to track the fees – a problem DWC says no longer exists.) The lien filing fee is refundable if the lien-claimant prevails. In addition, for liens that are pending, and were filed after the prior filing fee sunset, the bill provides for the payment of an activation fee. Again, the purpose is to provide a disincentive to file frivolous liens. Not surprisingly, there has been concern expressed that filing fees are a burden on providers who may have legitimate billing disputes with the employer or insurer.

Therefore, in order to further eliminate a major portion of the unnecessary volume of liens, the bill would create an "independent bill review" process where expert bill reviewers would make determinations in cases where it is merely a billing, and not a substantive treatment, dispute. This IBR process would relieve substantial congestion in the workers' compensation courts, provide much faster dispute resolution, and result in better decisions by billing experts as opposed to judges, who have no special training in the arcane world of billing codes and procedures."

In several places in the legislative history, reference is made to the lien reforms being based on recommendations in the CHSWC Liens Report of January 5, 2011. In that report, the Commission asserts that the cause of the lien crisis included medical treatment, medical-legal expenses, interpreters for treatment or med-legal evaluations, copy services in connection with medical treatment or med-legal evaluations, and discretionary costs under section 5811. In view of the CHSWC Lien Report, the Senate Floor Analysis, and the express legislative intent, it cannot be said that the Legislature intended a "work around" process such as a petition for cost directly to the appeals board.

We agree with the Coalition that a specific statement providing a unified procedure for both liens and petition for costs is essential. The Coalition's recommendation is to add the following in the definition of "lien", "lien claim", and "cost":

Whether filed as a lien or as a petition for costs, all medical treatment related services for which the employer is or may be liable, including but not limited to all services provided in connection with treatment under Article 2 commencing with Labor Code section 4600, including interpreter services, transportation and meals and lodging, and all medical-legal related services for which the employer

is or may be liable, including but not limited to all services provided in connection with a medical-legal evaluation under Article 2.5 commencing with Labor Code section 4620, are subject to the provisions of Labor Code sections 4903.05, 4903.06 and are subject to the jurisdiction of the WCAB in accordance with Labor Code section 4903(b) upon completion of the independent medical review and/or independent bill review appeal processes.

Whether filed as a lien or a petition for costs, pursuant to Labor Code section 5811, the Appeals Board has original jurisdiction over claims for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services, and such claims shall be subject to the lien filing and activation fees established in Labor Code sections 4903.05, 4903.06, and the limitations period in Labor Code section 4903.5 in the same manner as liens generally.

For consistency, this language should be added to the definition of “cost” (10301(h)(2)), “lien claimant” (10301(x)), “section 4903(b) lien” (10301(ii)), and to sections 10451(b)(2) and 10770(h)(2) (added to new subdivisions (B) and (C)).

Our specific recommendations and reasoning is provided below.

RECOMMENDED CHANGES are indicated by and highlighted underscore and ~~strikeout~~.

Section 10301 – Definitions

Recommendation

(h) “Cost” means ~~any claim for reimbursement of expense or payment of service that is not allowable as a lien under Labor Code section 4903.~~ “Costs” include, but are not limited to:

- (1) expenses and fees under Labor Code section 5710;
- (2) ~~costs under Labor Code section 5811, including qualified interpreter services rendered during a medical treatment appointment or medical-legal examination; and~~ under Labor Code section 5811 and subject to the provisions of Labor Code sections 4603.2, 4603.6 and 4622, ...

Discussion

The definition of a ‘cost’ that is distinct from an expense that is subject to a lien must be precise. The Board’s inclusion of interpreter services as costs under section 5811 is directly contrary to the statutory scheme for the payment and resolution of these services under SB 863. Interpreter services in connection with medical treatment are specifically included in SB 863 as medical treatment expenses in section 4600(g). Interpreter billings are expressly included in the section 4603.2(b)(1) billing requirements, section 4603.2(b)(2) outlining the employer’s EOR requirements, and section 4603.2(e) regarding second reviews and independent bill review under section 4603.6. The only jurisdiction that the WCAB has over such disputes is on appeal of the

IBR pursuant to section 4603.6(f). Since the IBR decision is “a determination and order by the administrative director”, the enforcement is through the administrative director. The appeals board has no authority to intervene until this process has been completed.

Section 10301 – Definitions

Recommendation

(aa) “Lien conference” means a proceeding, including a proceeding following an order of consolidation, held in accordance with section 10770.1 for the purpose of assisting the parties in resolving disputed lien claims, claims of costs filed as liens, and/or petitions for costs under section 10451 or, if the dispute cannot be resolved, to frame the issues and stipulations and to list witnesses and exhibits in preparation for a lien trial.

Discussion

Whether an expense is asserted under Labor Code section 4903 or section 5811, if it arises from medical treatment or the medical-legal process, the statutory provisions apply. According to the statute, it is a lien for purposes of EOB (section 4603.2(b)(2)), IBR (section 4603.2(e)(4)), filing or activation fees, and WCAB jurisdiction under section 4622(b)(4). The restriction proposed by the Board is in conflict with the statutory process enacted by the Legislature.

Section 10408 -- Application for Adjudication of Claim Form

Recommendation

(j)(3)(E) discovery shall close at the lien conference, except as provided by section 10770.1(h); and

(F) if the petitioner fails to appear at a lien conference or lien trial, the Workers’ Compensation Appeals Board may issue a notice of intention to dismiss the petition for costs in accordance with section 10770.1(i), subject to (G); and

Add: (G) If the petitioner fails to appear at a lien conference or lien trial and the record reflects that the petitioner failed to pay the requisite filing or activation fee as applicable, then the Workers' Compensation Appeals Board shall issue a Notice of Dismissal.

(k) The limitation period for filing a lien claim under Labor Code section 4903.5 shall apply to petitions for costs.

(l) Petitions for Costs shall not be subject to walk-through calendar approval, but must be resolved at a lien conference or lien trial, except as noted above.

Discussion

In accordance with our comments, petition for costs under 5811 should be very narrow and infrequent. These procedures must then reflect the statutory provisions enacted in SB 863 and apply those statutory requirements to petition for costs, as well.

Section 10451 -- Petition for Costs

Discussion

To the extent the section 10451 states that a petition for cost can be filed with the appeals board in lieu of filing a lien or following the statutory lien process, it is directly contrary to the provisions of SB 863. In the Board's Statement of Reason, it suggests that the cost reimburse procedures enacted by the Legislature are optional. The Board may be the only entity that reads SB 863 that way. The Board's rationale states:

In fact, because section 4903.05(c) provides that all claims of costs liens "shall be subject to a filing fee," a person or entity seeking reimbursement for claims of costs may prefer to file a petition for costs, rather than seeking reimbursement through the filing of a lien form.

First, section 4903.05(c) does not say "all claims of costs liens". "Claims of costs" is not used as an additive but a noun. The statute reads:

(c) All liens filed on or after January 1, 2013, for expenses under subdivision (b) of Section 4903 or for claims of costs shall be subject to a filing fee as provided by this subdivision.

Secondly, the Board's misreading of this section leads it to declare that regardless of the character of the expense, reimbursement may be sought through the appeals board. Later in its Statement of Reason the Board asks:

If all types of fee schedule disputes must go through IBR, then there is no discernible reason why only interpreter fee schedule disputes are mentioned in section 5811, i.e., if the Legislature had not intended that interpreter fee schedule disputes be treated differently, then why does section 5811 specifically mention only them or, indeed, mention them at all?

The Institute suggests that the answer to that question is very narrow. There may be some costs to which section 5811 applies -- section 5710 fees, interpreter services at trial, or other litigation fees -- but those costs do not include any expenses arising under sections 4600 or 4620.

To come to its conclusion that section 5811 is another reimbursement option, the Board ignores specific language in section 4620(a) defining "medical-legal expense" to include interpreter's fees and its extensive opinion in Guitron v Santa Fe Extruders (2001) 76 CCC 228 that determined that interpreter services for medical treatment appointments are a part of medical care under section 4600. This is now expressly stated in section 4600(g). It also ignores the specific mandate of section 4622(a) and (b) requiring unresolved medical legal billings go to an independent bill review as provided for in Section 4603.6.

The consequence of the Board's conclusion is a nullification of the social policy determinations made by the Legislature and enacted in SB 863. The Legislature has eliminated the Board jurisdiction over the question of medical necessity for a specific treatment; it has eliminated the Board's jurisdiction over medical billing disputes; it has

eliminated the method and procedures required for seeking the reimbursement of medical and medical legal expenses. The Board has no authority to contravene the Legislature's policy decisions.

Section 10451 -- Petition for Costs

Recommendation

(a) Any person or entity may file a petition for costs as defined by section 10301(h);

Recommendation

Add: (b)(1)(D): any expense other than costs as defined by section 10301(h)

Discussion

This is necessary for clarity.

Recommendation

(b)(2) ... ~~Nothing in t~~ This subdivision shall not preclude an interpreter from ~~electing to~~ pursuing independent bill review as required by Labor Code sections 4603.2, 4603.6, and 4622.

Discussion

This is necessary for clarity.

Recommendation

(b)(4) Strike this subdivision.

Discussion

These waiver provisions are directly contrary to section 4622(f). The Board creates this proposed waiver out of whole cloth and an erroneous interpretation of the statute and case law. There is no supporting authority for the section and it must be stricken.

Recommendation

(c) No petition for costs pursuant to Labor Code section 5811 for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services shall be filed or served until at least 60 days after a an itemized written demand for the costs has been mailed to or personally served on the defendant. The petition shall append: (1) a copy of the written demand, together with a copy of its proof of service; and (2) a copy of the defendant's response, if any. A petition that fails to comply with these provisions shall be dismissed by operation of law and shall not toll the time for filing a lien claim under Labor Code section 4903.5, whether or not the

petition was accepted for filing, and it shall not relieve the petitioning person or entity from the lien filing fee, lien activation fee, and other provisions of Labor Code sections 4903.05 and 4903.06 and their related regulations.

Discussion

In accordance with our comments above, petitions for costs cannot be adjudicated by the Board if they are for medical or medical legal expenses. Dismissal by operation of law reflects the intent of several related statutes and regulations and should be reiterated here.

Recommendation

(d) Except as provided in subdivision (b)(2) or (b)(3), Unless the Labor Code section 4603.2 and 4622 procedures of billing and report submission, explanation of review, and second review and IBR/IMR and appeals process (as applicable) have been completed or have been timely attempted without timely response, if the petition seeks payment for any costs that are lienable under Labor Code section 4903(b) or that are subject to independent medical review and/or independent bill review, the entire petition shall be dismissed by operation of law. In addition, the petition shall not toll the time for filing a lien claim under Labor Code section 4903.5, whether or not the petition was accepted for filing, and it shall not relieve the petitioning person or entity from the lien filing fee, lien activation fee, and other provisions of Labor Code sections 4903.05 and 4903.06 and their related regulations.

Discussion

As drafted this regulation is contrary to the statute and legislative intent and should state the relevant procedures. While the Board asserts that section 5811 is a more specific statute than the provisions of SB 863, we disagree. The provisions of SB 863 dealing with the reimbursement for medical and medical legal costs and liens are the most recent statutory statement enacted on these issues and are more specific and directive than section 5811.

The Legislature projected cost reductions of over \$100 million based on the revisions to the lien litigation procedures alone. The proposed regulations would simply eliminate those legislative goals and that the Board cannot do.

Recommendation

(e) The petition shall be identified as a "Petition for Costs" in the caption or at the top of the first page in 12 point font.

Discussion

This provision will make these petitions readily identifiable.

Recommendation

Add: (i)(1) If the Labor Code section 4603.2 and 4622 procedures of billing and report submission, explanation of review, and second review and IBR/IMR and appeals process (as applicable) have been completed or have been timely attempted without timely response.

Discussion

This addition is necessary for the reasons stated above (section 10451(d)).

Recommendation

(j)(2) section 10770(h)(1), i.e., the petition for costs shall be deemed dismissed with prejudice by operation of law when the petitioner provides written notification to the Workers' Compensation Appeals Board that its petition for costs and or lien has been resolved or withdrawn; and ...

Discussion

This additional language is necessary to create uniformly applicable procedures.

Recommendation

(j)(3) The exemption from filing and activation fees should be stricken.

Discussion

This revision is necessary for the reasons stated above.

Section 10451.1 -- Petition to Enforce IBR Determination**Recommendation**

(a) Any person or entity to whom the Administrative Director has issued an IBR determination and order requiring payment may file a petition to enforce an independent bill review (IBR) determination if ...

Discussion

A petition to enforce an AD's determination can only be filed by the entity for whom the determination was made.

Recommendation

(a)(2) Strike the word "possible".

Discussion

The word is meaningless and will only create confusion and litigation.

Section 10582.5 -- Dismissal of Inactive Lien Claims for Lack of Prosecution Recommendation

Add: “petition for cost” or “petitioner for costs” where applicable throughout this section in order to apply the regulatory procedures of section 10582.5 to petition for costs, as well as liens and lien claimants.

Section 10606 Recommendation

Add: (e) The report of an agreed or qualified medical evaluator shall not be admissible regarding the employee’s dispute of a utilization review decision under Section 4610, nor to the employee’s dispute of the medical provider network treating physician’s diagnosis or treatment recommendations under Sections 4616.3 and 4616.4.

Discussion

This addition is necessary to clarify the role of medical legal evaluators with regard to specific disputes.

Section 10606.5 – Vocational Expert’s Reports as Evidence Recommendation

(a) The Workers’ Compensation Appeals Board favors the production of vocational expert evidence in the form of written reports. Direct examination of a vocational expert witness will not be received at a trial except upon a showing of good cause. Good cause does not include a vocational expert’s refusal to issue a report. A continuance may be granted for rebuttal testimony if a report that was not served sufficiently in advance of the close of discovery to permit rebuttal is admitted into evidence.

Discussion

This clarification will impose greater order on the process and support the Board’s policy favoring receiving expert evidence by report.

Section 10608 and 10608.01 – Service of Medical and Medical Legal Reports

The Institute agrees with the revisions proposed by the Chamber of Commerce and CCWC with regard to the service of medical and medical legal reports on lien claimants and physician lien claimants.

Recommendation

In the initial introductory subdivision, whether the Board retains section 10608 as proposed or creates 10608.01, the following language should be included:

The provisions of this subdivision shall apply to the service of medical reports, medical-legal reports, or other medical information on a non-physician lien claimant regardless of whether the injured employee has signed an authorization or provided a waiver to release medical information.

Discussion

This statement is necessary in order to ensure that non-physician lien claimants do not circumvent the specific procedures established by the Board for the receipt of medical information.

Section 10770-- Filing and Service of Lien Claims

Recommendation

(c)(1) The requirements of this subdivision shall apply to all lien claims, whether or not filed electronically. For purposes of this section, lien claim includes any section 4903(b) lien, a petition or other claim of costs arising from medical treatment or medical-legal process.

Discussion

In accordance with our previous comments and for consistency and clarity this revision is necessary.

Recommendation

(c)(2) Only original (i.e., initial or opening) lien claims or petitions for costs shall be filed. Except as provided in subdivisions (g) or (h) of section 10233 or as ordered by the Workers' Compensation Appeals Board, no amended lien claims or petitions for costs shall be filed. Any amended lien previously filed or lodged for filing may be destroyed without notice.

Recommendation

(h)(2)(A) If a petition for costs is filed that seeks reimbursement for any of the same goods or services that had previously been sought by filing a lien claim, the entire lien claim shall be deemed withdrawn and dismissed without prejudice by operation of law. This provision, however, shall not nullify the provisions of section 10451(e).

(B) Whether filed as a lien or as a petition for costs, all medical treatment related services for which the employer is or may be liable, including but not limited to all services provided in connection with treatment under Article 2 commencing with Labor Code section 4600, including interpreter services, transportation and meals and lodging, and all medical-legal related services for which the employer is or may be liable, including but not limited to all services provided in connection with a medical-legal evaluation under Article 2.5 commencing with Labor Code section 4620, are subject to the provisions of Labor Code sections 4903.05, 4903.06 and are subject to the jurisdiction of the WCAB in accordance with Labor Code section 4903(b) upon completion of the independent medical review and/or independent bill review appeal processes.

(C) Whether filed as a lien or a petition for costs, pursuant to Labor Code section 5811, the Appeals Board has original jurisdiction over claims for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services, and such claims shall be subject to the lien filing and activation fees established in Labor Code sections 4903.05, 4903.06, and the limitations period in Labor Code section 4903.5 in the same manner as liens generally.

Discussion

As previously noted, this additional language is required in order to avoid the unauthorized circumvention of the lien filing and activation fee statutes and other lien processing statutes by the filing of petitions for costs. The additional language would clarify that the lien litigation procedures and filing fees cannot be avoided and that original jurisdiction cannot be created out of whole cloth.

Section 10770.1 -- Lien Conferences and Lien Trials Recommendation

(a)(1) A lien conference shall be set: (A) when any party, including a lien claimant or petitioner for costs who is a “party” as defined by section ...

Section 10770.5 -- Verification to Filing of Lien Claim or Petition for Costs or Application by Lien Claimant/Petitioner.

(a) Any section 4903(b) lien, any lien or petition for ~~medical-legal~~ costs, and any application related to any such lien or petition shall have attached to it a verification under penalty of perjury which shall contain a statement specifying in detail the facts establishing that both of the following have occurred: ...

Section 10774.5 -- Representation Recommendation

It is again recommended that wherever “lien claimants” or “liens” are referred to in this section, “petitions for costs” and/or “petitioner for costs” also be included.

Discussion

In accordance with our previous comments and for consistency and clarity, these revisions are necessary to create a uniform procedure for resolving disputes over reimbursement.

Section 10957 – Petition Appealing IBR Determination Recommendation

(b) The petition shall be filed with the Workers’ Compensation Appeals Board no later 20 days after ~~the AD served~~ the IBR determination is served, except the time for filing shall be extended in accordance with sections 10507 and 10508. An untimely petition may be summarily dismissed.

Discussion

The proposed regulation as crafted misinterprets the statute regarding service. Section 4603.6 does not require the AD serve the determination but the IBR company is required to serve the decision on the AD and the parties. The proposed regulation must be revised to conform to the statutory procedure.

Thank you for considering our comments. Please contact me if further clarification is needed.

Sincerely,

Michael McClain
General Counsel
California Workers' Compensation Institute

MMc/ja

Attachment: Exhibit A - WorkCompCentral Article: "Copy Services, Interpreters May Find a Way around Lien Fees"

cc: Destie Overpeck, DWC Acting Administrative Director
CWCI Claims Committee
CWCI Legal Committee
CWCI Medical Care Committee
CWCI Regular Members
CWCI Associate Members



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State: CA

Copy Services, Interpreters May Find a Way around Lien Fees: Top [2013-04-04]

California workers' comp attorneys disagree on whether copy services or interpreting agencies may avoid the lien filing and activation fees imposed by Senate Bill 863 by filing petitions for costs, and the answer may not be known until the issue is litigated.

Tim Kinsey, managing shareholder of the Grancell, Lebovitz, Stander, Reubens & Thomas office in Orange County, said firms are filing cost petitions rather than liens "with some frequency," although he said he thinks current rules don't allow the dodge. Los Angeles defense attorney Zachary Sacks of Sacks & Zolonz agreed. "You can't perfume the pig," Sacks said. Calling a claim a cost petition is "too obviously an effort to subvert the activation and the filing fee," he said. If a judge were to ask, "Why didn't you file this as a cost before the imposition of the activation and the filing fees, what's the answer going to be?"

But even state regulators aren't sure if the cost-saving maneuver will fly.

"This practice has been called to our attention," said Peter Melton, a spokesman for the Department of Industrial Relations. "While it appears that the practice is contrary to the intent of SB 863, DWC and DIR cannot comment on whether or not it is a correct interpretation of the applicable statutes."

A lien claim is a request for payment by any person who provided services constituting a "reasonable expense" by an injured worker under Labor Code Section 4903 or 4903.1. Lien claims filed after Jan. 1 of this year are subject to a \$150 filing fee, and unresolved liens which were pending as of Jan. 1 of this year are subject to a \$100 "activation fee" pursuant to newly enacted Labor Code Sections 4903.05 and 4903.06.

A petition for costs is similar. Under the WCAB emergency regulations currently in effect, "costs" include a claim for the reimbursement of an expense or payment of service that is not allowable as a lien and can include interpreter's fees, fees related to copy services or subpoenas, electronic document filing fees and expenses under Labor Code Section 5710. Cost petitions are not subject to the fees imposed by Labor Code Sections 4903.05 and 4903.06.

Reid L. Steinfeld, general counsel for the Grant & Weber collections company, said he thinks interpreters actually have a strong argument that cost petitions, instead of liens, should be allowed based on the Workers' Compensation Appeals Board proposed changes to its Rules of Practice and Procedure.

Among the board's suggested amendments is the addition of [Section 10451\(b\)\(2\)](#), which specifically would provide that a petition for costs may be filed for interpreter services rendered during a medical treatment appointment or a medical-legal examination. The proposed rule makes no mention of copy services.

A [public hearing](#) on the proposed rule change is set for April 16 at the Hiram Johnson State Office Building in San Francisco.

Until the proposed regulations are enacted, however, Steinfeld says he sees "a void in the law" as to whether copy services and interpreting agencies can file claims as cost petitions instead of liens, so it would be up to the discretion of a judge as to whether to accept the petition. Scott Rountree, a partner in defense firm Bradford Barthel's Tarzana office, said he understands current Labor Code Section 5811 to interpreters to file cost petitions. He said he also thought copy services qualify as a "medical-legal" expense for which a service provider could file a cost petition, but not every judge agrees with him.

Rountree said he heard a judge at the downtown Los Angeles board at a hearing Wednesday morning telling an interpreter to file a lien if he wanted to get paid.

Defense attorney Michael Sullivan of Sullivan & Associates posited in [a column](#) for WorkCompCentral that neither copy service providers nor interpreters will have to file a lien if the WCAB adopts its proposed amendments to Rules of Practice and Procedure Section [10205\(aa\)](#).

He explained that Labor Code Section 5811 allows only a "party" to file a cost petition, and the WCAB regulations up until the start of this year had defined a "party" as an applicant, a defendant or a lien claimant. This meant interpreters and copy service providers had to file liens and become lien claimants because they were not a "party" who could file a cost petition.

The WCAB's [emergency regulations](#) adopted Jan. 1 and currently in effect, however, expanded the definition of a party to include "a lien claimant or a petitioner for costs" if the underlying claim has been resolved or the applicant has chosen not to proceed with it. The proposed final version also includes "a petitioner for costs" as within the definition of a "party."

Sullivan contended that these regulatory changes give service providers a valid claim that they don't need to file liens, and he called on members of the defense bar to challenge the proposed WCAB regulations because they conflict with the purposes and intent of Labor Code Sections 4903.05 and 4903.06.

Kinsey said he was not sure this would be necessary, in light of the limitation on what qualifies for a cost set out in the proposed version of Rules of Practice and Procedure Section [10205\(h\)](#).

The section states that a "cost" is any claim for reimbursement for an expense "that is not allowable as a lien."

Kinsey said he took that to mean a valid cost petition cannot include an expense that can be recovered on a lien basis, so "if you can file a lien for it, you can't file a petition for costs for it."

In other words, he said, "if it walks like a lien and squawks like a lien, it ain't a cost."

The WCAB also appears to be taking a hard line as to the requirement that lien claimants pay their activation and filing fees.

Last month, a panel comprised of Commissioners Alfonso Moresi, Deidra Lowe and Marguerite Sweeney ruled that the liens by claimants who hadn't paid their fees by the time of the lien conference were subject to dismissal with prejudice.

Rules of Practice and Procedure Section [10208\(a\)](#) provides that a claimant cannot participate in a lien conference without "written proof of prior timely payment of the fee."

Since the claimants demanding payment for services provided to the worker involved in a case called *Soto v. Marathon Industries* paid their fees at some point between 10:56 and 11:06 a.m. on January 10 of this year, but appeared at a lien conference at 8:30 that morning, the WCAB panel concluded the claims were properly dismissed.

The panel decision is available [here](#).

April 16, 2013
Steve Cattolica
Advocal

Ms Gabrielli,

Our thanks to you and the Commissioners for the opportunity to contribute to the proposed regulatory amendments. Please do not hesitate to call on me for any additional information.

April 16, 2013

Workers' Compensation Appeals Board
P.O. Box 429459
San Francisco, CA 94142-9459
Attn: Annette Gabrielli, Regulations Coordinator

RE: Proposed Amendments to WCAB Rules of Practice and Procedure – Via electronic mail

On behalf of our clients – the California Society of Industrial Medicine and Surgery, the California Society of Physical Medicine and Rehabilitation, the California Neurology Society, VQ OrthoCare and the California Workers' Compensation Services Association, we want to thank the Appeals Board for its diligence with respect to the proposed amendments to its Rules of Practice and Procedure, intended to help implement provisions of Senate Bill 863 (Ch. 363, Stats. 2012).

We were particularly heartened with the addition of Article 20, Review of Administrative Orders, Sections 10957, 10957.1 and 10959. While we understand the Board's desire to put limits on use of these sections, we also recognize that the provisions of SB 863 creating Independent Bill Review (IBR) and Independent Medical Review (IMR) and those that changed how Medical Provider Networks are certified and operate left much to be desired. As one employer representative at today's hearing put it, "there are holes in 863." Because of these holes and despite the Appeals Board efforts, we have discovered that our members and clients, the individuals and entities that will use IBR and IMR, remain without remedy in some instances. In the case of a MPN appellant, the regulations may present a substantial handicap to access for unrepresented injured workers. We urge the Appeals Board to review the entire gambit of issues that are likely to arise and reconsider its Rules to assure the courts can provide those remedies to everyone who has a right to them.

We present three examples, one each for the three sections mentioned above.

§ 10957. Petition Appealing Independent Bill Review Determination of the Administrative Director

Subdivision (a) reads in relevant part, "...For purposes of this section, a "determination" includes a decision regarding the amount payable to the provider, if any, and a decision that a dispute is not subject to independent bill review." (emph. added).

The highlighted phrase appears to open use of a § 10957 petition to parties who believe they have been inappropriately held out of the IBR process. We applaud the ability for these individuals to petition the Appeals Board for a remedy.

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However, subdivision (h) (1) limits eligibility for use of the petition to one or more of the grounds specified in Labor Code Section 4603.6(f). That is, appeal is only allowed on the grounds of an action in excess of the Administrative Director's (AD) powers, fraud, conflict of interest, bias, or an erroneous finding of fact.

Given the limitations of subdivision (h) (1), how does an aggrieved party gain access to use of a § 10957 petition if they were not subject to IBR in the first place? For instance, if the party is deemed ineligible because the reimbursement issue involved application of a PPO contract, subdivision (h) (1) does not apply. Where is this party to go for a remedy?

§ 10957.1. Petition Appealing Independent Medical Review Determination of the Administrative Director.

The same issue exists in this section as in our first example.

Subdivision (b) reads in relevant part, "...For purposes of this section, a "determination" includes a decision regarding medical necessity and a decision that a dispute is not subject to independent medical review." (emph. added). Again, we applaud the ability to petition to be included into IMR if the party so desires.

However, subdivision (i) (1) places the same limitations as before, but this time they are found within Labor Code Section 4610.6(h). The question arises again, how does an aggrieved party gain access to use of a § 10957.1 petition if he/she has not participated in the IMR process to begin with?

To illustrate, we foresee that a single Request For Authorization form (RFA) may list more than one treatment modality, diagnostic test or item of durable medical equipment subject to Utilization Review. Based on a properly submitted request for IMR by the injured worker, any denied items can be reviewed. For the purpose of this example, consider that two of five items were authorized leaving three to be reviewed through the IMR process. Pursuant to CCR Title 8, § 9792.10.6 (a), the claims administrator can terminate this IMR process by authorizing only one of the items under review. We believe that since the IMR process is terminated, the remaining two items will cease being reviewed, effectively being ruled no longer eligible for IMR. Since no decision has been made regarding the remaining two items, there are no Section 4610.6(h) grounds to invoke use of the petition. However, this situation fits perfectly within the definition found in proposed § 10957.1 (a) as, "a dispute (that is) not subject to independent medical review." Where is the injured worker to go for a remedy?

§ 10959. Petition Appealing Medical Provider Network Determination of the Administrative Director.

This section provides an aggrieved person with the opportunity to appeal a determination of the AD for, among other decisions, one to "revoke or suspend an MPN plan." (emph. added). Among the aggrieved could be "an injured employee or group of injured employees..." We

applaud this provision in the regulations, but urge that the Appeals Board allow some latitude within the filing requirements that may assist such an employee who has, up to the point of his/her need to appeal, been representing him/herself. In our reading, this section's stringent requirements will virtually assure that an injured worker obtain a lawyer. While obtaining legal representation may be an appropriate outcome, we request that the MPN appeals process direct injured workers who are unrepresented to an Information and Assistance Officer for help in filing this particular appeal.

§ 10451 Petition for Costs.

We seek clarification regarding subdivision (c) which stipulates that, "No petition for costs shall be filed or served until at least 60 days after a written demand for the costs has been mailed to or personally served on the defendant..." (emph. added). We request that the Appeals Board elsewhere define what constitutes a "written demand" in broad terms so as to accommodate both paper and electronically submitted "demands." It would be a shame if the form of the demand itself, became a new stumbling block.

§ 10451.1 Petition to Enforce IBR Determination

For claims administrators, we believe there are few, if any, meaningful deterrents for bad behavior found within the IBR provisions of SB 863 or the Administrative Director's regulations¹. We are on record as requesting close cooperation within the DWC and its Audit Unit with respect to findings of a "pattern and practice" as defined in proposed § 9792.5.12 (b)(3). We urge the Appeals Board to actively participate in the cooperative effort we have suggested to the Administrative Director. There should be no immunity from misconduct, audit or other penalties by simply participating in the IBR process. With respect to Petitions to Enforce IBR Determinations, if, as a result of the IBR appeals process, it can be determined that a claims administrator has systematically refused to comply with the Administrative Director's findings to pay, we would expect a swift target audit and additional penalties and fees would be assessed. We request that to the extent the Appeals Board can assist the Administrative Director in this effort, it will do so. If a means is lacking to provide the Administrative Director with the result of proceedings pursuant to this subdivision, we request the Appeals Board create one.

In testimony provided at today's public hearing, claims administrators and employers cautioned the Appeals Board to be sure that its proposed amendments to the Rules of Practice and Procedure not erode, "roll back" or otherwise negate the savings assumptions and projections upon which SB 863 was sold to the legislature. The panel was told that SB 863 was written with savings assumptions in mind that must be upheld. Their admonition to the Board, together with the admitted "holes in 863" mentioned previously, lead us to believe that

¹ Proposed amendments to CCR Title 8, Chapter 4.5, Subchapter 1 Administrative Director – Administrative Rules, Article 5.5.0 Rules for Medical Treatment Billing and Payment on or after October 15, 2011

the Appeals Board was being asked to patch those holes so that certain savings assumptions could be realized. We do not believe that is the Appeals Board's purpose to make good on those assumptions.

Specifically, employer arguments regarding the nature and intent of the SB 863 lien fees and the issues raised about the Appeals Board's interpretation of the application of Labor Code Sections 5811 and 4903 were misleading. Any legitimate provider of necessary services has a right to reimbursement for those services. If there is a dispute about reimbursement, they also have a right to an actual and effective remedy which includes due process. We maintain that the Appeals Board rules should allow for that right to be fully exercised without impediment. Instead, the sponsors and supporters of SB863 have often and readily admitted that the fees were established as a deterrent to exercising the remedy(ies) available. If there are any savings realized, it will be because providers do not pursue their right to a remedy. We do not believe this is a legitimate method of creating a low cost system. Nor do we attribute efficiency to a systematic loss of due process.

Lastly, SB 863 fees do not represent savings in relationship to past costs or certainly the current costs of running California's comp system. They represent new or added revenue. Depending on the "success" or "failure" of IBR and IMR and/or the lien process (that is, which entity succeeds and which one fails), those fees may in fact represent a new cost to employers when a provider, lien claimant or petitioner (pick one) prevails. The DWC will retain the fee revenue but fees reimbursed by the claims administrator will end up being passed through to the insured employer in the form of premiums. Increased fee revenue to the DWC may have a positive effect on employer assessments, but this too, does not represent actual savings.

At today's hearing, a defense attorney stated in effect, that the system (i.e. the Appeals Board) is living the consequences of SB 863. We could not agree more. These repercussions should be expected when legislation is written in secret, hurriedly introduced, hurriedly amended, hurriedly passed and signed into law. And in this regard, it will fall on the Appeals Board to provide the missing element of thoughtful consideration of the facts.

We stand ready to assist the Appeals Board further. Please do not hesitate to call on me for any additional information or clarification that may be necessary.

Respectfully,



Stephen J. Cattolica
Director, Government Relations
AdvoCal

April 16, 2013
Jeremy Merz
Policy Advocate
California Chamber of Commerce

Please accept the attached comments sent on behalf of a coalition of trade associations representing tens of thousands of California employers and insurance companies.
Please feel free to contact me directly with any questions.

Thank you,

April 16, 2013

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

RE: Workers' Compensation Appeals Board Proposed Changes to Rules of Practice and Procedure

Dear Mr. Sullivan:

The undersigned organizations thank you for the opportunity to provide comments on the proposed changes to the Workers' Compensation Appeals Board's Rules of Practice and Procedure. Combined, our organizations represent tens of thousands of insured and self-insured public and private California employers, as well as companies that provide workers' compensation insurance coverage in the state.

As more fully explained below, we are gravely concerned that many of the proposed changes to the *California Code of Regulations, Title 8, Division 1, Chapter 4.5. Division of Workers' Compensation, Subchapter 1.9. Rules of the Court Administrator & Subchapter 2. Workers' Compensation Appeals Board--Rules of Practice and Procedure*: (a) are contrary to the language of SB 863 (De Leon, 2012); (b) are contrary to the legislative intent; (c) would severely undermine the lien solution that was encompassed within SB 863; and (d) would dismantle the savings anticipated by the lien solution that formed the basis of much of the benefit increases contained within the bill.

From an over-arching standpoint, we would propose that the regulations be changed to include language clarifying liens under LC § 4903, costs under LC § 5811, the applicability of lien filing/activation fees, and the applicability of Independent Bill Review (IBR), Workers' Compensation Appeals Board (WCAB) jurisdiction and limitations periods. The following language, inserted as part of the definition of "lien" or "lien claim" within proposed Rule 10301(v) reads:

Whether filed as a lien or as a petition for costs, all medical treatment related services for which the employer is or may be liable (including but not limited to all services provided in connection with treatment under Article 2 commencing with LC 4600, including interpreters) and all medical-legal related services for which the employer is or may be liable (including but not limited to all services provided in connection with a medical-legal evaluation under Article 2.5 commencing with LC 4620, including interpreters) are subject to the lien filing/activation fee of LC 4903.05, 4903.06, and subject to WCAB lien jurisdiction under 4903(b) only upon completion of the IMR/IBR appeal process.

Whether filed as a lien or as a petition for costs, pursuant to LC 5811 the Appeals Board has original jurisdiction over claims for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services, and such claims shall be subject to the lien filing/activation fee of LC 4903.05, 4903.06 and limitations periods of LC 4903.5 in the same manner as liens generally.

The foregoing clarification would be consistent with the statutory language and the legislative intent to provide IBR as the primary manner of resolving medical-legal and medical treatment related billing disputes expeditiously, without wasting judicial resources.

Below are specific comments regarding other sections of the *Proposed Changes to the California Code of Regulations, Title 8, Division 1, Chapter 4.5. Division of Workers' Compensation, Subchapter 1.9. Rules of the Court Administrator & Subchapter 2. Workers' Compensation Appeals Board--Rules of Practice and*

Procedure as well as any proposed alternative regulatory language and commentary/discussion of the problem presented.

Proposed §10301(h)(2)

LANGUAGE FROM REGULATION:

(h) "Cost" means any claim for reimbursement of expense or payment of service that is not allowable as a lien under Labor Code section 4903. "Costs" include, but are not limited to:

(1) expenses and fees under Labor Code section 5710;

(2) costs under Labor Code section 5811, including qualified interpreter services rendered during a medical treatment appointment or medical-legal examination; and

(3) any amount payable under Labor Code section 4600 that would not be subject to a lien against the employee's compensation, including but not limited to any amount payable directly to the injured employee for reasonable transportation, meal, and lodging expenses and for temporary disability indemnity for each day of lost wages.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

Whether filed as a lien or as a petition for costs, all medical treatment related services for which the employer is or may be liable (including but not limited to all services provided in connection with treatment under Article 2 commencing with LC 4600, including interpreters) and all medical-legal related services for which the employer is or may be liable (including but not limited to all services provided in connection with a medical-legal evaluation under Article 2.5 commencing with LC 4620, including interpreters) are subject to the lien filing/activation fee of LC 4903.05, 4903.06, and subject to WCAB lien jurisdiction under 4903(b) only upon completion of the IMR/IBR appeal process.

Whether filed as a lien or as a petition for costs, pursuant to LC 5811 the Appeals Board has original jurisdiction over claims for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services, and such claims shall be subject to the lien filing/activation fee of LC 4903.05, 4903.06 and limitations periods of LC 4903.5 in the same manner as liens generally.

COMMENTS/DISCUSSION:

This regulation [proposed §10301(h)(2)] is contrary to the statutes and appears to improperly open the door to circumvent the lien filing/activation process and the IBR process thru LC § 5811.

Interpreter services in connection with medical treatment were formally made part of the LC § 4600 treatment obligation by judicial decision in the 2011 En Banc decision in the *Guitron* case, and are now included by statute in LC § 4600(g). Interpreter billings are expressly included in new LC § 4603.2(b)(1) billing requirements, (b)(2) regarding employer EOR requirements, (e) regarding second reviews as well as IBR under LC § 4603.6. It is therefore clear that interpreter fees in connection with medical treatment are to be treated the same as the medical treatment itself.

The only WCAB jurisdiction over such fee disputes is on appeal of the IBR pursuant to LC § 4603.6(f). Since the IBR decision is "a determination and order by the administrative director," the enforcement is through the AD and not the WCAB. Thus, per the statutory scheme, the only WCAB jurisdiction over interpreter fees bill in connection with medical treatment arises where: (a) there is an appeal of an IMR non-certification of medical necessity; or (b) there is an appeal of an

IBR decision that no additional payment is due. Because the interpreter services, in connection with medical treatment, are expressly within LC § 4600, such claims are considered medical treatment both by case law and statute, and the regulation should clarify that such interpreter fees *cannot* be claimed under 5811, that these fees are subject to the filing and activation fees, and that they are subject to the IBR process.

Interpreter services, in connection with medical-legal evaluations, are provided for in LC § 4620(a), LC § 4620(d) and LC § 4621(a). The payment process is found in LC § 4622 including the EOR requirement and the application of the IBR process mirroring the IMR process. Thus, per the statutory scheme, the only WCAB jurisdiction over interpreter fees bill in connection with medical-legal evaluation arises where: (a) there is an appeal of an IMR non-certification of medical necessity; or (b) where there is an appeal of an IBR decision that no additional payment is due. Because the interpreter services, in connection with medical-legal evaluations, are expressly within LC § 4600, such claims are considered medical-legal both by case law and statute, and the regulation should clarify that such interpreter fees *cannot* be claimed under LC § 5811, that these fees are subject to the filing and activation fees, and that they are subject to the IBR process.

Both the definition of “costs” and the “petition for costs” process, contemplated by this and related proposed regulations, are contrary to the statutes and serve only to create confusion regarding lien filing fees or activation fees.

Proposed §10301(h)(3)

LANGUAGE FROM REGULATION:

(h) “Cost” means any claim for reimbursement of expense or payment of service that is not allowable as a lien under Labor Code section 4903. “Costs” include, but are not limited to:

(3) any amount payable under Labor Code section 4600 that would not be subject to a lien against the employee’s compensation, including but not limited to any amount payable directly to the injured employee for reasonable transportation, meal, and lodging expenses and for temporary disability indemnity for each day of lost wages.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(h) “Cost” means any claim for reimbursement of expense or payment of service that is not allowable as a lien under Labor Code section 4903. “Costs” include, but are not limited to:

(3) any amount payable under Labor Code section 4600 that would not be subject to a lien against the employee’s compensation, ~~including but not limited to any amount payable directly to the injured employee for reasonable transportation, meal, and lodging expenses and for temporary disability indemnity for each day of lost wages~~

COMMENTS/DISCUSSION:

This regulation [10301(h)(3)], insofar as it appears to create a distinction between a “lien” and a LC § 5811 cost, is contrary to the statutes. The enumerated categories are found in LC § 4600(e) which is within Article 2. Claims falling within Article 2 are expressly subject to the lien process per the express language of LC § 4903(b). Because they are defined by LC § 4903 as subject of a lien against compensation, that definition cannot be changed by regulation. The WCAB cannot redefine these as a “cost” in order to put them outside the statutory lien process.

Proposed §10301(x)

LANGUAGE FROM REGULATION:

~~(t)(x)~~ “Lien claimant” means any person or entity claiming payment under the provisions of Labor Code section 4903 ~~or 4903.1 et seq.~~, including a claim of costs filed as a lien.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

“Lien claimant” means any person or entity claiming payment under the provisions of *the* Labor Code ~~section 4903 or 4903.1 et seq.~~, including but not limited to a claim of costs whether filed as a lien or by petition.” Whether filed as a lien or as a petition for costs, all medical treatment related services for which the employer is or may be liable (including but not limited to all services provided in connection with treatment under Article 2 commencing with LC 4600, including interpreters) and all medical-legal related services for which the employer is or may be liable (including but not limited to all services provided in connection with a medical-legal evaluation under Article 2.5 commencing with LC 4620, including interpreters) are subject to the lien filing/activation fee of LC 4903.05, 4903.06, and subject to WCAB lien jurisdiction under 4903(b) only upon completion of the IMR/IBR appeal process.

COMMENTS/DISCUSSION:

Proposed § 10301(x) is contrary to the statutes. Whether a cost claim is payable under LC § 4903 or LC § 5811, if the cost item relates to medical treatment or medical-legal process, it is still treated as a lien for purposes of EOB, IBR, filing/activation fees and WCAB jurisdiction. Thus, this proposed definition is not correct. Medical treatment expenses must go through the EOR process [LC § 4603.2(b)(2)], then through IBR [LC § 4603.2(e)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4603.6(f)]. Medical-legal expenses must go through EOR process [LC § 4622(a)(1)], then to IBR [LC § 4622(b)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4622(b)(4)]. The statute makes no distinction regarding how the claim is presented. Rather, it is the subject of the claim that dictates the applicable procedure. Therefore, this subsection should be amended to read as modified above.

Proposed §10301(y)

LANGUAGE FROM REGULATION:

(y) “Lien filing fee” or “filing fee” is the fee payable under Labor Code section 4903.05(c) for a section 4903(b) lien and/or claim of costs lien filed on or after January 1, 2013, unless the lien claimant is exempted from the fee by Labor Code section 4903.05(c)(7).

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(y) “Lien filing fee” or “filing fee” is the fee payable under Labor Code section 4903.05(c) for a ~~section 4903(b)~~ lien and/or claim of costs ~~lien~~ filed on or after January 1, 2013, unless the lien claimant is exempted from the fee by Labor Code section 4903.05(c)(7)

COMMENTS/DISCUSSION:

Proposed 10301(y) is contrary to the statutes. Whether a cost claim is payable under LC § 4903 or LC § 5811, if the cost item relates to medical treatment or medical-legal process, it is still treated as a lien for purposes of EOB, IBR, filing/activation fees and WCAB jurisdiction, and thus this proposed definition is not correct. Medical treatment expenses must go through the EOR process [LC § 4603.2(b)(2)], then through IBR [LC § 4603.2(e)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4603.6(f)]. Medical-legal expenses must go through EOR process [LC § 4622(a)(1)], then to IBR [LC § 4622(b)(4)] and finally to the WCAB,

albeit only on appeal from an adverse IBR decision [LC § 4622(b)(4)]. The statute makes no distinction regarding how the claim is presented. Rather, it is the subject of the claim that dictates the applicable procedure. The filing fee is payable per the express terms of LC § 4903.05(b) and (c) for both liens and cost claims. Insofar as the proposed language attempts to circumvent the filing fee by creating a new creature called a “petition for costs,” this creation is not authorized by the statutes and contrary to the clear legislative intent and statutory language. Therefore, this subsection should be amended to read as modified above.

Proposed §10301(aa)

LANGUAGE FROM REGULATION:

(u)(aa) “Lien conference” means a proceeding, including a proceeding following an order of consolidation, held in accordance with section 10770.1 for the purpose of assisting the parties in resolving disputed lien claims or claims of costs filed as liens pursuant to Labor Code section 4903 or 4903.4 or, if the dispute cannot be resolved, to frame the issues and stipulations and to list witnesses and exhibits in preparation for a lien trial.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(u)(aa) “Lien conference” means a proceeding, including a proceeding following an order of consolidation, held ~~in accordance with section 10770.1~~ for the purpose of assisting the parties in resolving disputed lien claims or claims of costs filed as liens or by petition pursuant to Labor Code section 4903 or 4903.4 or, if the dispute cannot be resolved, to frame the issues and stipulations and to list witnesses and exhibits in preparation for a lien trial.

COMMENTS/DISCUSSION:

The lien conference process should apply whether it is triggered by an appeal from IBR or subject to the WCAB’s original jurisdiction under LC § 5811 for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services. Whether a cost claim is payable under LC § 4903 or LC § 5811, if the cost item relates to medical treatment or medical-legal process, it is still treated as a lien for purposes of EOB, IBR, filing/activation fees and WCAB jurisdiction, and thus this proposed definition is not correct. Medical treatment expenses must go through the EOR process [LC § 4603.2(b)(2)], then through IBR [LC § 4603.2(e)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4603.6(f)]. Medical-legal expenses must go through EOR process [LC § 4622(a)(1)], then to IBR [LC § 4622(b)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4622(b)(4)]. The statute makes no distinction regarding how the claim is presented. Rather, it is the subject of the claim that dictates the applicable procedure. The WCAB’s original jurisdiction over liens and cost claims is limited under SB 863 to matters not within the medical treatment or medical-legal spheres. Therefore, this subsection should be amended to read as modified above

Proposed §10301(ii)

LANGUAGE FROM REGULATION:

(ii) “Section 4903(b) lien” means a lien claim filed in accordance with Labor Code section 4903(b) for medical treatment expenses incurred by or on behalf of the injured employee, as provided by Article 2 (commencing with Labor Code section 4600), including transportation service expenses incurred in connection with medical treatment. It shall not include any amount payable directly to the injured employee.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(ii) "Section 4903(b) lien" means a lien claim filed in accordance with Labor Code section 4903(b) for ~~medical treatment~~ reasonable expenses incurred by or on behalf of the injured employee, as provided by Article 2 (commencing with Labor Code section 4600), including interpreters and transportation service expenses incurred in connection with medical treatment. It shall not include any amount payable directly to the injured employee.

COMMENTS/DISCUSSION:

This regulation [§ 10301(ii)] is contrary to the statute. LC § 4903(b) related to all expenses under Article 2 commencing with LC § 4600 – it is not limited to medical treatment expenses. This regulation would improperly limit LC § 4903(b) to treatment expenses and transportation service expenses. That language is not supported by statute or case law. The reason for including transportation is stated to be reliance on the Supreme Court decision in *Avalon Bay*. But inasmuch as the WCAB in its 2011 En Banc opinion in *Guiron* similarly included interpreters within the LC § 4600 obligations, and the recently amended LC § 4600 expressly includes interpreters, there is no justification for excluding interpreters from the lien statute. Excluding interpreters from the statute serves only to create confusion regarding lien filing fees or activation fees, IBR and WCAB jurisdictional limitations. This proposed regulation improperly contradicts the express language of the statute. The regulation should be modified as set forth above.

Proposed §10408

LANGUAGE FROM REGULATION:

§ 10408. ~~Forms of Application for Adjudication of Claim Form and Other Forms.~~

(a) Each of the following documents ~~The Application for Adjudication for compensation benefits and death benefits~~ shall be on a ~~form~~ forms prescribed and approved by the Appeals Board: (1) an application for adjudication of claim for compensation benefits or death benefits; (2) a lien; (3) a declaration of readiness (including for an expedited hearing); (4) a pretrial conference statement (including for a lien conference); (5) Minutes of Hearing (except Minutes of Hearing prepared by a court reporter); (6) a compromise and release agreement (including for dependency and third-party claims); (7) stipulations with request for award (including death cases); (8) a petition to terminate liability for temporary disability indemnity; (9) a special notice of lawsuit; and (10) any other form the Appeals Board, in its discretion, determines should be uniform and standardized.

(b) Any form prescribed and approved by the Appeals Board may be printed (i.e., hard copy) by the Division of Workers' Compensation for distribution at district offices of the Workers' Compensation Appeals Board. In addition, the Division may create: (1) electronic versions of the prescribed and approved forms (i.e., e-forms); and/or (2) optical character recognition versions of those forms (i.e., OCR forms), either in fillable format or otherwise, for posting on the Division's Forms webpage. Any hard copy, e-form, or OCR form for proceedings before the Workers' Compensation Appeals Board created by the Division shall be presumed to have been prescribed and approved by the Appeals Board unless the Appeals Board issues an order or a formal written statement to the contrary.

(c) No workers' compensation administrative law judge and no district office of the Workers' Compensation Appeals Board shall require the parties to use a form other than that prescribed and approved by the Appeals Board.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(a) Each of the following documents The Application for Adjudication for compensation benefits and death benefits shall be on a form forms prescribed and approved by the Appeals Board: (1) an application for adjudication of claim for compensation benefits or death benefits; (2) a lien; (3) a declaration of readiness (including for an expedited hearing); (4) a pretrial conference statement (including for a lien conference); (5) Minutes of Hearing (except Minutes of Hearing prepared by a court reporter); (6) a compromise and release agreement (including for dependency and third-party claims); (7) stipulations with request for award (including death cases); (8) a petition to terminate liability for temporary disability indemnity; (9) a special notice of lawsuit; (10) *Petition for Costs*; (11) *Petition to Enforce IBR Determination*; (12) *Petition for Determination of Non-IBR Medical-Legal Dispute*; (13) *Petition for Dismissal of Inactive Lien Claims for Lack of Prosecution*; (14) *Petition for Medical Information*; (15) *Petition for Medical-Legal Costs*; (16) *Petition by Non-Physician Lien Claimant for Medical Information*; (17) *Notices of Representation and Notices of Change of Representation*; (19) *Notice of Non-Representation*; (20) *Petition Appealing Independent Bill Review Determination of the Administrative Director*; (21) *Petition Appealing Independent Medical Review Determination of the Administrative Director*; (22) *Petition Appealing Medical Provider Network Determination of the Administrative Director* and (40) (23) *any other form the Appeals Board, in its discretion, determines should be uniform and standardized.*

(b) Any form prescribed and approved by the Appeals Board may be printed (i.e., hard copy) by the Division of Workers' Compensation for distribution at district offices of the Workers' Compensation Appeals Board. In addition, the Division ~~may~~ shall create: (1) electronic versions of the prescribed and approved forms (i.e., e-forms); and/or (2) optical character recognition versions of those forms (i.e., OCR forms), either in fillable format or otherwise, for posting on the Division's Forms webpage. Any hard copy, e-form, or OCR form for proceedings before the Workers' Compensation Appeals Board created by the Division shall be presumed to have been prescribed and approved by the Appeals Board unless the Appeals Board issues an order or a formal written statement to the contrary.

(c) No workers' compensation administrative law judge and no district office of the Workers' Compensation Appeals Board shall require the parties to use a form or procedure other than that prescribed and approved by the Appeals Board

COMMENTS/DISCUSSION:

(a) Proposed § 10408 should be modified to include other mandatory use forms in order to create uniformity and expedite case processing for all interested persons. Use of mandatory forms will streamline issue/topic/dispute/issue identification, entry into electronic case management, etc. The following addition are recommend:

- *"Petition for Costs"*
- *Petition to Enforce IBR Determination*
- *"Petition for Determination of Non-IBR Medical-Legal Dispute"*
- *Petition for Dismissal of Inactive Lien Claims for Lack of Prosecution*
- *Petition for Medical Information"*
- *Petition for Medical-Legal Costs*
- *Petition by Non-Physician Lien Claimant for Medical Information.*
- *Notices of Representation and Notices of Change of Representation*
- *Notice of Non-Representation*
- *Petition Appealing Independent Bill Review Determination of the Administrative Director*
- *Petition Appealing Independent Medical Review Determination of the Administrative Director*
- *Petition Appealing Medical Provider Network Determination of the Administrative Director*

- (b) Because old-style typewriters are increasingly unavailable in this electronic age, mandatory forms should be *required* to be posted on the DWC and/or WCAB website and available in electronic format that can be filled out and printed or electronically transmitted. It is recommended that this language be changed from “*may*” to “*shall*.”
- (c) Local offices are notorious for developing both their own preferred forms and local procedures. Both are prohibited by statute, and this regulation should address the required uniformity of both. Therefore, the modification indicated above should be made.

Proposed §10451(b)

LANGUAGE FROM REGULATION:

(b)(1) Except as provided in subdivision (b)(2) or subdivision (b)(3), a petition for costs shall not be filed for:

(A) any medical treatment cost that may be claimed ~~through~~ as a section 4903(b) lien;

(B) any medical-legal cost under Labor Code section 4620 et seq.; or

(C) any cost that is subject to independent medical review (IMR) or independent bill review (IBR) and their related procedures.

(2) A petition for costs may be filed for interpreter services rendered during a medical treatment appointment or a medical-legal examination. Such a petition may raise all issues, including the amount payable under an official fee schedule whether or not independent bill review was previously pursued. Such a petition may be filed only if the Labor Code section 4603.2 and 4622 procedures of billing and report submission, explanation of review, and second review (as applicable) have been completed or have been timely attempted without timely response. Nothing in this subdivision shall preclude an interpreter from electing to pursue independent bill review.

(3) A petition for costs may be filed for any medical-legal cost if:

(A) the provider submits a properly documented written billing to the defendant in accordance with Labor Code section 4622(a)(1) and, within 60 days thereafter, the defendant makes less than full payment and fails to serve an explanation of review that complies with Labor Code section 4603.3 and any related regulations adopted by the Administrative Director; or

(B) the provider submits a timely and proper request for a second review to the defendant in accordance with Labor Code section 4622(b)(1) and, within 14 days thereafter, the defendant either fails to make a final written determination or it fails to make payment consistent with that final written determination; or

(C) the provider submits a timely objection to the defendant’s explanation of review regarding a dispute other than the amount payable and, within 60 days thereafter, the defendant fails to file both a “Petition for Determination of Non-IBR Medical-Legal Dispute” and a declaration of readiness with the Workers’ Compensation Appeals Board as required by Labor Code section 4622(c) and Rule 10451.2.

(4) If the Workers’ Compensation Appeals Board determines that:

(A) a defendant failed to comply with the provisions of subdivisions (b)(3)(A) and/or (b)(3)(B), the defendant shall be deemed to have finally waived all objections to the provider’s medical-legal billing other than compliance with Labor Code sections 4620 and 4621;

(B) a defendant failed to comply with the provisions of subdivision (b)(3)(C), the defendant shall be deemed to have finally waived all objections relating to the provider’s medical-legal billing other than: (i) the amount to be paid pursuant to the fee schedule(s) in effect on the date

the services were rendered; and (ii) compliance with Labor Code sections 4620 and 4621.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(b)(1) Whether filed as a lien or as a petition for costs, all medical treatment related services for which the employer is or may be liable (including but not limited to all services provided in connection with treatment under Article 2 commencing with LC 4600, including interpreters) and all medical-legal related services for which the employer is or may be liable (including but not limited to all services provided in connection with a medical-legal evaluation under Article 2.5 commencing with LC 4620, including interpreters) are subject to the lien filing/activation fee of LC 4903.05, 4903.06, and subject to WCAB lien jurisdiction under 4903(b) only upon completion of the IMR/IBR appeal process. ~~Except as provided in subdivision (b)(2) or subdivision (b)(3), a petition for costs shall not be filed for:~~

~~(A) any medical treatment cost that may be claimed through as a section 4903(b) lien;~~

~~(B) any medical-legal cost under Labor Code section 4620 et seq.; or~~

~~(C) any cost that is subject to independent medical review (IMR) or independent bill review (IBR) and their related procedures.~~

(2) Whether filed as a lien or as a petition for costs, pursuant to LC 5811 the Appeals Board has original jurisdiction over claims for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services, and such claims shall be subject to the lien filing/activation fee of LC 4903.05, 4903.06 and limitations periods of LC 4903.5 in the same manner as liens generally.

A petition for costs may be filed for interpreter services rendered during a medical treatment appointment or a medical-legal examination. Such a petition may raise all relevant issues, including the amount payable under an official fee schedule whether or not independent bill review was previously pursued. Such a petition may be filed only if the Labor Code section 4603.2 and 4622 procedures of billing and report submission, explanation of review, and second review and IBR (as applicable) have been completed or have been timely attempted without timely response. Nothing in this subdivision shall preclude an interpreter from electing to pursue independent bill review.

(3) A petition for costs may be filed for any medical-legal cost only if the Labor Code section 4603.2 and 4622 procedures of billing and report submission, explanation of review, and second review and IBR (as applicable) have been completed or have been timely attempted without timely response, or where

~~(A) the provider submits a properly documented written billing to the defendant in accordance with Labor Code section 4622(a)(1) and, within 60 days thereafter, the defendant makes less than full payment and fails to serve an explanation of review that complies with Labor Code section 4603.3 and any related regulations adopted by the Administrative Director; or~~

~~(B) the provider submits a timely and proper request for a second review to the defendant in accordance with Labor Code section 4622(b)(1) and, within 14 days thereafter, the defendant either fails to make a final~~

~~written determination or it fails to make payment consistent with that final written determination; or~~

~~(C) the provider submits a timely objection to the defendant's explanation of review regarding a dispute other than the amount payable and, within 60 days thereafter, the defendant fails to file both a "Petition for Determination of Non-IBR Medical-Legal Dispute" and a declaration of readiness with the Workers' Compensation Appeals Board as required by Labor Code section 4622(c) and Rule 10451.2.~~

~~(4) If the Workers' Compensation Appeals Board determines that:~~

~~(A) a defendant failed to comply with the provisions of subdivisions (b)(3)(A) and/or (b)(3)(B), the defendant shall be deemed to have finally waived all objections to the provider's medical-legal billing other than compliance with Labor Code sections 4620 and 4621;~~

~~(B) a defendant failed to comply with the provisions of subdivision (b)(3)(C), the defendant shall be deemed to have finally waived all objections relating to the provider's medical-legal billing other than: (i) the amount to be paid pursuant to the fee schedule(s) in effect on the date the services were rendered; and (ii) compliance with Labor Code sections 4620 and 4621.~~

COMMENTS/DISCUSSION:

This regulation [§ 10451(b)] is contrary to the express terms of the applicable statute, insofar as it purports to provide a new path to exempt lien filing and cost claims related to medical treatment or medical-legal related services from the mandatory procedures under SB 863.

As more fully set out below, the Initial Statement of Reasons (ISOR) misstates the statute and, based on this misstatement, creates an unauthorized set of procedures. The proposed regulation effectively creates an unlawful process whereby any party can circumvent the entirety of the SB 863 lien reforms, lien filing fee and lien activation fee and IBR statutes by instead filing a heretofore unknown document called "claim for costs" instead of a lien.

More specifically, the ISOR inaccurately states as follows:

"Section 4903.05(b) states: 'Any lien claim for [medical treatment] expenses under subdivision (b) of Section 4903 or for claims of costs shall be filed with the appeals board electronically using the form approved by the appeals board.'"

But the statute does not say "medical treatment;" it says "lien claim for expenses under Subdivision (b) of section LC § 4903 or for claims of costs." The proposed regulation then improperly creates a new "petition for costs," seemingly relying upon the same kind of misplaced "last antecedent rule" logic that the Courts of Appeal previously rejected in the cases dealing with SB 899's changes in LC § 4660(b). Using that same kind of misplaced "last antecedent rule" logic, the proposal herein would nullify virtually all of the lien reforms within SB 863. This kind of logic was rejected by the Court of Appeals in a published opinion in *Costco* as it related to SB 899 as it was contrary to the statutory scheme and legislative intent. The proposed rule herein is unauthorized for the same reasons, namely that it would improperly limit and restrict the application of SB 863's lien filing reforms.

According to the legislative history, the lien filing fees and related changes contained within SB 863 were expected to save \$119 million, and those savings were used to increase benefits to the

injured workers without increasing costs to the system. All of those anticipated savings instantly vanish with the proposed rule change – clearly contrary to the express language and clear intent of the statutory change. The regulation should be clarified that, whether filed as a “lien claim for expenses” or a “claim of costs,” if the services provided fall within the purview of LC § 4903 they are subject to the lien filing and activation fees, and that all bills for such services are governed by IMR/IBR and not subject to WCAB jurisdiction except upon appeal from an adverse IBR/IMR decision.

With regard to the proposed special interpreter related portions of the draft regulation [(b)(2)], that portion of the proposed regulation is also contrary to the express language of the statutes. Interpreter services in connection with medical treatment were formerly allowed by judicial decision in the 2011 En Banc decision in the *Guiron* case and are now included by statute in LC § 4600(g). Interpreter billings are expressly included in the new LC § 4603.2(b)(1) billing requirements, (b)(2) regarding employer EOR requirements, and (e) regarding second reviews and then IBR under 4603.6. The only WCAB jurisdiction over such disputes is on appeal of the IBR pursuant to LC § 4603.6(f). The proposed regulation improperly makes the IBR process elective (contrary to the Supreme Court’s rationale in *Sandhagen* in the analogous UR context). Thus, per the statutory scheme, the only WCAB jurisdiction over interpreter fees bill in connection with medical treatment arises where: (a) there is an appeal of an IMR non-certification of medical necessity; or (b) there is an appeal of an IBR decision that no additional payment is due. Because the interpreter services in connection with medical treatment are expressly within LC § 4600, such claims are considered medical treatment both by case law and statute, and the regulation should clarify that such interpreter fees *cannot* be claimed under LC § 5811, these fees are subject to the filing and activation fees, and that they are subject to the IBR process.

Interpreter services in connection with medical-legal evaluations are provided for in LC § 4620(a), LC § 4620(d) and LC § 4621(a). The payment process is found in LC § 4622 including the EOR requirement and the application of the IBR process mirroring the IMR process. Thus, per the statutory scheme, the only WCAB jurisdiction over interpreter fees bill in connection with medical-legal evaluation arises (a) where there is an appeal of an IMR non-certification of medical necessity or (b) where there is an appeal of an IBR decision that no additional payment is due. Because the interpreter services in connection with medical-legal evaluations are expressly within LC § 4600, such claims are considered medical-legal both by case law and statute, and the regulation should clarify that such interpreter fees *cannot* be claimed under LC § 5811, that these fees are subject to the filing and activation fees, and that they are subject to the IBR process.

Both the definition of “costs” and the “petition for costs” process contemplated by this and related proposed regulations is contrary to the statutes and serve only to create confusion regarding lien filing fees or activation fees, application of the IBR process, and the jurisdiction of the Appeals Board.

The proposed regulation is invalid because it is not “reasonably necessary to effectuate the purpose of the statute.” (*State Farm*, 32 Cal.4th at p. 1040 (quoting from *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 40)). Indeed, this proposed regulation is contrary to both the statutory language and legislative intent.

As stated above, interpreter bills are expressly subject to the IBR process and are not elective as suggested by proposed regulation § 10451(b)(2). That portion of the proposed regulation [§ 10451(b)(2)] is therefore contrary to the statutes.

The waiver provisions of proposed regulation § 10451(b)(4) are directly contrary to LC § 4622(f) and the WCAB’s En Banc decision in *Kuntz* which held that LC § 4603.2 did not authorize a waiver of defenses when objections were untimely or incomplete. The ISOR completely misconstrues the *Kuntz* case and LC § 4622(f). *Kuntz* held “a defendant’s failure to specifically object to a medical treatment lien claim on the basis of reasonable medical necessity (or on any

other basis) does not effect a waiver of that objection.” Therefore, the regulation should be stricken as it is based on an erroneous interpretation of the statute and case law.

Proposed §10451(c)

LANGUAGE FROM REGULATION:

(c) No petition for costs shall be filed or served until at least 60 days after a written demand for the costs has been mailed to or personally served on the defendant. The petition shall append: (1) a copy of the written demand, together with a copy of its proof of service; and (2) a copy of the defendant’s response, if any. A petition that fails to comply with these provisions shall be dismissed.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(c) No petition for costs pursuant to LC 5811 for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services shall be filed or served until at least 60 days after a written demand for the costs has been mailed to or personally served on the defendant. The petition shall append: (1) a copy of the written demand, together with a copy of its proof of service; and (2) a copy of the defendant’s response, if any. A petition that fails to comply with these provisions shall be dismissed by operation of law and shall not toll the time for filing a lien claim under Labor Code section 4903.5, whether or not the petition was accepted for filing, and it shall not relieve the petitioning person or entity from the lien filing fee, lien activation fee, and other provisions of Labor Code sections 4903.05 and 4903.06 and their related regulations.

COMMENTS/DISCUSSION:

If the cost item relates to medical treatment or medical-legal process, it is still treated as a lien for all purposes (including EOB, IBR, filing/activation fees and WCAB jurisdiction) and thus this proposed regulation is not correct. Medical treatment expenses must go through the EOR process [LC § 4603.2(b)(2)], then through IBR [LC § 4603.2(e)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4603.6(f)]. Medical-legal expenses must go through EOR process [LC § 4622(a)(1)], then to IBR [LC § 4622(b)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4622(b)(4)]. The statute makes no distinction regarding how the claim is presented. Rather, it is the subject of the claim that dictates the applicable procedure.

There is slightly different treatment for discretionary costs under LC § 5811 not related to medical treatment or medical-legal services. The above suggested changes to the language recognizes that difference, and remains consistent with the enactment of extensive lien reforms in SB 863 and the intent behind those changes.

Automatic dismissal by operation of law of liens/cost claims is provided for throughout the proposed regulations as a means of avoiding unnecessary paperwork and administrative expense, and this section should be brought into compliance with that framework.

Proposed §10451(d)

LANGUAGE FROM REGULATION:

(d) Except as provided in subdivision (b)(2) or (b)(3), if the petition seeks payment for any costs that are lienable under Labor Code section 4903(b) or that are subject to

independent medical review and/or independent bill review, the entire petition shall be dismissed by operation of law. In addition, the petition shall not toll the time for filing a lien claim under Labor Code section 4903.5, whether or not the petition was accepted for filing, and it shall not relieve the petitioning person or entity from the lien filing fee, lien activation fee, and other provisions of Labor Code sections 4903.05 and 4903.06 and their related regulations.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(d) ~~Except as provided in subdivision (b)(2) or (b)(3), Unless the Labor Code section 4603.2 and 4622 procedures of billing and report submission, explanation of review, and second review and IBR/IMR and appeals process (as applicable) have been completed or have been timely attempted without timely response,~~ if the petition seeks payment for any costs that are lienable under Labor Code section 4903(b) or that are subject to independent medical review and/or independent bill review, the entire petition shall be dismissed by operation of law. In addition, the petition shall not toll the time for filing a lien claim under Labor Code section 4903.5, whether or not the petition was accepted for filing, and it shall not relieve the petitioning person or entity from the lien filing fee, lien activation fee, and other provisions of Labor Code sections 4903.05 and 4903.06 and their related regulations.

COMMENTS/DISCUSSION:

This proposed regulation [§ 10451(d)] is contrary to the statute and legislative intent.

As currently drafted, the ISOR erroneously claims that LC § 5811 may allow costs between parties. LC § 5811 is a more specific statute than the extensive and highly specific medical-legal lien statutes [whereby (1) Labor Code section 4620(a) defines “medical-legal expense” to include interpreter’s fees; (2) Labor Code section 4622 states that “all medical-legal expenses ... shall ... be paid ... as follows” (italics added); and (3) Labor Code section 4622(a) and (b) go on to provide that, if an “amount paid” medical-legal expense issue is not resolved through the procedure of billing and report submission, EOR, and second review, “the provider shall request an independent bill review as provided for in Section 4603.6” (italics added)]. And medical treatment lien statutes [whereby (1) Labor Code section 4600(g) indicates that interpreter services during medical treatment appointments are a medical treatment expense; (2) Labor Code section 4603.2(b) provides that medical treatment expenses go through a procedure of billing submission, explanation of review, and second review; and (3) Labor Code section 4603.2(e)(4) provides that, if an “amount paid” medical-legal expense issue still remains unresolved, “the provider shall request an independent bill review as provided for in Section 4603.6” (italics added).]

In light of the legislative expectation that the lien changes would save \$115 million which savings were then used to increase indemnity benefits to injured workers without increasing any costs to the system, the proposed regulation what would eviscerate the legislative expectation. The WCAB’s regulatory overreach goes against the legislative intent and is not authorized. Here the proposed regulatory action would be directly contrary to the clear intent of the statute and contrary to its language and is therefore invalid without the changes as proposed to § 10451(b) noted in the suggested language above. The proposed regulation should be modified as noted above.

Proposed §10451(i)(1)

LANGUAGE FROM REGULATION:

(i)(1) A petition for costs shall be placed on calendar: (A) on the filing of a declaration of readiness; or (B) on the Workers' Compensation Appeals Board's own motion. A declaration of readiness shall be filed only by a "party" as defined by section 10301(dd)(4).

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(i)(1) If the Labor Code section 4603.2 and 4622 procedures of billing and report submission, explanation of review, and second review and IBR/IMR and appeals process (as applicable) have been completed or have been timely attempted without timely response, A a petition for costs shall be placed on calendar: (A) on the filing of a declaration of readiness; or (B) on the Workers' Compensation Appeals Board's own motion. A declaration of readiness shall be filed only by a "party" as defined by section 10301(dd)(4).

COMMENTS/DISCUSSION:

A lien or cost petition should not be placed on calendar until the applicable LC § 4603.2 and LC § 4622 procedures of billing and report submission, explanation of review, and second review and IBR/IMR and appeals process (as applicable) have been completed or have been timely attempted without timely response. The change above clarifies this process and avoids setting cases at the WCAB prematurely.

Proposed §10451(i)(2)

LANGUAGE FROM REGULATION:

(i)(2) Notwithstanding subdivision (i)(1), the Workers' Compensation Appeals Board may, at any time, issue a notice of intention to allow or disallow the costs sought by the petition, in whole or in part. The notice of intention shall give the petitioner and any adverse party no less than 10 calendar days to file written objection showing good cause to the contrary. If no timely written objection is filed, or if the written objection on its face fails to show good cause, the Workers' Compensation Appeals Board, in its discretion, may: (A) issue an order regarding the petition for costs, consistent with the notice of intention; or (B) set the matter for hearing.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(i)(2) Notwithstanding subdivision (i)(1), the Workers' Compensation Appeals Board may, at any time *sua sponte*, issue a notice of intention to allow or disallow the costs sought by the petition, in whole or in part. The notice of intention shall give the petitioner and any adverse party no less than 10 calendar days to file written objection showing good cause to the contrary. If no timely written objection is filed, or if the written objection on its face fails to show good cause, the Workers' Compensation Appeals Board, in its discretion, may: (A) issue an order regarding the petition for costs, consistent with the notice of intention; or (B) set the matter for hearing.

COMMENTS/DISCUSSION:

Where the WCAB identifies a cost claim as non-reimbursable as claimed, it should have the power to issue a NIT to deny that cost claim without having to wait for a DOR or wasting calendar time.

Additionally, proposed § 10451(i)(2) provides too short a time frame to object to the NIT. Ostensibly 10 calendar days might seem enough. But if the NIT issues on a Friday, it actually gives the responding party only 6 working days to object. It is recommended that the regulation be modified to allow for no fewer than 10 working days to file a written objection.

Proposed §10451(i)(3)

LANGUAGE FROM REGULATION:

(j) Unless the petition for costs is filed by a “party” within the meaning of section 10301(dd)(1) or (2), the petitioner shall be treated as a lien claimant under:

...

(3) section 10770.1, i.e., the petitioner for costs shall have the same rights and responsibilities as a lien claimant for all purposes under section 10770.1 (other than provisions relating to the payment of a lien filing or activation fee), including but not limited to the following:

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(j) Unless the petition for costs is filed by a “party” within the meaning of section 10301(dd)(1) or (2), the petitioner shall be treated as a lien claimant under:

...

(3) section 10770.1, i.e., the petitioner for costs shall have the same rights and responsibilities as a lien claimant for all purposes under section 10770.1 ~~(other than provisions relating to the payment of a lien filing or activation fee)~~, including but not limited to the following:

COMMENTS/DISCUSSION:

The blanket exemption from the entire statutory lien process through use of a newly established regulatory petition for costs is contrary to the statutory scheme and legislative intent. Whether a cost claim is payable under LC § 4903 or claimed under LC § 5811, if the cost item relates to medical treatment or medical-legal process, it is still treated as a lien for all purposes (including EOB, IBR, filing/activation fees and WCAB jurisdiction) and thus this proposed regulation is not correct.

Medical treatment expenses must go through the EOR process [LC § 4603.2(b)(2)], then through IBR [LC § 4603.2(e)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4603.6(f)]. Medical-legal expenses must go through EOR process [LC § 4622(a)(1)], then to IBR [LC § 4622(b)(4)] and finally to the WCAB, albeit only on appeal from an adverse IBR decision [LC § 4622(b)(4)]. The statute makes no distinction regarding how the claim is presented. Rather, it is the subject of the claim that dictates the applicable procedure. Therefore, this subsection should be amended to read as modified above.

Proposed §10451.1(a)

LANGUAGE FROM REGULATION:

(a) Any person or entity may file a petition to enforce an independent bill review (IBR) determination if

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(a) Any person or entity *to whom the Administrative Director has issued an IBR determination and order requiring payment* may file a petition to enforce an independent bill review (IBR) determination if

COMMENTS/DISCUSSION:

Proposed § 10451.1(a) is overbroad in that it provides no limitation on who can file a petition to enforce. Only parties in whose favor the AD has issued an IBR determination requiring payment should be able to file a petition. As such, § 10451.1(a) should be changed to read as follows: “Any person or entity *to whom the Administrative Director has issued an IBR determination and order requiring payment* may file a petition to enforce ...”

Proposed §10451.1(a)(2)

LANGUAGE FROM REGULATION:

(2) the defendant has not paid the full amount allowed, including possible penalties and interest under Labor Code section 4622(a) and/or possible IBR fee reimbursement under Labor Code section 4603.6(c), within 20 days of finality of the determination and order, as extended by sections 10507 and 10508

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(2) the defendant has not paid the full amount allowed, including ~~possible~~ penalties and interest awarded by the Administrative Director under Labor Code section 4622(a) and/or ~~possible~~ IBR fee reimbursement awarded by the Administrative Director under Labor Code section 4603.6(c), within 20 days of finality of the determination and order, as extended by sections 10507 and 10508

COMMENTS/DISCUSSION:

The use of the word “possible” in proposed § 10451.1(a)(2) creates no appropriate legal standard. The regulation should be clarified as noted above to clearly state it relates to penalties and interest or IBR fees awarded by the AD.

Proposed §10451.1(h)

LANGUAGE FROM REGULATION:

(h) Within 15 days of the filing of the petition to enforce, the Workers’ Compensation Appeals Board shall issue a notice of intention to grant or deny the petition, in whole or in part. The notice of intention shall give the petitioner and any adverse party no less than 10 calendar days to file written objection showing good cause to the contrary. If no timely written objection is filed, or if the written objection on its face fails to show good cause, the Workers’ Compensation Appeals Board, in its discretion, may: (1) issue an order regarding the petition to enforce, consistent with the notice of intention; or (2) set the matter for hearing.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(h) Within 15 days of the filing of the petition to enforce, the Workers’ Compensation Appeals Board shall issue a notice of intention to grant or deny the petition, in whole or in part. The notice of intention shall give the petitioner and any adverse party no less than 10 ~~calendar~~ working days to file written objection showing good cause to the contrary. If no timely written objection is filed, or if the written objection on its face fails to show good cause, the Workers’ Compensation Appeals Board, in its discretion, may: (1) issue an order regarding the petition to enforce, consistent with the notice of intention; or (2) set the matter for hearing.

COMMENTS/DISCUSSION:

Proposed § 10451.1(h) provides too short a time frame to object to the NIT. Ostensibly 10 calendar days to file a written objection might seem enough. But if the NIT issues on a Friday, it actually gives the responding party only 6 actual days. It is recommended that the regulation be modified to allow for no fewer than 10 working days to file a written objection.

Proposed §10582.5(c)(2)(B)(i)

LANGUAGE FROM REGULATION:

(i) the petitioner made a reasonable and good faith payment and, where required, an explanation of review on each billing consistent with all existing law(s), ~~where applicable, including but not limited to the following:~~ (I) Lab. Code, § 4603.2(b)(1) and Cal. Code Regs., tit. 8, § 9792.5(c) for medical treatment liens; (II) Lab. Code, § 4622(c) and Cal. Code Regs., tit. 8, § 9794(b) & (c) for medical-legal liens; and (III) Cal. Code Regs., tit. 8, § 9795.4(a) for interpreter liens; or

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(i) the petitioner made a reasonable and good faith payment and, where required, an explanation of review on each billing consistent with all ~~existing applicable~~ law(s), ~~where applicable, including but not limited to the following:~~ (I) Lab. Code, § 4603.2(b)(1) and Cal. Code Regs., tit. 8, § 9792.5(c) for medical treatment liens; (II) Lab. Code, § 4622(c) and Cal. Code Regs., tit. 8, § 9794(b) & (c) for medical-legal liens; and (III) Cal. Code Regs., tit. 8, § 9795.4(a) for interpreter liens; or

COMMENTS/DISCUSSION:

The reference to “all existing laws” in proposed rule § 10582.5 is an error in that the law in effect on the date of service generally governs past conduct. Instead, it should say “consistent with all ~~existing applicable~~ law(s)....”

Proposed §10606(d)

LANGUAGE FROM REGULATION:

(d) The report of an agreed or qualified medical evaluator shall be admissible for the purpose(s) of: (1) making a general award of future medical care; (2) assessing the adequacy of a compromise and release agreement in accordance with section 10882; and (3) determining disputed lien claims or claims of costs.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

- (d) The report of an agreed or qualified medical evaluator shall be admissible for the purpose(s) of: (1) making a general award of future medical care; (2) assessing the adequacy of a compromise and release agreement in accordance with section 10882; and (3) determining disputed lien claims or claims of costs.
- (e) The report of an agreed or qualified medical evaluator shall not be admissible regarding the employee's dispute of a utilization review decision under Section 4610, nor to the employee's dispute of the medical provider network treating physician's diagnosis or treatment recommendations under Sections 4616.3 and 4616.4

COMMENTS/DISCUSSION:

Consistent with the ISOR on 10606(d), this section should be amended by adding an additional paragraph to clarify the statutory limitation regarding admissibility of AME and QME reports. Specifically this paragraph should state:

The report of an agreed or qualified medical evaluator shall not be admissible regarding the employee's dispute of a utilization review decision under Section 4610, nor to the employee's dispute of the medical provider network treating physician's diagnosis or treatment recommendations under Sections 4616.3 and 4616.4

Proposed § 10608:

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

§ 10608. Filing and Service of Medical Reports, and Medical-Legal Reports, and Other Medical Information.

~~(a) All medical reports and medical-legal reports filed with the Workers' Compensation Appeals Board shall be filed in accordance with the regulations of the Court Administrator, or as otherwise provided by these rules. Service of all medical reports, and medical-legal reports, and other medical information on other parties shall be made in accordance with the provisions of this section. For purposes of this section, the following definitions shall apply:~~

~~(1) "Medical information" shall include but is not limited to: (A) medical reports; (B) medical-legal reports; (C) deposition transcripts (including but not limited to depositions of physicians) containing references to medical reports, medical-legal reports, medical treatment, medical diagnoses, or other medical opinions; (D) medical chart notes; and (E) diagnostic imaging as defined in section 10603(a)(2).~~

~~(2) "Party" shall mean: (A) an injured employee; (B) the dependent of a deceased injured employee; (C) a party defendant named in the application or other case opening document or subsequently joined; or (D) the attorney or non-attorney representative of any of the foregoing. For purposes of this section only, "party" shall not include any other person or entity, even if it would otherwise be deemed a "party" under section 10301(dd)(4), except as provided by subdivision 10608.01(d)(8)(D)(ii)(II).~~

~~(b) Service of Medical Reports and Medical-Legal Reports on a Party The provisions of this subdivision shall apply to the service of medical reports and medical-legal reports on a party.~~

~~(1) After the filing of an Application for Adjudication application or other case opening document, if a party or lien claimant is requested by another party claimant to serve copies of medical reports and medical-legal reports relating to the claim, the party receiving the request shall serve copies of the reports that are in its possession or under its control on the requesting party within six (6) 10 calendar days of the request, if the reports have not been previously served. The party or lien claimant receiving the request shall serve a copy of any subsequently-received medical report and medical-legal report on the party or physician lien claimant within six (6) 10 calendar days of receipt of the report.~~

~~(e)(2) At the time of the filing of any Declaration of Readiness to Proceed or Declaration of Readiness to Proceed to Expedited Hearing, the filing declarant shall concurrently serve copies of all medical reports and medical-legal reports~~

relating to the claim that have not been previously served and that are in the possession or under the control of the filing declarant on: ~~(4)~~(A) all other parties, whether or not they have previously requested service; The filing declarant also shall serve a copy of any subsequently-received medical report and medical-legal report relating to the claim on all other parties ~~six (6)~~ 10 calendar days of receipt of the report.

~~(d)~~(3) Within ~~six (6)~~ 10 calendar days after service of any Declaration of Readiness to Proceed or Declaration of Readiness to Proceed to Expedited Hearing, all other parties and lien claimants shall serve copies of all medical reports and medical-legal reports relating to the claim that are in their possession or under their control, and that have not been previously served, on: ~~(4)~~(A) all other parties, whether or not they have previously requested service. The other parties and lien claimants also shall serve a copy of any subsequently-received medical report and medical-legal report relating to the claim on the requesting party ~~six (6)~~ 10 calendar days of receipt of the report, consistent with subsections ~~(d)(1) and (d)(2)~~ subdivisions (b)(3)(A) and (b)(3)(B).

~~(f)~~(5) All medical reports and medical-legal reports relating to the claim that have not been previously served shall be served on all other parties upon the filing of a compromise and release or stipulations with request for award, unless the rights and/or liabilities of those parties were previously fully resolved.

(d) Any violation of the provisions of this section may result in sanctions, attorney's fees, and costs under Labor Code section 5813 and section 10561.

Note: Authority cited: Sections 133, 4903.6(d), 5307, 5309 and 5708, Labor Code. Reference: Sections 4903.6(d), 5001, 5502, 5703 and 5708, Labor Code; Sections 56.05 and 56.10, Civil Code.

§ 10608.01 Service on Medical Reports, Medical Legal Reports & Other Medical Information on Physician and Non-Physician Lien Claimants:

(a) Service of all medical reports, and medical-legal reports, and other medical information on lien claimants shall be made in accordance with the provisions of this section. For purposes of this section, the following definitions shall apply:

1. "Lien claimant" shall mean a person or entity that: (A) has invoked the jurisdiction and authority of the Workers' Compensation Appeals Board by filing a lien claim, including a claim of costs, or a petition for costs; and (B) has previously paid any lien filing or activation fee required by Labor Code sections 4903.05 or 4903.06.

2. "Medical information" shall include but is not limited to: (A) medical reports; (B) medical-legal reports; (C) deposition transcripts (including but not limited to depositions of physicians) containing references to medical reports, medical-legal reports, medical treatment, medical diagnoses, or other medical opinions; (D) medical chart notes; and (E) diagnostic imaging as defined in section 10603(a)(2).

3. "Non-physician lien claimant" shall mean a lien claimant that is not defined as a "physician" by Labor Code section 3209.3 and that is not an entity described in Labor Code sections 4903.05(c)(7) and 4903.06(b).

4. "Physician lien claimant" shall mean a lien claimant defined as a "physician" by Labor Code section 3209.3, an entity described in Labor Code sections 4903.05(c)(7) and

4903.06(b), or the attorney or non-attorney representative for any such physician or entity. For purposes of this section, an attorney or non-attorney representative shall not include any person or entity to whom a physician lien claimant's lien has been assigned, either as an assignment of all right, title, and interest in the accounts receivable or as an assignment for collection. Service of Medical Reports and Medical-Legal Reports on a Party or a Physician Lien Claimant

(b) No defendant or applicant will be required to serve any medical reports on any lien claimant if the sole basis for the dispute is the fees to be paid to the provider.

(c) Service of Medical Reports, Medical-Legal Reports, and other Medical Information on a Physician Lien Claimant:

The requirement for defendant to serve a physician lien claimant copies of medical records does not arise until 30-days following service of the approval of the final order (Compromise and Release, Stipulations with Request for Approval and Award, Findings and Award). If after the 30-days following service of the final order, the parties are unable to resolve the dispute then the defendant is required to file and serve on the physician lien claimant the entire medical record, subject to the limitations of paragraph (b).

(d) Service of Medical Reports, Medical-Legal Reports, and other Medical Information on a Non-Physician Lien Claimant

The provisions of this subdivision shall apply to the service of medical reports, medical-legal reports, or other medical information on a non-physician lien claimant.

(1) If a party or lien claimant is requested by a non-physician lien claimant to serve a copy of any medical report, medical-legal report, or other medical information relating to the claim, the party or lien claimant receiving the request shall not serve a copy on the non-physician lien claimant unless ordered to do so by the Workers' Compensation Appeals Board.

(2) A non-physician lien claimant may petition the Workers' Compensation Appeals Board for an order directing a party or other lien claimant in possession or control of any medical report, medical-legal report, or other medical information to serve a copy of that report or information, or a particular portion thereof, on the non-physician lien claimant.

(3) For each document, or a portion thereof, containing medical information that is sought, the petition shall specify each of the following:

(A) the name of the issuing physician, medical organization (e.g., a group medical practice or hospital), or other entity and the date of the document containing medical information, if known, or if not known, sufficient information that the party or lien claimant from whom it is sought may reasonably be expected to identify it; and

(B) the specific reason(s) why the non-physician lien claimant believes that the document containing medical information, or a portion thereof, is or is reasonably likely to be relevant to its burden of proof on its lien claim or its petition for costs.

(4) When the petition is filed, a copy shall be concurrently served on each party or, if represented, the attorney or non-attorney of record for the represented party. In addition, if the medical information is alleged to be in the possession or control of a non-party or

another lien claimant, a copy of the petition shall be concurrently served on that non-party or other lien claimant or, if represented, its attorney or non-attorney of record.

(5) The petition shall be identified as a "Petition by Non-Physician Lien Claimant for Medical Information."

(6) A document cover sheet and a document separator sheet shall be filed with the petition and "Petition for Medical Information" shall be entered into the document title field of the document separator sheet.

(7) The petition shall be filed as follows:

(A) if a case opening document was previously filed, the petition, unless e-filed, shall be filed only with the district office having venue;

(B) if no case opening document was previously filed: (i) an application shall be filed together with the petition, and venue shall be designated and determined in accordance with Labor Code section 5501.5 and section 10409; and (ii) unless e-filed, the petition and application shall be filed only with the district office where venue is being asserted.

(8) Disposition of a Petition by Non-Physician Lien Claimant for Medical Information:

(A) The Workers' Compensation Appeals Board, in its discretion, may take whatever action on the petition it deems appropriate, including but not limited to: (i) denying the petition if it is inadequate on its face; (ii) issuing a notice of intention to order that the non-physician lien claimant is entitled to service of all, some, or none of the medical information sought; or (iii) setting the petition for a hearing, either without or after issuing a notice of intention.

The Workers' Compensation Appeals Board shall serve or cause to be served each notice of hearing or notice of intention pertaining to the petition on the petitioner and on each person or entity listed in subdivision 10608(c)(4).

(B) When issuing a notice of intention or setting a hearing, the Workers' Compensation Appeals Board may order that the party or lien claimant alleged to be in possession of the medical information shall send it to the personal and confidential attention of the assigned workers' compensation judge, in a sealed envelope lodged by mail or personal service only, for in camera review. Medical information so lodged shall not be deemed filed or admitted in evidence and shall not become part of the record.

(C) If a notice of intention is issued, it shall issue within 15 business days after the filing of the petition and it shall give the petitioner and any adverse party 10 days to file a written response. This time limit shall be extended by sections 10507 and 10508.

(D)(i) If a hearing is set after the issuance of a notice of intention, the hearing date shall be within 45 days after the lapse of the period for the timely filing of a response.

(ii) If a notice of intention is not issued and (I) the non-physician lien claimant is a "party" within the meaning of section 10301(dd)(4), a hearing shall not be

set unless a declaration of readiness is filed; (II) the non-physician lien claimant is not yet a "party" and is therefore precluded from filing a declaration of readiness by section 10250, the hearing date shall be within 60 days after the petition was filed.

(E) The Workers' Compensation Appeals Board shall serve any order disposing of the petition on the petitioner and on each person or entity listed in subdivision 10608(c)(4). Designated service shall not be used for such service. If the Board orders that the non-physician lien claimant is entitled to service of medical information, it may also order that a portion or portions of the medical information shall be redacted before it is served on the non-physician lien claimant.

(9) The production of a release or a waiver, signed by the applicant, by the lien claimant does not obviate the need for the lien claimant to secure Workers' Compensation Appeals Board approval of release of records, as required above.

(e) In no case shall any lien claimant be entitled to subpoena the records of a defendant absent an order from the WCAB.

(f) Any violation of the provisions of this section may result in sanctions, attorney's fees, and costs under Labor Code section 5813 and section 10561.

Note: Authority cited: Sections 133, 4903.6(d), 5307, 5309 and 5708, Labor Code. Reference: Sections 4903.6(d), 5001, 5502, 5703 and 5708, Labor Code; Sections 56.05 and 56.10, Civil Code.

COMMENTS/DISCUSSION:

The proposed changes to § 10608 are not in keeping with the intent of SB 863 to reduce frictional costs and promote efficiency in the Workers' Compensation system. The WCAB in its recommendations have addressed the service of medical records between the parties and with that we find no issue.

However, we do find that the requirement that Physician Lien Claimants are required to be served with any medical documentation prior to issuance of a final order creates an unreasonable burden on applicants and defendants to serve documents that may not be material to resolution of the dispute. Requiring service on lien claimants at any time prior to a final order and at any time when the only dispute of the amount of reimbursement has the opposite effect that was intended by SB 863.

The language presented by the WCAB relative to Non-Physician Lien Claimants addresses the issues and requirements. We do recommend adding language that would prevent the use of a Release of Records, waiver of the requirements of this section or any other section adopted by the WCAB addressing this issue that is intended to obviate these requirements. We also request declaratory language barring a lien claimant from securing records via subpoena, without prior approval of the WCAB. The proposed changes to the § 10608, 10608.01 (service on Physician and Non-Physician Lien Claimants) and the WCAB language in 10608(c) are consistent with the intent of SB 863. These changes specify when a party is required to serve a Physician Lien Claimant, maintain sanctions as a penalty for not doing so and thus preclude the potential for one lien creating another via the subpoena.

Proposed §10770

COMMENTS/DISCUSSION:

The ISOR for proposed § 10770 erroneously assumes that removing med-legals from LC § 4903(b) removed them from the lien processes generally. However, LC § 4903 relates to liens against the employee's recovery (so-called liens against compensation), and thus the first paragraph of LC § 4903 indicates that lien prioritization may be needed if there isn't enough compensation owed to the employee. But med-legals are not asserted against the employee's monetary recovery and thus they didn't belong in that section. That is why the SB 863 drafting distinguished between a LC § 4903(b) lien against compensation and a lien claim for costs against defendant [and required both to be subject to the filing fees per LC § 4903.05]. Both are liens but one is against the employee's monetary recovery and the other is a lien against defendant for a cost item, and both are subject to the lien filing fees and IBR.

The ISOR for proposed §10770 also mistakenly states "Section 4903.05(b) states: 'Any lien claim for [medical treatment] expenses under subdivision (b) of Section 4903 or for claims of costs shall be filed with the appeals board electronically using the form approved by the appeals board.'"

But the statute does not specifically use the term "medical treatment." Instead, it states "reasonable expense incurred by or on behalf of an injured employee, as provided by Article 2 (commencing with LC § 4600) except those disputes subject to (IMR or IBR) ..." Article 2 covers medical and hospital treatment [LC § 4600(a)], mileage, bridge tolls, transportation, meals, lodging and lost wages [LC § 4600(e)], interpreters (LC §§ 4600(f) and (g)), home health services [LC § 4600(h)], drugs [LC §§ 4600.1 and 4600.2], disputed treatment and billing issues [LC § 4603.2], independent bill and medical review process [LC §§ 4603.6 and 4604] and the med-legal process by reference/incorporation in LC § 4622 [which makes med-legals subject to the IMR/IBR procedures of LC § 4603.6].

The lien filing fees and related changes contained within SB 863 were expected to save \$119 million, and that money was to be used to increase compensation benefits (TD/PD) to injured workers without increasing costs to the system. Those anticipated savings instantly vanish with the proposed rule change which allows everybody to avoid the newly enacted lien statutes. This outcome is clearly contrary to the express language and clear intent of the statutory change.

According to the Senate Floor analysis in the legislature as it considered the lien statute changes:

Lien Reforms. The current lien system in workers' compensation is out of control. There is no effective statute of limitations, because case law has developed tolling rules that result in most billing matters remaining alive indefinitely. In addition, the method of resolution requires formal litigation in an already overcrowded workers' compensation court system. There are presently hundreds of thousands of backlogged liens, possibly in excess of a million, and many of these are related to long-since closed cases. One of the concerns most often expressed by employers is that liens get filed by providers for months of treatment when the employer had no idea that there was any treatment being provided. The bill seeks to avoid these situations by mandatory notice by providers to the employer, an expedited hearing process to determine if the provider has a right to be treating the injured worker, and a prohibition against paying bills submitted in violation of these rules.

But lien abuse is not limited to treatment the employer has no notice of. For example, it has become common for third parties to purchase old receivables from providers, who often billed at (higher) usual and customary rates but were properly paid according to established fee schedules. These third parties then file liens in an effort to leverage settlements. Another example of lien abuse involves a provider filing a lien for excessive amounts after being paid, again with the hope of obtaining a settlement. Nuisance-value settlements are rampant because the workers' compensation courts simply don't have time for these minor matters when crucial right to benefits issues are the priority cases. To address this growing volume of problem liens, the bill proposes to re-enact a lien filing fee, so that potential filers of frivolous liens have a disincentive to file. This approach

worked well in the past before it sunset (due to the DWC's inability to track the fees – a problem DWC says no longer exists.) The lien filing fee is refundable if the lien-claimant prevails. In addition, for liens that are pending, and were filed after the prior filing fee sunset, the bill provides for the payment of an activation fee. Again, the purpose is to provide a disincentive to file frivolous liens. Not surprisingly, there has been concern expressed that filing fees are a burden on providers who may have legitimate billing disputes with the employer or insurer.

Therefore, in order to further eliminate a major portion of the unnecessary volume of liens, the bill would create an "independent bill review" process where expert bill reviewers would make determinations in cases where it is merely a billing, and not a substantive treatment, dispute. This IBR process would relieve substantial congestion in the workers' compensation courts, provide much faster dispute resolution, and result in better decisions by billing experts as opposed to judges, who have no special training in the arcane world of billing codes and procedures.

In several places in the legislative history, reference is made to the lien statute being based on recommendations contained within the January 5, 2011 Commission on Health and Safety and Workers' Compensation (CHSWC) Liens Report. In that report, CHSWC makes it clear that the lien problem arises from medical treatment, medical-legal expenses, interpreters in connection with treatment or med-legal evaluations, copy services in connection with medical treatment or med-legal evaluations, and discretionary costs under LC § 5811. Considering both the CHSWC Lien Report and the Senate Floor Analysis, it cannot be said that the legislature intended there to be a "trap door" via Petition for Costs that would allow lien-able claims deriving from medical treatment or med-legal evaluations to escape the entire legislative solution merely by changing the heading on the pleading to read "petition for costs" instead of "lien claim."

Proposed §10770(a)(3)

LANGUAGE FROM REGULATION:

(3) Claims for medical-legal costs and other claims of costs are not allowable as a lien against compensation. Nevertheless, a claim for medical-legal costs or other claims of costs may be filed as a lien claim. If, however, a lien claim includes medical-legal costs or other claims of costs:

(A) the filing person or entity shall pay the lien filing or lien activation fees, if required by Labor Code sections 4903.05(c) and 4903.06; and

(B) if the person or entity fails to pay any requisite filing fee or lien activation fee within the time limits specified by Labor Code sections 4903.05(c) and 4903.06, the entire lien claim shall be deemed dismissed by operation of law.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(3) Claims for medical-legal costs and other claims of costs are not allowable as a lien against compensation. Nevertheless, a claim for medical-legal costs *shall only be filed as a lien, ~~or~~ and other claims of discretionary costs under LC5811* may be filed as a lien claim. If, however, a lien claim includes medical-legal costs or other claims of costs *in connection with medical treatment or medical-legal evaluation*:

(A) the filing person or entity shall pay the lien filing or lien activation fees, ~~if~~ as required by Labor Code sections 4903.05(c) and 4903.06; and

(B) if the person or entity fails to pay any requisite filing fee or lien activation fee within the time limits specified by Labor Code sections 4903.05(c) and 4903.06, the entire lien claim shall be deemed dismissed by operation of law.

COMMENTS/DISCUSSION:

The foregoing proposed modification of the draft regulation clarifies that, whether presented as a lien or other cost claim, if the services for which payment is sought were rendered in connection with medical treatment or medical-legal, then the lien or cost claim is for all purposes treated the same as the underlying treatment or med-legal specie. But if it is a discretionary cost sought under LC § 5811, and not otherwise considered medical treatment or med-legal, then it is treated differently.

Proposed §10770(b)(1)(A)

LANGUAGE FROM REGULATION:

(A) A section 4903(b) lien, a claim of costs lien, and any lien form that includes either or both of these liens shall be filed electronically. Any lien submitted in paper form in violation of this subparagraph: (i) shall not be deemed filed for any purpose, whether or not it was accepted for filing; (ii) shall not toll or extend the time for filing a lien claim under Labor Code section 4903.5; (iii) shall not be acknowledged or returned to the filer; and (iv) may be destroyed at any time without notice.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(A) A section 4903(b) lien, *a petition or other claim of costs arising from medical treatment or medical-legal process* ~~lien~~, and any lien form that includes either or both of these liens shall be filed electronically. Any lien submitted in paper form in violation of this subparagraph: (i) shall not be deemed filed for any purpose, whether or not it was accepted for filing; (ii) shall not toll or extend the time for filing a lien claim under Labor Code section 4903.5; (iii) shall not be acknowledged or returned to the filer; and (iv) may be destroyed at any time without notice.

COMMENTS/DISCUSSION:

The foregoing change would conform the proposed regulation to confirm that medical treatment and med-legal related costs are treated the same regardless of the manner in which they are pled (i.e., lien, petition or cost claim).

Proposed §10770(c)(1)

LANGUAGE FROM REGULATION:

~~(b)~~(c) Requirements for Filing of Lien Claims with the Workers' Compensation Appeals Board:

(1) The requirements of this subdivision shall apply to all lien claims, whether or not filed electronically.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

~~(b)~~(c) Requirements for Filing of Lien Claims with the Workers' Compensation Appeals Board:

(1) The requirements of this subdivision shall apply to all lien claims, whether or not filed electronically. For purposes of this section, lien claim includes any section 4903(b) lien, a petition or other claim of costs arising from medical treatment or medical-legal process.

COMMENTS/DISCUSSION:

The foregoing change would conform the proposed regulation to confirm that medical treatment and med-legal related costs are treated the same regardless of the manner in which they are plead (i.e., lien, petition or cost claim).

Proposed §10770(h)(2)

LANGUAGE FROM REGULATION:

(2) If a petition for costs is filed that seeks reimbursement for any of the same goods or services that had previously been sought by filing a lien claim, the lien claim shall be deemed withdrawn and dismissed without prejudice by operation of law. This provision, however, shall not nullify the provisions of section 10451(e).

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(2) (A) If a petition for costs is filed that seeks reimbursement for any of the same goods or services that had previously been sought by filing a lien claim, the entire lien claim shall be deemed withdrawn and dismissed without prejudice by operation of law. This provision, however, shall not nullify the provisions of section 10451(e).

(B) Whether filed as a lien or as a petition for costs, all medical treatment related services for which the employer is or may be liable (including but not limited to all services provided in connection with treatment under Article 2 commencing with LC 4600, including interpreters) and all medical-legal related services for which the employer is or may be liable (including but not limited to all services provided in connection with a medical-legal evaluation under Article 2.5 commencing with LC 4620, including interpreters) are subject to the lien filing/activation fee of LC 4903.05, 4903.06, and subject to WCAB lien jurisdiction under 4903(b) only upon completion of the IMR/IBR appeal process.

(C) Whether filed as a lien or as a petition for costs, pursuant to LC 5811 the Appeals Board has original jurisdiction over claims for discretionary costs not otherwise recoverable from the employer in connection with medical treatment or medical-legal services, and such claims shall be subject to the lien filing/activation fee of LC 4903.05, 4903.06 and limitations periods of LC 4903.5 in the same manner as liens generally.

COMMENTS/DISCUSSION:

The ISOR for proposed § 10770(h)(2) mistakenly creates an unauthorized means (via “petition for costs”) for parties to circumvent the lien filing and activation fee statutes. LC § 4903.05 relates to both a LC § 4906 lien and other claim of costs and requires a filing/activation fee for both.

Nothing authorizes this alternative Petition for Costs to circumvent and contravene the legislative intent and the statutes. The proposed change to the draft regulation would clarify that a party cannot avoid the lien procedures and filing fees, nor create WCAB original jurisdiction, merely by renaming a lien as a “petition for costs.”

Proposed §10770.1(c)

LANGUAGE FROM REGULATION:

(c) No lien claimant that is required to pay a lien filing or lien activation fee shall file a declaration of readiness or participate in any lien conference, including obtaining an order allowing its lien in whole or in part, without submitting written proof of prior timely payment of the fee.

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(c) No lien claimant or petitioner for costs that is required to pay a lien filing or lien activation fee shall file a declaration of readiness or participate in any lien conference, including obtaining an order allowing its lien in whole or in part, without submitting written proof of prior timely payment of the fee. For purposes of this section, lien claimant includes any person or entity asserting a section 4903(b) lien, a petition or other claim of costs arising from medical treatment or medical-legal process.

COMMENTS/DISCUSSION:

Proposed § 10770.1(c) should be modified as stated above. This would bring the proposed rule in line with LC § 4903.05 which requires both lien claimants and cost claimants to pay filing/activation fees.

Alternatively, every time the term “lien claimant” appears in this regulation, it could be replaced by the following language: “lien claimant, person or entity asserting a section 4903(b) lien, a petition or other claim of costs arising from medical treatment or medical-legal process

Proposed §10770.5(d)(2)

LANGUAGE FROM REGULATION:

(2) that the section 4903(b) lien, the lien (or the petition for medical-legal costs, or the application is not being filed solely because of a dispute subject to the independent medical review and/or independent bill review process; and

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(2) that the ~~section 4903(b) lien~~, the lien or the petition for ~~medical-legal~~ costs, or the application is not being filed solely because of a dispute subject to the independent medical review and/or independent bill review process; and

COMMENTS/DISCUSSION:

Proposed § 10770.5 should be reworded to state as modified above. This would bring the proposed rule in line with LC § 4903.05 which requires both lien claimants and cost claimants to pay filing/activation fees.

Proposed §10770.6

LANGUAGE FROM REGULATION:

No Declaration of Readiness to Proceed shall be filed for a ~~lien under Labor Code~~ section 4903(b) ~~lien~~, or for a lien claim or petition for medical-legal costs, without an attached verification ~~certifying executed~~ under penalty of perjury;

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

No Declaration of Readiness to Proceed shall be filed for a ~~lien under Labor Code section 4903(b) lien~~, or for a lien claim or petition for ~~medical-legal costs~~, without an attached verification ~~certifying executed~~ under penalty of perjury;

COMMENTS/DISCUSSION:

This would clarify that the prohibition applies to all liens and cost petitions.

Proposed §10957(b)

LANGUAGE FROM REGULATION:

(b) The petition shall be filed with the Workers' Compensation Appeals Board no later 20 days after the AD served the IBR determination, except the time for filing shall be extended in accordance with sections 10507 and 10508. An untimely petition may be summarily dismissed

PROPOSED ALTERNATIVE/ADDITIONAL LANGUAGE:

(c) The petition shall be filed with the Workers' Compensation Appeals Board no later 20 days after ~~the AD served~~ the IBR determination *is served*, except the time for filing shall be extended in accordance with sections 10507 and 10508. An untimely petition may be summarily dismissed

COMMENTS/DISCUSSION:

Proposed § 10957(b) is contrary to the statute on the service issue. The statute states "...20 days of the service of the determination." It does not require the AD to do the service. In fact, LC § 4603.6(e) states that the IBR company sends the decision to the AD and to the parties. Thus, the regulation unduly restricts the time frame and requires an additional method of service not authorized by the statute. It should be revised to reflect the statutory language.

In our view, the proposed modifications to the WCAB rules of practice and procedure would completely subvert the obvious intent of the SB 863 lien solution due to being contrary to the express legislative intent, contrary to the statutory framework, and contrary to the CHSWC recommendations. Furthermore, it would eliminate the legislative purpose of taking \$115 million savings from lien litigation and using that money to increase indemnity benefits to injured workers without adding to the system wide costs. We therefore urge you to make the changes suggested above, and such additional changes as would restore the process to one consistent with the language, intent and statutory scheme of SB 863.

Respectfully submitted,

ALPHA Fund
Association of California Insurance Companies
California Association of Joint Powers Authorities
California Chamber of Commerce
California Coalition on Workers' Compensation
California Grocers Association
California Manufacturers and Technology Association
California State Association of Counties
Golden Oak Cooperative Corporation
Grimmway Farms

GSG Associates
Independent Insurance Agents and Brokers of California
KBA Engineering
Marriott International
Matian Law Group
Metro Risk Management
Republic Indemnity Company of America
Robert E. Buch, Seyfarth Shaw LLP
Safeway
Schools Insurance Authority
Sedgwick Claims Management Services
Southern California Edison
TRISTAR Risk Management
University of California

April 16, 2013

Dan R. Jackle

Associated Reproduction Services Inc

Madam Chairwoman Caplane,

I think the proposed regulations discussed today are a good first step. We are all of the opinion that we would like to reduce the number of liens filed each month but not at the extreme disadvantage to both Interpreters and applicant copy services.

Several speakers representing the defense today said that the interpreters and copy services should not be allowed to escape paying the lien filing fee or the lien activation fee to process their invoice. If the Interpreters and copy services are required to pay these fees their revenue for the services performed will be drastically reduced. If these fees were to stay in place the carriers will undoubtedly want to play hardball with us. Just as the gentlemen from the Interpreter service said today at the hearing if we had a \$200 invoice, the carrier would probably offer us something ridiculous like \$75 and tell us to "take it or leave it or go ahead and file your \$150 lien".

Just this one tactic by the carriers could reduce our income by 40% on past liens. Being able to file a petition especially on these small invoices is much more fair. Even if we get do get the order to pay, there are no teeth in the regulations to penalize the carriers if they don't pay us timely.

To show you just how entrenched the carriers are in not paying, ARS had a scheduled lien trial today also at the SF board. Our invoice was for \$600. The defense has already met with us at lien conference to try to settle the invoice. Their idea of settling is to offer \$100. They had paid a witness (of dubious credentials) to assist them flying him up to the conference from southern California. When the case was set for trial, the judge made them bring the same witness to the trial today. However, since there was only one court reporter and several cases to hear our case was continued as they are most of the time increasing our costs of collection. We have tried to negotiate this invoice, but the carrier does not want to budge so we have a new trial set for July. These are the crazy things that clog up the court calendar.

In addition, as another interpreter mentioned, another tactic the carriers use to not to pay is to object with boilerplate objections whether or not they are applicable and almost all are non specific. ARS receives about 40 of these objections a day.

My point is that whatever regulations and fee schedule is put in place, they are worthless unless the WCAB/DWC starts putting in severe penalties for the carriers if they don't pay what they are supposed to and pay it timely.

April 16, 2013
Steve Suchil
Assistant Vice President/Counsel
State Affairs, Western Region
American Insurance Association

Please find attached AIA comments on the proposed regulatory changes to the Workers Compensation Appeals Board, Rules of Practice and Procedure Title 8, California Code of Regulations Sections 10250, et seq.



WESTERN REGION

1015 K Street

Suite 200

Sacramento, CA 95814

916-442-7617

www.aiadc.org

April 16, 2013

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation, Legal Unit
Post Office Box 420603
San Francisco, California 94142

Neil P. Sullivan
Assistant Secretary and Deputy Commissioner
Workers' Compensation Appeals Board
Post Office Box 429459
San Francisco, California 94142-9459

Sent via E-Mail and U.S. Mail

Subject: Workers' Compensation Appeals Board, Rules of Practice and Procedure
Title 8, California Code of Regulations Sections 10250, et seq.

Dear Ms. Gray and Mr. Sullivan,

These comments on the Workers' Compensation Appeals Board, Rules of Practice and Procedure Title 8, California Code of Regulations Sections 10250, et seq., are submitted on behalf of the members of the American Insurance Association (AIA).

AIA is the leading property-casualty insurance trade organization, representing approximately 300 insurers that write more than \$100 billion in premiums each year. AIA member companies offer all types of property - casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small businesses, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance.

Introduction

We are perplexed by the direction the Workers' Compensation Appeals Board (WCAB) has chosen to take in creating the dual track mechanism for dealing with disputed billings.

We are concerned that many of the proposed changes do not comport with the Legislative intent or the language of SB 863. The WCAB's proposed system compromises, and is contrary to, the lien solution enacted in SB 863. This proposal will severely limit the projected savings that were utilized in determining the level of, and offset for, benefit increases.

We recommend that these regulations be revised to include language clarifying that liens under Labor Code Section 4903, and costs under Labor Code Section 5811, include all services and goods that are in connection with medical treatment, as itemized in Labor Code Section 4600 et seq. and medical-legal evaluations in Labor Code Section 4620 et seq., the applicability of lien filing/activation fees, the applicability of Independent Bill Review (IBR), and WCAB jurisdiction for both tracks.

Set forth below is a discussion of certain sections of the proposal.

Suggestions for added language are shown with underline and deletion with ~~strikethrough~~.

Section 10301: Definitions

New Subdivision (h) (2) provides:

(h) "Cost" means any claim for reimbursement of expense or payment of service that is not allowable as a lien under Labor Code section 4903. "Costs" include, but are not limited to:

(2) costs under Labor Code section 5811, including qualified interpreter services rendered during a medical treatment appointment or medical-legal examination; and

We recommend that that Subdivision (h)(2) be completely deleted. Interpreter services in connection with medical treatment was formally made part of the Labor Code Section 4600 treatment obligation by judicial decision in the 2011 En Banc decision in the GUITRON case, and are now included by statute in Labor Code Section 4600(g). Interpreter billings are expressly included in new Labor Code Section 4603.2 in Subdivision (b)(1) billing requirements, Subdivision (b)(2) regarding employer EOR requirements, and Subdivision (e) regarding second reviews, and then IBR under Labor Code Section 4603.6.

We believe interpreter fees in connection with medical treatment are to be treated the same as the medical treatment itself.

Additionally, the Initial Statement of Reasons (ISOR) is in appears to be in error. It provides:

“Section 4903.05(b) states: “Any lien claim for *medical treatment (italics added)* expenses under subdivision (b) of Section 4903 or for claims of costs shall be filed with the appeals board electronically using the form approved by the appeals board.”

Labor Code Section 4903.05(b), however, does not state “medical treatment”, it provides “lien claim for expenses under Subdivision (b) of section 4903 or for claims of costs”

Interpreter services in connection with medical-legal evaluations are provided for in Labor Code Sections 4620(a) and (d), and 4621(a). The payment process is found in Labor Code Section 4622, including the EOR requirement and the application of the IBR process. Because interpreter services in connection with medical-legal evaluations are expressly within Labor Code Section 4620, we believe these interpreter fees must be treated the same as the medical-legal treatment itself.

Excluding interpreters from the statute serves only to create confusion regarding lien filing fees/activation fees, IBR and WCAB jurisdictional limitations. In addition, it will prevent the anticipated reduction of payment disputes that prevent the WCAB from efficiently dealing with its primary responsibility, determining benefits for the injured employee.

New Subdivision (h)(3) states:

(3) any amount payable under Labor Code section 4600 that would not be subject to a lien against the employee’s compensation, including but not limited to any amount payable directly to the injured employee for reasonable transportation, meal, and lodging expenses and for temporary disability indemnity for each day of lost wages.

This regulation creates a distinction between a “lien” and a Labor Code Section 5811 “cost”, which appears contrary to the statute. The enumerated categories are found in Labor Code Section 4600(e) which is within Article 2. Claims falling within Article 2 are expressly subject to the lien process as provided in Labor Code Section 4903(b). There does not appear to be statutory authority for the adoption of this proposed language.

Section 10451: Petition for Costs

New Subdivision (d) provides:

(d) Except as provided in subdivision (b)(2) or (b)(3), if the petition seeks payment for any costs that are lienable under Labor Code section 4903(b) or that are subject to independent medical review and/or independent bill review, the entire petition shall be dismissed by operation of law. In addition, the petition shall not toll the time for filing a lien claim under Labor Code section 4903.5, whether or not the petition was accepted for filing, and it shall not relieve the

petitioning person or entity from the lien filing fee, lien activation fee, and other provisions of Labor Code sections 4903.05 and 4903.06 and their related regulations.

With respect to the above provision, the ISOR is inaccurate. We do not accept the statement that Labor Code Section 5811 “costs as between the parties may be allowed” is more specific than the extensive and highly specific medical-legal lien statutes. There is a lack of consistency with a number of statutes, including Labor Code Section 4620(a) which defines “medical-legal expense” to include interpreter fees; Labor Code Section 4622 which states that “all medical-legal expenses shall be paid as follows”; and Labor Code Section 4622 (a) and (b) which further provide that, if an “amount paid” medical-legal expense issue is not resolved through the procedure of billing and report submission, EOR, and second review, “the provider shall request an independent bill review as provided for in Section 4603.6.” Similarly, the medical treatment lien statutes including Labor Code Section 4600(g) indicate that interpreter services during medical treatment appointments are a medical treatment expense; Labor Code Section 4603.2(b) provides that medical treatment expenses go through a procedure of billing submission, explanation of review, and second review; and, Labor Code Section 4603.2(e)(4) provides that, if an “amount paid” expense issue still remains unresolved, “the provider shall request an independent bill review as provided for in Section 4603.6.”

Section 10451: Petition For Costs

We recommend the following change to Subdivision (i)(2):

(i)(2) Notwithstanding subdivision (i)(1), the Workers’ Compensation Appeals Board may, at any time, issue a notice of intention to allow or disallow the costs sought by the petition, in whole or in part. The notice of intention shall give the petitioner and any adverse party no less than 10 **calendar business** days to file written objection showing good cause to the contrary. If no timely written objection is filed, or if the written objection on its face fails to show good cause, the Workers’ Compensation Appeals Board, in its discretion, may: (A) issue an order regarding the petition for costs, consistent with the notice of intention; or (B) set the matter for hearing.

The time to file a written objection should be extended to not less than ten business days. Under the proposal, depending on when the notice of intention is received the parties could only have six business days to respond, and if a three or four day weekend intervenes, the number of working days would be further reduced. In the worst case scenario where the request is received on a Friday and the following weekend is a three or four day weekend, there would only be four or five business days available to timely respond.

Section 10451.1: Petition To Enforce IBR Determination

Subdivision (h) should be amended as follows:

(h) Within 15 days of the filing of the petition to enforce, the Workers' Compensation Appeals Board shall issue a notice of intention to grant or deny the petition, in whole or in part. The notice of intention shall give the petitioner and any adverse party no less than 10 **calendar business** days to file written objection showing good cause to the contrary. If no timely written objection is filed, or if the written objection on its face fails to show good cause, the Workers' Compensation Appeals Board, in its discretion, may: (1) issue an order regarding the petition to enforce, consistent with the notice of intention; or (2) set the matter for hearing.

For the reasoning behind this change, please refer to the explanation in Section 10451, above.

Section 10582.5: Dismissal Of Inactive Lien Claims For Lack of Prosecution

We recommend the following amendment to Subdivision (c)(2)(B)(i):

(i)the petitioner made a reasonable and good faith payment and, where required, an explanation of review on each billing consistent with all **existing applicable** law(s);

This change is needed because payment rules for medical goods and services are contingent upon laws and rules in existence for the date of service.

Section 10608: Service of Medical Reports, Medical-Legal Reports, and Other Medical Information

Subdivision (b) should be amended as follows:

(b) Service of Medical Reports and Medical-Legal Reports on a Party or a Physician Lien Claimant

The provisions of this subdivision shall apply to the service of medical reports and medical-legal reports on a party or on a physician lien claimant.

(1) After the filing of an application or other case opening document, if a party or lien claimant is requested by another party or a physician lien claimant to serve copies of medical reports and medical-legal reports relating to the claim, the party or lien claimant receiving the request shall serve copies of the reports in its possession or under its control on the requesting party or physician lien claimant within 10 **calendar business** days of the request, if ~~the~~ not been previously

served. The party or lien claimant receiving the request shall serve a copy of any subsequently-received medical report and medical-legal report within 10 calendar business days of receipt ~~of the report~~.

(3) Within 10 calendar business days after service of any Declaration of Readiness to Proceed or Declaration of Readiness to Proceed to Expedited Hearing, all other parties and lien claimants shall serve copies of all medical reports and medical-legal reports relating to the claim that are in their possession or under their control, and that have not been previously served, on: (A) all other parties, whether or not they have previously requested service; and (B) all physician lien claimants that have previously requested service. The other parties and lien claimants also shall serve a copy of any subsequently-received medical report and medical-legal report relating to the claim on the requesting party or physician lien claimant within 10 calendar business days of receipt, consistent with subdivisions (b)(3)(A) and (b)(3)(B).

(4) If, at any time after the periods specified in subdivisions (b)(1), (b)(2) and (b)(3), a physician lien claimant initiates a request for service of medical reports and medical-legal reports, all parties and other lien claimants shall serve the requesting physician lien claimant with copies of all medical reports and medical-legal reports relating to the claim that are in their possession or under their control, and that have not been previously served, within 10 calendar business days of receipt of the request. The parties and other lien claimants also shall serve a copy of any subsequently-received medical report and medical-legal report relating to the claim within 10 calendar business days of receipt.

First, we appreciate the provision of a few additional days from those allowed in the Emergency regulation. There should be a further extension, however, for the time allowances in the above highlighted sections. We continue to be concerned that depending on when the request is received the parties or lien claimant could only have six business days to respond, and if a three or four day weekend intervenes the working days would be further reduced. In the worst case scenario where the request is received on a Friday and the following weekend is a three or four day weekend, there would only be 4 or five business days available to timely respond.

Section 10770: Filing And Service Of Lien Claims

The ISOR discussion for this section, appears to assume that removing Medical-Legal liens from Labor Code Section 4903(b) also removed them from the lien process generally. Labor Code Section 4903, however, relates to liens against the recovery of an employee, and the first paragraph of Labor Code Section 4903 indicates that lien prioritization may be needed if there isn't enough compensation owed to the employee. Medical-Legal liens, on the other hand, are not asserted against the employee's

recovery. We believe this is the reason they were removed from Labor Code Section 4903 (b). It also explains why SB 863 distinguished between a Labor Code Section 4903(b) lien against compensation as against a lien claim for costs against defendant, and required both to be subject to the filing fees as provided by Labor Code Section 4903.05. Both are liens but one is against an employee's monetary recovery and the other is a lien against a defendant for a cost item, and both are subject to the lien filing fees and IBR.

Section 10770.5: Verification To Filing Of Lien Claim Or Application By Lien Claimant

Subdivision (d)(2) should be amended to read:

(2) that ~~the section 4903(b) lien~~, the lien or the petition for ~~medical-legal costs~~, or the application is not being filed solely because of a dispute subject to the independent medical review and/or independent bill review process; and

This Subdivision should be revised as provided above to bring the proposed rule in compliance with Labor Code Section 4903.05, which requires both lien claimants and cost claimants to pay filing/activation fees.

Section 10770.6: Verification To Filing Of Declaration Of Readiness By Or On Behalf Of Lien Claimant

The first paragraph of this section should be amended as follows:

No Declaration of Readiness to Proceed shall be filed ~~for a section 4903(b) lien,~~ or for a lien claim or petition ~~for medical-legal costs~~, without an attached verification executed under penalty of perjury:

We recommend this revision to clarify that the prohibition applies to all liens and cost petitions.

Conclusion

In conclusion, we urge you to make the changes suggested above, and any additional changes that would restore the process to one consistent with the language, intent and statutory scheme of SB863.

The lien filing fees and related changes contained within SB 863 were expected to save \$119 million, and those savings were to be used to increase benefits to injured workers without increasing costs to the system. Those savings will be significantly reduced with the WCAB's proposed rule changes, however. The regulations should be clarified to clearly state that whether filed as a "lien claim for expenses" or a "claim of costs", if the services provided fall within the purview of Labor Code Section 4903 they are subject to

the lien filing and activation fees, and that all bills for such services are governed by IMR/IBR and not subject to WCAB jurisdiction except upon appeal from an adverse IBR/IMR decision.

Thank you for consideration of our comments.

Sincerely,

A handwritten signature in blue ink that reads "Rea Crane".

REA CRANE
RN, CDMS, CCM
Consultant

A handwritten signature in blue ink that reads "Steven Suchil".

STEVEN SUCHIL
Assistant Vice President/Counsel

April 16, 2013
Joel H Sherman
Director, Safety & Workers' Compensation
Grimmway Farms

Notes from my WCAB Regulatory Testimony given this Morning

Thank you commissioners for the opportunity to address you today. I'll be brief.

1. Important to remember that the intent of SB863 was to reduce the cost of the workers' compensation system while increasing benefit payments to injured workers...a grand bargain, if you will, in the spirit of the "Great Compromise" between employers and employees that created the first workers' comp laws in California.

2. If we do not maximize the potential savings inherent in this bill, we will ultimately cause it to fail, possibly push the system into crisis, and end up serving neither party in the fashion originally intended.

3. Everyone recognizes that California has one of the costliest and most litigious workers' compensation systems in the nation. Friction points create this needless level of litigation and the present system for handling liens is a major frictional point that significantly contributes to the excess litigation. Countless system resources, and valuable court time, end up being siphoned away to resolve issues that could be better addressed through the use of Independent Bill Review.

4. Interpreters and copy services represent a significant source of liens in the workers' compensation system (second only to medical providers according to a recent CHSWC study). Failing to incorporate these sources of liens into the filing fees and IBR process will greatly undermine the potential cost savings and allow a continued drain on court resources to resolve issues that could be more appropriately addressed elsewhere. The appropriate mechanism has been created. It needs to be put to use in all appropriate situations.

5. I would urge you to consider:

- Interpreters for medical treatment are part of medical expense under Labor Code Section 4600(g).
- Medical records copies and Interpreters for medical-legal exams are part of the medical legal expense under Section 4620(a).
- All billing disputes for medical treatment and medical-legal expense is supposed to go through IBR.
- There is no need to ignore one statute to carry out another.

In conclusion, One of the largest components of the savings associated with SB863 was from the changes to lien laws. Allowing the Petition for Costs mechanism as proposed will simply perpetuate a failed practice from a broken system. I understand the SB 863 has a few gaps that must be filled by your interpretation. But I would urge that all possible consideration be given to avoid a continuation of business as usual.

Thank you again for the opportunity to address you this morning.

April 15, 2013
Patricia Brown
Deputy Chief Counsel
State Compensation Insurance Fund

Mr. Sullivan:

Attached are State Compensation Insurance Fund's written comments regarding the Appeals Board Rules of Practice and Procedure.

Thank you.



April 15, 2013

Neil P. Sullivan
Assistant Secretary and Deputy Commissioner
Workers' Compensation Appeals Board
P.O. Box 429459
San Francisco, CA 94142-9459

Sent via email:
WCABRules@dir.ca.gov

Subject: Workers' Compensation Appeals Board Rules of Practice and Procedure

State Compensation Insurance Fund appreciates the opportunity to submit comments regarding the proposed Workers' Compensation Appeals Board Rules of Practice and Procedure. State Fund believes that the new procedures for petitions for costs should be limited to interpreters. Expanding the petition for costs to include other providers, such as copy services, is beyond the authority granted the Appeals Board by Labor Code § 5811. Moreover, IBR is not optional as the proposed regulations currently state. The Labor Code explicitly requires interpreters that dispute the amount paid to request IBR. Lastly, in the interest of judicial economy, the Statute of Limitations should apply to petitions for costs.

Petitions for Costs should be limited to interpreters

As the Appeals Board notes in its Initial Statement of Reason (ISOR), when the Legislature expressly references a particular item in a statute, but does not reference other items, this reflects intent to treat the expressly referenced item differently than the excluded items. (see *Klein v. U.S.* (2010) 50 Cal.4th 68, 80). Labor Code § 5811 expressly references the allowance of costs for interpreters' fees:

Interpreter fees that are reasonably, actually, and necessarily incurred shall be paid by the employer under this section, provided they are in accordance with the fee schedule adopted by the administrative director. (See Labor Code § 5811(b)(2)).

The statute does not reference copy services and other providers. Thus it is clear the Legislature intended for all providers other than interpreters to file liens and pay the associated fees.

SB 863 requires interpreters to request IBR

The Labor Code requires interpreters that file petitions for costs to request IBR. According to Labor Code § 4600, interpreter services provided to communicate with the treating physician are medical treatment. Labor Code § 4600 is under Division 4, Part 2, Chapter 2, Article 2 which is entitled *Medical and Hospital Treatment*. Labor Code § 4600(g) provides in relevant part:

If the injured employee cannot effectively communicate with his or her treating physician because he or she cannot proficiently speak or understand the English

language, the injured employee is entitled to the services of a qualified interpreter during medical treatment appointments.

In addition, the Labor Code requires all providers of medical treatment that contest the amount paid after the second review to request IBR. Labor Code § 4603.2(e)(4) states:

If the provider contests the amount paid, after receipt of the second review, the provider shall request an independent bill review as provided for in Section 4603.6.

Thus, IBR is not optional as the proposed regulations currently state. Any interpreter that disputes the amount paid for services provided at a medical appointment shall request IBR according to the Labor Code.

Moreover, interpreter fees related to depositions, medical evaluator exams and Appeals Board hearings are also subject to IBR. Labor Code § 4620(a) defines medical-legal expenses as including interpreters' fees. The pertinent portion of Labor Code § 4620(a) provides:

For purposes of this article, a medical-legal expense means any costs and expenses incurred by or on behalf of any party, the administrative director, or the board, which expenses may include X-rays, laboratory fees, other diagnostic tests, medical reports, medical records, medical testimony, and, as needed, interpreter's fees by a certified interpreter

Further, Labor Code § 4622(b)(4) states that providers of medical-legal services must request IBR if they contest the amount paid, "If the provider contests the amount paid, after receipt of the second review, the provider shall request an independent bill review as provided for in Section 4603.6."

There is nothing in Labor Code § 5811 (which authorizes petitions for costs) that conflicts with the requirement that interpreters request IBR. The regulations should require that an interpreter complete IBR, if applicable.

The Statute of Limitations should apply to Petitions for Costs

The Statute of Limitations should apply to petitions for costs. Otherwise, the Appeals Board will be confronted with the problem of zombie petitions for costs. The Appeals Board in its 2012 ISOR regarding § 10770 stated:

[T]hese provisions will close a loophole in the statute of limitations laws that created an incentive for entities to purchase old accounts receivables, file liens (informally called "zombie liens"), and use the WCAB's scarce judicial resources to collect payment on ancient bills.

By failing to apply the statute of limitations to petitions for costs, the Appeals Board is recreating the same loophole.

Labor Code § 4903.5(a) provides:

A lien claim for expenses as provided in subdivision (b) of Section 4903 shall not be filed after three years from the date the services were provided, nor more than

18 months after the date the services were provided, if the services were provided on or after July 1, 2013.

Subdivision (b) of Labor Code § 4903 allows for liens incurred under Labor Code § 4600. As noted above, interpreter services are included under Labor Code § 4600. An interpreter that chose to file a lien must do so within 3 years if the services were provided before July 1, 2013 and within 18 months if the services were provided after July 1, 2013. But the proposed regulations would place no such restriction on a petition for costs. Therefore, in the interest of judicial economy and certainty of case closure and finalization, the regulations should be amended to make petitions for costs subject to the statute of limitations.

Sincerely,

Patricia Brown

Patricia Brown
Deputy Chief Counsel

cc: Carol Newman, General Counsel
Peggy Thill, Claims Operations Manager, Claims Regulatory Division
Jose Ruiz, Acting Director Corporate Claims Operations & Regulatory Division
Michelle Weatherson, Director Corporate Medical Division

April 15, 2013

Jeffrey Katz DC QME

Word of Mouth Interpreters

The option of an interpreting company to not have to file a lien to recover bills that have not been paid by insurance companies maybe the only option left to keep most interpreting companies from closing up shop.

It has already become apparent that insurance companies have been incentivized not to pay for one or two interpretations by mandating that the interpreting company show proof of having paid a lien activation fee before they will even do good faith negotiations—which the WCAB has stated is an act of bad faith and was not the intention of SB863. They know that we will lose money by pursuing the lien each and every time.

They also know that we have to pay \$50-100 for each lien reps appearance on top of the activation fee and 20% of what is collected. The average interpretation lien yields 40% of its fee at a lien conference according to the WCAB's statistics.

So a typical \$200 interpretation bill that has to be fought at the board yields \$80 minus \$150 activation fee, minus \$50-100 lien rep appearance fee minus \$16 in lien collection fees. Obviously this is not a viable business This obviously knocks out interpreters at MRI centers, surgical centers, EMG/NCV facilities, Sleep Centers and one shot deals at Pain management offices.

Furthermore, with a yet to be known fee schedule for medical interpretations and difficulty finding and knowing the new costs of medically certified interpreters, interpreting companies are truly in the dark on how they can survive all these challenges to continue to provide services to the injured worker.

With all these strained conditions and unknown variables placing pressure upon the future ability for interpreting companies to exist we ask that you allow our industry the right to petition the board as a cost and thereby not having to pay an activation fee.

Thank you for your consideration on this matter.

April 15, 2013
Bruce E Dizenfeld
Attorney at Law
Theodora Oringer PC

To: Neil PI Sullivan, Assistant Secretary and Deputy Commissioner
Workers' Compensation Appeals Board

Attached please find comment submitted on behalf of the California Workers' Compensation Interpreters Association with respect to the Proposed Rules of Practice and Procedure set for public hearing on April 16, 2013.

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

PUBLIC HEARING

RULES OF PRACTICE AND PROCEDURE

Hearing Date: April 16, 2013

COMMENT SUBMISSION ON
BEHALF OF CALIFORNIA
WORKERS' COMPENSATION
INTERPRETERS
ASSOCIATION

I. BACKGROUND.

- A. **It is now well established that interpreting services are essential to an employee with limited English proficiency in legal, medical-legal and medical treatment settings.¹**

Both federal and state laws have established that the administration of justice and standard of medical care require that a person deemed to have limited English proficiency (LEP) relative to the circumstances is deprived access to their legal due process and guaranteed access to medical care if they are not afforded the services of an interpreter. Any rule that would have as its purpose the reduction of access or availability to an interpreter is inherently inconsistent with such laws and the intent of Article XIV, Section 4 of the California constitution.

¹ Interpreters have been required during medical treatment as a matter of law and as the standard of medical practice for years. SB 863 expressly acknowledged and incorporated by reference the law and standards applicable to the provision of interpreters as provided under Health & Safety Code §1367.04 (health plans required to provide language assistance, see 28 CCR §§1300.67.04). See, also, Health & Safety Code §1259 (obligation of hospitals); Insurance Code §§10133.8 and 10133.9 (10 CCR 2538.1 et seq.); Title VI of the Civil Rights Act applies to ensure meaningful access to persons with limited-English proficiency, 42 USC §2000d; 45 CFR §80.3(b)(2); 68 Fed.Reg. 47311. With the passage of the "Cultural and Linguistic Competency of Physicians Act of 2003" the legislature expressly found, among other things, that "persons with limited English proficiency are often excluded from programs, experience delays or denials of services, or receive care and services based on inaccurate or incomplete information," and that "when socio-cultural differences between the patient and the provider are not appreciated, explored, understood or communicated in the medical encounter, the result is patient dissatisfaction, poor adherence, poor outcomes, and racial and ethnic disparities in health care." Bus & Prof Code §2198, Section 1.

B. LC 4903(b) was amended by emergency regulation² to delete the reference to interpreter’s fees as liens, and as a result interpreter’s fees may not be “allowed as liens”

By excluding interpreter’s fees, a determination has been made that interpreter’s fees should no longer be prosecuted as liens. It should be patently obvious that the relative charge for interpreter’s fees compared to the lien activation and lien fees would have a chilling effect on the availability of interpreters for LEP employees and result in a limitation upon access by those employees to constitutionally and statutorily protected rights to legal and medical services.

C. Section 5811 clearly defines interpreter’s fees as costs.

The Initial Statement of Reasons provided by the WCAB in connection with the presently proposed regulations correctly concludes:

“Accordingly, read as a whole, the Board concludes that section 5811 provides that interpreter fees for services during a ‘medical treatment appointment or medical-legal examination’ are amounts that ‘shall be paid . . . under’ section 5811 as ‘costs’ in accordance with the fee schedule adopted by the AD. Consequently, claims for such interpreter fees may be made by a petition for costs.”

At the present time, although LC 4620(d) refers to the future adoption of a fee schedule for interpreter fees, there has been no fee schedule adopted with regard to interpreter fees. Thus, until such a fee schedule is adopted, it would be inappropriate to impose regulations that cannot be implemented absent the occurrence of some future event. When that event occurs, further regulation may be addressed at that time pertinent to that which exists vs. that which is merely contemplated. Therefore, the discussion regarding potential recourse to independent bill review and how that might impact the treatment of interpreter fees as “costs” is inapplicable at this time.

For at least the present time, we concur with the conclusion reached in the Initial Statement of Reasons, p8, as follows:

“[F]or the reasons that follow, the Appeals Board concludes that, under SB863, disputes over interpreter services rendered during medical-legal examinations or medical treatment appointments, including disputes over amounts payable

² See Emergency Regulations adopted by the DWC February 8, 2013, to expressly provide that the definition of a LC 4903(b) lien is amended to delete reference to “interpreters fees incurred in connection with medical treatment (Labor Code Section 4600)” because those fees are subject to a petition for costs under Labor Code section 5811. See also footnote 4 to the Initial Statement of Reasons to these Proposed Regulations.

under the official interpreter fee schedule, are subject to the specific costs procedures of Labor Code section 5811 and not solely IBR procedures.”

Thus, even if the interpreter fee schedule had already been adopted, interpreters may still rely upon the procedures of Labor Code section 5811, and are not obligated to proceed with an IBR procedure.

D. We concur with the proposed definition of “Costs” under CCR 10301(h), is appropriate to the exclusion of the treatment of interpreters fees as a lien or lien claim

The proposed definition of “Costs” states that it “means any claim for reimbursement of expenses or payment of service that is not allowable as a lien under Labor Code Section 4903.” This proposed definition then identifies certain fees expressly intended to be treated as “costs” to include those “costs under Labor Code section 5811, including qualified interpreter services rendered during a medical treatment appointment or medical-legal examination.”

E. We also concur with the acknowledgment in proposed CCR §10451 (b)(2) that a petition for costs may be utilized for interpreter services

Further confirming the intent to treat interpreter fees as costs under Section 5811 and not as a lien claim, we concur with the affirmation that the fee for interpreter services may be submitted using a petition for costs. To be clear, the use of a petition for costs is instead of the filing of “lien” or “lien claim,” as those terms are defined in the proposed definitions in CCR 10301(v).

And, to further confirm the point of this discussion, we also concur with the proposed definition of “lien activation fee” and “lien filing fee” set forth in CCR 10301(w) and (y) to apply to (i) a fee payable under Labor Code Section 4903.06(a)(1) for medical treatment and/or medical-legal cost liens filed prior to January 1, 2013 treated as a lien under Labor Code 4903(b) or (ii) a fee payable for a Section 4903(b) lien and/or claim lien filed after January 1, 2013, respectively. It has been noted above and in the Initial Statement of Reasons, that interpreter fees shall no longer be considered a medical-legal expense under Labor Code Section 4903(b).

As a result, it should be evident that there is a clear intent to carve interpreter fees out of the burdens otherwise imposed upon lien claimant, liens and costs liens, and enable interpreters to pursue a more streamlined and financial unencumbered procedure to preserve the availability of interpreting services to employees consistent with public policy.

F. Proposed CCR 10451(j) should not be permitted to unwind the clear intent of the legislature and the Board by redefining a petitioner for costs as a lien claimant

CCR section 10451(j) suggests that unless the petition for costs is filed by a “party” within the meaning of proposed CCR section 10301(dd)(1) or (2), that “the petitioner shall be treated as a lien claimant under . . .” It appears, however, that an interpreter would be included in the definition of a “party” only under proposed CCR section 10301(dd)(4), as a “non-employee petitioner for costs.” We are concerned that is misapplied, someone may attempt to suggest that interpreters should be treated as “lien claimants.” In particular, CC section 10451(a) provides that “Any person or entity may file a petition for costs.”

We do not think that this would be a necessary conclusion, but using interchangeable terminology creates an opportunity for future abuse. As we understand this provision, even if an interpreter is obligated to be treated as a “lien claimant” under the provisions of proposed CCR section 10451(j), and by extension proposed CCR section 10770.1 applicable to lien conferences and lien trials, it is expressly stated that the application of the “lien claimant” status for such purposes shall be for “other than provisions relating to the payment of a lien filing or activation fee”.³

II. PUBLIC POLICY SHOULD NOT BE ALLOWED TO BE SUBVERTED BY TECHNICAL OBFUSCATION

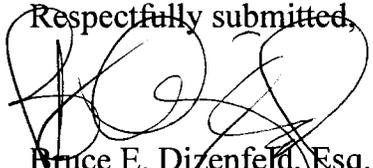
Although it should be evident from a review of the above described existing and proposed statutes and regulations applicable to the provision of interpreting services, there are pitfalls in the proposed Regulations that may be misused by those seeking to avoid the expense associated with ensuring that an injured employee with limited English proficiency will have access to legal and medical services guaranteed by California and federal constitutional provisions.

As described above, interpreter services are to be treated as costs and not liens, they are to be submitted pursuant to Labor Code Section 5811, they may be submitted by the interpreter as a petition for costs, and that such petition for costs shall not thereby be treated as a “lien” for purposes of requiring an activation fee or lien fee.

³ It should be noted that this acknowledgment that participation in a lien conference or lien trial shall not include the imposition or requirement of an activation fee or lien fee supports the conclusion described above with regard to the application of such filing fees only to liens governed by Labor Code 4903(b) and not generally to any person that might be considered a “lien claimant” for any other procedural reason.

We are nevertheless concerned that provisions that refer to lien forms⁴ and procedures to be implemented as a lien claimant may be misinterpreted and misapplied in an effort to override the clear intent of the statutes and the regulations to treat interpreting services in a manner distinct from other medical-legal and medical treatment expenses in order to protect its importance to the overall process.

Therefore, to ensure such an outcome, an affirmative statement confirming that interpreter services will be compensated as a cost and shall not be subject to the activation fees or lien fees otherwise chargeable to medical-legal and medical treatment providers would help avoid WCAB time repeatedly addressing arguments posed to undermine such services.

Respectfully submitted,

Bruce E. Dizenfeld, Esq.
Theodora Oringher, PC
535 Anton Boulevard, 9th Floor
Costa Mesa, California 92626
(714) 549-6165

⁴ See, for example, footnote 4 to the Initial Statement of Reasons, formulating an unsupportable hypothesis for the interpretation of Labor Code Section 4903.05(b) that if “claims of costs” are submitted “using a lien claim form” approved by the appeals board, that the mere form used for a petition for costs may somehow override legislative intent and the regulations proposed to require lien filing and activation fees under Labor Code Sections 4903.05 and 4903.06. Such a conclusion only serves to undermine the efforts to preserve protected rights to access.

April 15, 2013
Mark Gerlach
California Applicants' Attorneys Association

The California Applicants' Attorneys Association offers the following comments concerning the proposed changes to the Workers' Compensation Appeals Board Rules of Practice and Procedure scheduled for public hearings on April 16, 2013.

1. Section 10250 (d) (1):

This section limits who may file a Declaration of Readiness to Proceed. The reference to Section 10301 (dd) (4) would appear to actually preclude anyone other than a lien claimant or non-employee cost petitioner to file a Declaration of Readiness to Proceed. This appears to be a drafting error, and we recommend that the reference to subsection (4) be deleted because the reference should be only to Section 10301 (dd). This would clarify that parties may file a Declaration of Readiness to Proceed or, after the underlying case is resolved, lien claimants and non-employee cost petitioner may file a Declaration of Readiness to Proceed.

2. Section 10957.1 (p):

This subsection provides that where the IMR determination is reversed by the WCJ or the Appeals Board, the dispute is to be remanded to the AD "in accordance with Labor Code Section 4603.6 (g)". However, Section 4603.6 (g) concerns independent bill review; not IMR. We recommend that the reference to the Labor Code be amended to refer to the correct Code Section.

April 13, 2013
S. James Tsui
SJT & Associates

Dear Gentlepersons:

1. Interpreters' Burden of Proof of Interpreting Necessity:

Interpreters and interpreting agencies are assigned jobs. We don't create jobs. It is impractical that an interpreter or an agency ask the insurance company adjuster, the defense or applicant attorney when given a job assignment, to request proof, confirmation or evidence that the injured worker really needs interpreter before we accept a job. They will simply hang up on us and call someone else.

Likewise, it is ludicrous for an agency or an interpreter to conduct an English fluency test to confirm or prove that the injured worker indeed needs an interpreter.

So how is it that it is the interpreter or an agency's burden to obtain proof that an injured worker's need and request for interpreting service is necessary?

2. Interpreter's Burden of Proof of Injured Body Parts:

When an injury is finally denied, or a certain body part, let say, psyche is denied, interpreters and agencies are paid nothing for the jobs done. Again, if and when we are assigned jobs

by the applicant attorneys, we don't question the applicant attorneys if the injury or if certain body parts are accepted. They will hang up on us and call someone else if we do.

Our jobs is to interpret for the injured workers, it is not our job to question and to know merits of the cases. We are neither doctors nor attorneys.

As in any arena or trade, there are always bad apples; but they are always in the minority. Most of us interpreters/agencies are like all other ordinary citizens who are happy to have work, pay our mortgage and raise our children. It is hurtful that we are often paid nothing or at a loss for issues that we have no control of.



April 16, 2013

Neil P. Sullivan
Assistant Secretary and Deputy Commissioner
Workers' Compensation Appeals Board
Attention: Annette Gabrielli, Regulations Coordinator
P.O. Box 429459
San Francisco CA 94142-9459

Re: Commentary of Zenith Insurance Company Regarding
Proposed WCAB Rules § 10451, Petition for Costs

Dear Deputy Commissioner Sullivan:

Zenith would first like to commend the Workers' Compensation Appeals Board for the thoughtful and detailed work that has gone into drafting the regulations necessitated by Senate Bill 863, as well as the Initial Statement of Reasons. This was a monumental task that in many areas has involved a venture into uncharted territory with a minimum of guidelines in either statute or case law. Where there is innovation, there is always the danger of unintended consequences. Zenith would like to offer some comments concerning proposed WCAB Rules § 10451 Petitions for Costs which we believe may lead to unintended and undesirable consequences.

In fact, as described in greater detail below, some of these unintended consequences are already being realized in Southern California cases in the form of conditional orders to allow petitions for costs that are unsupported by law and fact and may constitute a denial of due process of law. There is additionally the clear potential for extensive and protracted litigation over these issues. Our specific suggestions are summarized on pages six and seven.

Statutory Basis for Costs

A discussion of the WCAB's proposed regulation on Petitions for Costs requires some background into the history of costs, as they existed prior to SB 863.

The statutory basis for costs is Labor Code § 5811(a) which states:

“No fees shall be charged by the clerk of any court for the performance of any official service required by this division, except for the docketing of awards as judgments and for certified copies of transcripts thereof. In all proceedings

under this division before the appeals board, costs as between the parties may be allowed by the appeals board.”

Since the first sentence of the subsection discusses court fees, the costs to which the statute refers are logically costs of litigation. The plain meaning of this statute is that only parties may incur costs of litigation that the Board has the power to “allow.” Although no distinction is made between the parties in the statute, as a practical matter, the litigation costs that the Board is authorized to allow are those of the applicant, with the defendant being the party that is responsible for payment. This is in keeping with the longstanding goal in workers’ compensation of leveling the playing field between employees and employers.

Besides Labor Code §5811, SB 863 added two new statutes containing the term, “costs.” Labor Code §§4903.05 and 4903.06 authorize the lien filing and lien activation fees. These statutes provide that fees are payable in connection with the filing and “activation” of all medical treatment liens and all “claims of costs filed as liens.” Except for these three statutes, there is no mention of costs in the Labor Code.

The Traditional Approach to Costs

Costs of litigation have traditionally included non-medical costs of obtaining evidence to prosecute a disputed claim. Included are photocopy of records that do not have a medical component and the costs of lay witnesses and non-medical expert reports and testimony such as vocational experts. The costs of interpreters at the WCAB, as well as in connection with depositions have also been considered costs under Labor Code §5811(b).

Although there has never been any statutory authority for providers of non-medical litigation costs to file liens, liens have commonly been filed as a matter of custom and practice and have been treated as liens procedurally even though they did not fit the formal definition of such. Prior to SB 863, the only true claims of costs under Labor Code §5811 were asserted by applicant attorneys seeking reimbursement of costs associated with non-medical lay and expert witnesses, including the costs of taking depositions. These claims were uniformly paid prior to or in connection with the resolution of the case in chief.

Who Can Be a Cost Petitioner?

Without further specific guidance from the Legislature, it strains the plain meaning of Labor Code §5811 to provide that any person or entity can file a “petition for costs” and thus become a party litigant in a workers’ compensation case. Allowing any person or entity to file a petition for costs will potentially open the door to unintended consequences and unintended petitioners. For example, the insurance carrier’s sub rosa investigator could file a petition for costs and claim party status to litigate a claim that the services were unpaid or underpaid and the Board would have to adjudicate it. Such a scenario would be a distinct possibility if the vendor saw a legal opportunity to right a perceived wrong without the expense of civil litigation. Thus, disputes that should be resolved in the civil arena may begin to appear at the already over-taxed WCAB.

Procedural Difficulties

If the Legislature intended to provide that costs are identical to liens without the obligation to pay the filing and activation fees, then the introduction of cost petitions into the process would be of little consequence. Existing law does not, however, provide the ability to carry out such a potential legislative intent. There is an extensive body of statute, regulation and case law dealing with liens and lien claimants. For the newly-minted cost petitioners, there is only a brief mention of the term in three Labor Code sections and an en banc decision, *Costa v. Hardy Diagnostic*, in which the Board held that recovery of costs should be governed by the medical-legal rules, specifically referring to costs of vocational experts.

Format of Petition for Costs

There is no standard form for a petition for costs so the submission may theoretically take any form that the filing entity, often a collection agent with no legal training, may devise. There is no requirement for the verifications that must accompany liens. The proposed WCAB regulation only requires that a demand for payment and response, if any, be attached to the petition and that the petition not be filed sooner than 60 days after a demand for payment is served on the defendant.

What Constitutes a “Demand for Payment?”

There is no authority that defines “a demand for payment” or the form that it must take in relation to a claim of costs outside of the Labor Code §§4603.2 and 4622 procedures for medical treatment and medical-legal charges which presumably correspond to the demand for payment referenced in the proposed WCAB regulation. Section 4603.2(b) (1) addresses the need for an itemized bill accompanied by reports and a prescription to be submitted by “providers of services provided pursuant to Section 4600. The subsection then goes on to state that “providers of services” include but are not limited to, “physicians, hospitals, pharmacies, interpreters, copy services, transportation services, and home health care services.”

Now, of course, no matter what Labor Code §4603.2 might say, photocopy services are never provided pursuant to Labor Code §4600 and only the interpreters for medical treatment are provided under §4600. Thus, there is no relevant statutory authority for the procedures to be followed and the information to be provided in submitting a bill for photocopy and interpreting services, much less those of vocational experts. As the Board pointed out, IBR is probably inappropriate for interpreters seeking a market value rate. Although SB 863 mandated fee schedules for photocopy services and vocational experts, as of yet no such fee schedules have been adopted.

Time Limitations on Cost Claims

There are no express statutory time limitations for the filing of a petition for costs. In its recent revision of the proposed regulations, the WCAB deleted the language by which cost petitions would be subject to the same statute of limitations as liens. This was probably justified in the absence of any statutory authority. However, the question remains unanswered as to

whether petitions for costs must be filed prior to a final order or whether there is no time limitation whatsoever on the filing of such petitions. Logically, a petition for costs should not survive the resolution of the case in chief because the applicant's own costs should be part of his or her ultimate recovery and there is no statutory authority for resolution of costs in separate proceedings as there is for liens in Labor Code §4903.4. Thus, it may be that only costs filed as liens have access to later adjudication.

The concept of costs as quasi-liens has never before been entertained and thus there is no authority in this area. Pursuant to Labor Code §5815, unresolved liens are barred unless jurisdiction over such liens is reserved in the final order or award. At the very least, there would have to be such a reservation of jurisdiction over costs and to date this has never happened because costs were either filed as a lien or paid in the case in chief.

Petitions for Costs and Conditional Orders for Payment of Costs

The reason why the content of the petition, the nature of the demand for payment and the question of the statute of limitations are so important is because of certain events that are currently taking place in Southern California that represent unintended consequences of the SB 863 distinction between liens and costs.

Great numbers of photocopy services and interpreters are either requesting that their liens be dismissed or are allowing them to be dismissed for failure to pay the lien activation fee. In their place, they are filing petitions for costs, relying on the premise that such a procedure is authorized by SB 863 and the proposed WCAB regulations.

Attached to many of these petitions for costs are proposed conditional orders by which it is requested that a WCJ order the defendant to pay the charges or the balance thereof within a stated number of days, absent objection showing good cause. One photocopy company has made it a practice to request payment in the amount of a "compromise figure" that was the subject of a prior written demand to which the defendant either neglected to respond or rejected.

Some WCJs are refusing to accept these petitions, taking the position that if a lien was previously filed, the provider is bound by its prior action in asserting a "claim of costs filed as a lien" If the lien activation fee is not paid, the lien will be dismissed with no ability to revive it through a later filed cost petition. In contrast, other WCJs are signing the conditional orders, occasionally as a task communicated through EAMS, but most often on a walk-through basis. Zenith has received most of these conditional orders in cases filed at the San Diego and Goleta Boards. However, the practice is spreading to other Southern California District Offices.

Many of these petitions and conditional orders are factually or procedurally defective. Nonetheless, if a judge has signed the order, it would be risky for a defendant not to respond with an objection. In 2010, a WCAB panel issued a decision in a case called *Barajas v. F & H Cold Storage*, ADJ6559495, in which a WCJ improperly inserted a hold harmless provision into the Order Approving Compromise and Release that was not part of the settlement agreement. Even though the WCJ had no right to alter the terms of the settlement, the panel found that the defendant was bound by the hold harmless order because it failed to petition for reconsideration.

The WCAB could well take the same position concerning a defective conditional order allowing costs as long as it was signed by a WCJ and served on the defendant.

Potential Due Process Violations

Zenith is aware of the fact that WCAB Rules §10349 provides that “an order with a clause rendering the order null and void if an objection showing good cause is filed within ten (10) days shall be deemed equivalent to a ten (10) day notice of intention.” Nonetheless, it cannot be denied that a conditional order that can only be voided by a showing of good cause may represent a due process violation. If an objection is filed, the parties will never know whether the WCJ found the objection to constitute good cause unless a subsequent ruling issues. In the absence of such a ruling, a defendant that does not file a Petition for Reconsideration may be risking a final order to pay what it doesn’t owe. This is why summary allowance and disallowance of costs and lien should only be accomplished through a notice of intention and subsequent order as provided in the proposed WCAB regulations, and never by means of a conditional order.

Moreover, an order allowing or disallowing a cost or a lien is a final adjudication on the merits. The request in the petition for the issuance of an order, if such request is deemed by the WCJ to require judicial action, is a submission of the dispute for adjudication. As such, the resulting decision is subject to Labor Code §5313 and requires reasons for the opinion. These reasons should be provided by the petitioner in its petition together with any necessary proof. As the WCAB noted in its recent en banc decision in *Torres v. AJC Sandblasting*, mere presentation of a bill that has not been paid is not sufficient to enable a lien claimant or, presumably a cost petitioner, to carry its burden of proof.

Of course, merely filing a petition for costs and proposed conditional order does not constitute a submission any more than the Board’s receipt of the form entitled “Notice and Request for Allowance of a Lien” means that a WCJ is immediately required to rule on the request for the allowance of the lien. Unless the merits are obvious from the petition and any attachments, a conditional order disallowing the lien or cost would be as justifiable as one allowing the lien or cost. In fact, if such a procedure were truly a valid way to dispose of disputes, a WCJ could issue a conditional order awarding 100% PD or ordering that an applicant take nothing, and if the adverse party overlooked the “order” and failed to object, that would be the end of the case.

The Burden on the WCAB

For the providers that wish to avoid paying the lien activation fee, it is little trouble to simply attach another piece of paper to a generic petition for costs and send someone down to the Board to collect judicial signatures. However, it places a heavy burden on both defendants and the WCAB. In most cases, the defendant will object and absolutely nothing will have been accomplished except to generate more paper and more work. Success in those instances where there is no objection will very slightly decrease the amount of disputes coming on the Board’s

calendars, but at the same time it will encourage more providers to utilize the procedure and tax the limited resources of the Board.

Litigation Over Cost Petition Issues

The more significant problem is that this state of affairs has the potential for protracted litigation that will continue long beyond January 1, 2014 when all activation fees must be paid or the liens dismissed by operation of law. One prominent defense attorney has published a commentary on petitions for costs arguing that proposed §10451 is invalid as inconsistent with the statute, citing as authority the Board's en banc decision in *Mendoza v. Huntington Hospital*. He has urged defendants to file petitions for removal should the regulation be adopted in its present form.

Should the WCAB or the Court of Appeal ultimately determine that it is not permissible to dismiss a lien and file a petition for costs, the fate of these providers' claims will be open to question, and particularly if filing a new lien would be time barred. To complicate matters, some of the petitioning providers claim that they have relied on the advice of certain WCJs who have specifically told them to dismiss their liens and file cost petitions. It seems likely that some of these claims are true.

It would be much easier for the WCAB to address these potential unintended consequences before they become overwhelming rather than to wait for the flood of litigation that is bound to take place after it is too late to remedy the problem.

Zenith's Recommendations for Revision of Proposed WCAB Rules § 10451

- Petitions for Costs should not be allowed to be filed by "any person or entity" but should be limited to those that provided specified services to the applicant for the purpose of litigating a disputed claim or for interpreting in connection with medical treatment.
- No later than the adoption of the final version of the proposed WCAB regulations, the WCAB should adopt a form Petition for Costs that is analogous to the lien form and should require its use for all claims of costs. A proposed form has been attached to the email transmitting this commentary.
- Petitions for Costs filed by interpreters should be required to contain a declaration in compliance with the WCAB's en banc decision in *Guitron v. Santa Fe Extruders* by requiring service on the defendant of the name of the interpreter that performed the services and his or her certification number, and if not certified, a brief statement of qualifications, as well as a declaration in the petition for costs that the applicant required an interpreter and that the services were actually performed.
- Petitions for Costs filed by medical-legal petitioners should contain a declaration that the requirements for filing such a petition, as outlined in the proposed regulations, have been met.

- All cost petitioners should be required to declare that they have complied with the requirements in the proposed regulations for the filing of a Petition for Costs and the form should contain a notice that violation of these provisions will result in the dismissal of the petition.
- Instead of including in Rule 10451 procedural rules for costs that are already applicable to liens, the Board should simply add language to certain regulations governing liens so that costs are included. For example, Rules 10770.1 and 10888 should be amended to add costs petitions wherever liens are mentioned which would ensure uniformity of procedure between the two types of claims. Any overlap in the provisions should be deleted from Rule 10451.
- If liens can be dismissed for lack of prosecution or for failure to appear at a lien conference or lien trial, the same procedures should apply to costs. This could be accomplished by simply adding cost petitioners to the applicable dismissal regulations for liens. Otherwise, there will be no consequences for the cost petitioners that create the need for multiple continuances of lien hearings by failing to appear at the WCAB.
- The regulations should contain a provision that conditional orders to allow or disallow a cost or a lien may not be utilized and that a notice of intention to allow or disallow a lien or petition for costs may issue, but that the notice must state the legal and/or factual basis for the proposed order beyond mere nonpayment of all or part of the bill.
- The Board should decide as soon as possible, through regulation or panel decisions or even an en banc decision, whether or not it was the intent of the Legislature that a provider that has already filed a lien has the option of dismissing its lien and filing a petition for costs in order to avoid the lien activation fee. If the procedure is a valid one, there remains the question of whether the petitions might be time-barred and on what basis.

Thank you for giving us an opportunity to comment on the proposed WCAB regulations.

Very truly yours,



HON. PAMELA FOUST (Retired)
Vice-President Claims Legal
Zenith Insurance Company.

**STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
PETITION FOR COSTS**

Date of Original Petition _____ Original Petition Amended Petition
MM/DD/YYYY

Case No. _____
(Choose only one)

a specific injury on _____
(DATE OF INJURY: MM/DD/YYYY)

a cumulative injury which began on _____ and ended on _____
(START DATE: MM/DD/YYYY) (END DATE: MM/DD/YYYY)

Injured Worker:

First Name _____

Last Name _____

Address/PO Box (Please leave blank spaces between numbers, names or words) _____

City _____ State _____ Zip Code _____

Attorney/Representative for Injured Worker:

Name _____

Address/PO Box (Please leave blank spaces between numbers, names or words) _____

City _____ State _____ Zip Code _____

Cost Petitioner (Completion of this section is required):

Name of Organization filing petition for costs (for individual petitioners, leave blank) _____

First Name of individual filing petition for costs (organizational petitioners, leave blank) _____

Last Name of individual filing petition for costs (organizational petitioners, leave blank) _____

Address/PO Box (Please leave blank spaces between numbers, names or words) _____

City _____ State _____ Zip Code _____

Phone _____

Cost Petitioner's Attorney/Representative, if any

Law Firm/Attorney

Non-Attorney Representative

Petitioner not represented

Cost Petitioner Law Firm/Representative

First Name

Last Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

Phone

Employer

Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

Insurance Carrier or Claims Administrator

Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

Employer or Claims Administrator Attorney/Representative (if known)

Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

The Cost Petitioner hereby requests that the Workers' Compensation Appeals Board allow the following costs that were incurred by or on behalf of the Applicant and order the Defendant to pay the reasonable value of said costs directly to the Cost Petitioner. (mark appropriate box):

Expenses and fees under Labor Code § 5710

Attorney fees

Costs of qualified interpreters

Expenses of injured worker (specify):

Photocopy costs under Labor Code §§ 5811(a) and 4620(a), including subpoena services and witness fees.

Costs of qualified interpreters under Labor Code § 5811(b) in connection with the following:

WCAB hearings

Medical-legal examinations

Medical treatment appointments

Other (specify):

Costs of Vocational experts under Labor Code § 5811

Costs under Labor Code § 4600 payable directly to the injured worker for reasonable transportation, meal, and lodging expenses and for temporary disability indemnity.

Medical-legal costs under Labor Code § 4620 et seq.

Other costs: Specify nature and statutory basis:

REQUIRED DECLARATIONS:

All petitioners for costs of interpreters must declare the following:

- Petitioner has provided the defendant with the names and certification numbers, if any, of all interpreters the cost of whose services is being claimed. All interpreting services were actually provided and an interpreter was required to facilitate communication between the applicant and his or her attorney, a medical professional in connection with a medical-legal evaluation or a medical treatment appointment, a WCJ or an Information and Assistance Officer.
- Petitioner has complied with the Labor Code §§ 4603.2 and 4622 procedures of billing and report submission, explanation of review and second review, as applicable and said procedures have either been completed or have been timely attempted without timely response.

All petitioners for medical-legal costs must declare the following:

- Petitioner has complied with the provisions of Labor Code § 4622(a) and (b) and the defendant has failed to timely make a final written determination or has failed to make payment in accordance with that determination or has failed to timely file both a Petition for Determination of Non-IBR Medical-Legal Dispute and a Declaration of Readiness to Proceed as required by § 4622(c).

All cost petitioners must declare the following:

NOTE: A PETITION THAT FAILS TO COMPLY WITH THESE PROVISIONS SHALL BE DISMISSED.

- No cost is being claimed for a medical treatment cost that may be claimed as a Labor Code § 4903(b) lien.
- No cost is being claimed that is subject to Independent Medical Review (IMR) or Independent Bill Review (IBR) and their related procedures.
- At least 60 days have elapsed since a written demand for the costs has been mailed to or personally served on the defendant.
- Attached to this Petition for Costs is the following:
 - A copy of the written demand together with a copy of the proof of service, and
 - A copy of the defendant's response, or
 - No response to the written demand was received.

(Signature of Attorney/Representative for Petitioner)

(Signature of Cost Petitioner)

**STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
PETITION FOR COSTS**

Date of Original Petition _____ Original Petition Amended Petition
MM/DD/YYYY

Case No.
(Choose only one)

a specific injury on _____
(DATE OF INJURY: MM/DD/YYYY)

a cumulative injury which began on _____ and ended on _____
(START DATE: MM/DD/YYYY) (END DATE: MM/DD/YYYY)

Injured Worker:

First Name

Last Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City _____ State _____ Zip Code _____

Attorney/Representative for Injured Worker:

Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City _____ State _____ Zip Code _____

Cost Petitioner (Completion of this section is required):

Name of Organization filing petition for costs (for individual petitioners, leave blank)

First Name of individual filing petition for costs (organizational petitioners, leave blank)

Last Name of individual filing petition for costs (organizational petitioners, leave blank)

Address/PO Box (Please leave blank spaces between numbers, names or words)

City _____ State _____ Zip Code _____

Phone

Cost Petitioner's Attorney/Representative, if any

Law Firm/Attorney

Non-Attorney Representative

Petitioner not represented

Cost Petitioner Law Firm/Representative

First Name

Last Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

Phone

Employer

Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

Insurance Carrier or Claims Administrator

Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

Employer or Claims Administrator Attorney/Representative (if known)

Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

The Cost Petitioner hereby requests that the Workers' Compensation Appeals Board allow the following costs that were incurred by or on behalf of the Applicant and order the Defendant to pay the reasonable value of said costs directly to the Cost Petitioner. (mark appropriate box):

Expenses and fees under Labor Code § 5710

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Expenses of injured worker (specify):

Photocopy costs under Labor Code §§ 5811(a) and 4620(a), including subpoena services and witness fees.

Costs of qualified interpreters under Labor Code § 5811(b) in connection with the following:

WCAB hearings

Medical-legal examinations

Medical treatment appointments

Other (specify):

Costs of Vocational experts under Labor Code § 5811

Costs under Labor Code § 4600 payable directly to the injured worker for reasonable transportation, meal, and lodging expenses and for temporary disability indemnity.

Medical-legal costs under Labor Code § 4620 et seq.

Other costs: Specify nature and statutory basis:

REQUIRED DECLARATIONS:

All petitioners for costs of interpreters must declare the following:

- Petitioner has provided the defendant with the names and certification numbers, if any, of all interpreters the cost of whose services is being claimed. All interpreting services were actually provided and an interpreter was required to facilitate communication between the applicant and his or her attorney, a medical professional in connection with a medical-legal evaluation or a medical treatment appointment, a WCJ or an Information and Assistance Officer.
- Petitioner has complied with the Labor Code §§ 4603.2 and 4622 procedures of billing and report submission, explanation of review and second review, as applicable and said procedures have either been completed or have been timely attempted without timely response.

All petitioners for medical-legal costs must declare the following:

- Petitioner has complied with the provisions of Labor Code § 4622(a) and (b) and the defendant has failed to timely make a final written determination or has failed to make payment in accordance with that determination or has failed to timely file both a Petition for Determination of Non-IBR Medical-Legal Dispute and a Declaration of Readiness to Proceed as required by § 4622(c).

All cost petitioners must declare the following:

NOTE: A PETITION THAT FAILS TO COMPLY WITH THESE PROVISIONS SHALL BE DISMISSED.

- No cost is being claimed for a medical treatment cost that may be claimed as a Labor Code § 4903(b) lien.
- No cost is being claimed that is subject to Independent Medical Review (IMR) or Independent Bill Review (IBR) and their related procedures.
- At least 60 days have elapsed since a written demand for the costs has been mailed to or personally served on the defendant.
- Attached to this Petition for Costs is the following:
 - A copy of the written demand together with a copy of the proof of service, and
 - A copy of the defendant's response, or
 - No response to the written demand was received.

(Signature of Attorney/Representative for Petitioner)

(Signature of Cost Petitioner)

April 11, 2013
Victoria Katz
Rules Attorney
Aderant

Dear Mr. Sullivan,

We are writing to comment on the proposed amendments to the WCAB Rules of Practice and Procedure, 8 CCR 10300 through 10999, out for written comment until April 15, 2013. Specifically, we request that 8 CCR sections 10957, 10957.1 and 10959 be further amended to clarify the deadlines to answer petitions appealing determinations of the Administrative Director ("AD").

As proposed, 8 CCR 10957(b), 10957.1(c) and 10959(b)(1) say that the petitions appealing the AD determinations shall be filed no later than 20 days after service of the AD's determination, "except the time for filing shall be extended in accordance with sections 10507 and 10508." Thus, it is our understanding that if the AD served the determination by mail or fax, the filing deadline would be 25 days after such service if the determination is served within California.

Similarly, proposed 8 CCR 10959(h) refers to an extension of time under sections 10507 and 10508 for the answer to the petition appealing an AD determination: "The AD may file an answer to the petition within 10 days of the date of service of that petition, except the time for filing shall be extended in accordance with sections 10507 and 10508."

In contrast, however, the 10507 and 10508 extension is not included in the answer deadlines in 10957(j) and 10957.1(k). These sections state only, "The adverse party(ies) or provider(s) and the AD may file an answer to the petition within 10 days of its date of service."

Because the deadlines to file all three petitions appealing the AD determinations and the deadline to answer the petition in 10959 all specifically refer to extensions of time under 10507 and 10508, the absence of these provisions in 10957(j) and 10957.1(k) seems conspicuous. Does the WCAB intend by this absence that no extension of time under 10507 and 10508 should be applied to the deadlines to answer the petitions in 10957(j) and 10957.1(k) when the petition is served by means other than personal delivery? If so, to avoid confusion we respectfully request that these answer deadlines be further amended to state specifically that no extension of time under 10507 and 10508 is to be applied to these deadlines.

Moreover, unless the WCAB intends that the 10507 and 10508 extensions do not apply to a particular deadline, we suggest that the WCAB remove the exception language from all of the petition-related deadlines. On their face, neither section 10507 nor 10508 appear to limit their application to particular regulations or circumstances. Thus it is our understanding that unless stated otherwise by Code or Regulation, the extensions apply to all WCAB deadlines where documents are served by means other than personal service and where deadlines land on weekends or holidays, respectively, without need for specific reference to such rules. If this is correct, including the exception language on these petition-related deadlines is unnecessary and may actually cause confusion amongst practitioners as to which deadlines the extensions apply.

However, if the WCAB prefers to retain the 10507 and 10508 references and it is not the WCAB's intention to treat the calculation of the 10957(j) and 10957.1(k) answer deadlines differently than the other petition-related deadlines, we would respectfully request that these deadlines be further amended to include the same language as the other petition-related deadlines – "except the time for filing shall be extended in accordance with sections 10507 and 10508."

Thank you for your time and consideration.

April 8, 2013
Mark Webb
Vice President & General Counsel
Pacific Compensation Insurance Company

For the rule making file.

Thank you



30301 Agoura Road
Agoura Hills, California 91301-2096
818.575.8500

Toll Free 866.374.8500
www.pacificcomp.com

March 27, 2013

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation, Legal Unit
Post Office Box 420603
San Francisco, CA 94142
dwcrules@dir.ca.gov

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

RE: Division of Workers' Compensation Independent Bill Review Proposed Regulations; Workers' Compensation Appeals Board Proposed Changes to Rules of Practice and Procedure

Dear Ms. Gray/Mr. Sullivan,

On behalf of Pacific Compensation Insurance Company, we appreciate the opportunity to provide the following comments on proposed regulations implementing the new Independent Bill Review (IBR) provisions of Senate Bill 863 (De León) and the proposed new Rules of Practice and Procedure relating to a "Petition for costs" under proposed 8 CCR § 10451. We are offering these comments to you simultaneously due to the application of Labor Code § 5811 as amended. For purposes of example only, these comments are addressed primarily to interpreting at a medical treatment appointment, although much the same discussion, and the same analysis of ambiguities, can be applied to interpreting for med-legal appointments payable pursuant to Labor Code §§ 4620 and 4622.

As a preliminary matter, reconciling the various provisions of SB 863 as it relates to a "Petition for costs" is not an enviable task. Including fees for interpreter services during medical treatment appointments in Labor Code § 5811 while simultaneously designating such services medical treatment under Labor Code §§ 4600(g) and 4603.2(b)(1) creates an ambiguity that requires through the rule making process more clarification than has

been afforded by proposed 8 CCR § 10451.¹ Unfortunately, we are left with the statutory framework, patchwork though it is, for the time being and now we as a community and you as the regulatory authorities are left to see what can be best made of it. Nevertheless, it is within the authority of the Board and the Division, "... to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Government Code § 11342.600).

While it is true that a specific provision of law governs a general one, Elliott v. Workers' Comp. Appeals Bd. (2010)182 Cal.App.4th 355, it is also true that, as stated in Carlton Browne & Co. v. Superior Court (Charterhouse Investment Co.) (1989) 210 Cal.App.3d 35, 258 Cal.Rptr. 118:

"Every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. In the construction of a particular statute or any of its provisions, all acts relating to the same subject matter or having the same general purpose should be read together as constituting one law." (Citations omitted) 210 Cal.App.3d at 43, 44.

The starting point for resolving the ambiguities created in SB 863, therefore, is reading Labor Code §§ 4600, 4603.2, 4603.3, 4603.6, 4903 and 5811 *in pari materia*.

As stated in the Assembly Floor analysis of SB 863,

"Therefore, in order to further eliminate a major portion of the unnecessary volume of liens, the bill would create an "independent bill review" process where expert bill reviewers would make determinations in cases where it is merely a billing, and not a substantive treatment, dispute. *This IBR process would relieve substantial congestion in the workers' compensation courts, provide much faster dispute resolution, and result in better decisions by billing experts as opposed to judges, who have no special training in the arcane world of billing codes and procedures.*" – Assembly Floor Analysis, SB 863, September 1, 2012, p.12. (Emphasis supplied)

An analysis, "... which was before the Legislature during its deliberations on the legislation in question, falls within the class of documents that this court traditionally has considered in determining legislative intent." People v. Benson (1998) 18 Cal.4th 24, 34 fn.6, 74 Cal.Rptr.2d 294; 954 P.2d 557. Consequently, the Board and the Division need to be mindful of the intent of enacting independent bill review (IBR) when resolving the ambiguities created in the amendments to Labor Code § 5811.

¹ This ambiguity is underscored by the definition of "Costs" in proposed 8 CCR § 10301(h)(2), stating that payment of costs for a qualified interpreter under Labor Code § 5811 is subject to a petition for costs because it is a, "...service that is not allowable as a lien under Labor Code section 4903". Interpreter services, however, are "medical treatment" per the Board's decision in Guitron v. Santa Fe Extruders (State Compensation Insurance Fund) (2011) Case No. ADJ163338 (LAO 0873468) and the amendments to Labor Code § 4600, subdivision (g), in SB 863. As such, an interpreter for medical treatment appointments does indeed have a lien pursuant to subdivision (b) of Section 4903. As we try to set forth in these comments, the challenge is not whether *all* interpreter costs fall outside the provisions of Section 4903 but rather to identify *which* ones do in order to reconcile the application of statutes that are *in pari materia*.

1.

Not all interpreters for medical treatment appointments are “qualified” for purposes of Labor Code § 5811.

Labor Code § 5811 defines a “qualified interpreter” as, “...a language interpreter who is certified, or deemed certified, pursuant to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or Section 68566 of, the Government Code.”

This Section, as amended, states that only a “qualified interpreter” may render services during a medical treatment appointment and file a petition for costs for “...fees that are reasonably, actually, and necessarily incurred shall be paid by the employer under *this section*.” [Labor Code § 5811(b)(2)(C)] (Emphasis added)

Subdivision (f) of Sec. 4600 sets forth the criteria for interpreters who provide services during an examination: “For purposes of this section, “qualified interpreter” means a language interpreter certified, or deemed certified, pursuant to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or Section 68566 of, the Government Code.” Those are the same requirements in Sec. 5811(b)(2).

However, subdivision (g) of Labor Code § 4600, which was also added in SB 863, states that, “To be a qualified interpreter for purposes of medical treatment appointments, an interpreter is not required to meet the requirements of subdivision (f)”.

Thus, a “qualified interpreter” under Labor Code § 4600(g) who does not meet the requirements under subdivision (f) of that section, is not “qualified” under Section 5811 and cannot file a petition for costs.

At a minimum, the regulations should reflect this distinction. This would also harmonize, to an extent, the provisions of Labor Code §§ 4600, 4903(b), and 5811 by identifying interpreter services for which a lien is allowable and, corresponding, where a petition for costs is not appropriate.

2.

Under most circumstances an applicant will not incur costs for interpreter services allowable under Labor Code § 5811(b)(2).

Section 5811 states: “It shall be the responsibility of any party producing a witness requiring an interpreter to arrange for the presence of a qualified interpreter.”

Paragraph (2) of subdivision (b) of this Section goes on to state, “Interpreter fees that are reasonably, actually, and necessarily incurred shall be paid by the employer under this section, provided they are in accordance with the fee schedule adopted by the administrative director.”

Consistent with the notion of “costs” in the context of civil litigation (Code of Civil Procedure § 1033.5), Section 5811 places the burden on securing an interpreter on the party producing the witness and, in the case of an applicant, either advancing or incurring costs associated with interpreter services for which the employer may be liable but for which the applicant is liable at the time they are incurred. This, again, is consistent with Code of Civil Procedure § 1033.5(c)(1): “Costs are allowable if incurred, whether or not paid.”

By definition, “incurred” means to become liable or subject to. [See: Lolley v. Campbell (2002) 28 Cal.4th 367, 121 Cal.Rptr.2d 571, citing Webster's 3d New International Dictionary (1981) p. 1146²] An obligation that is “incurred” becomes the liability of the party who incurs it until it is paid. Thus, in Barr v. Workers' Comp. Appeals Bd. (2008) 164 Cal.App.4th 173, the question of whether an award of costs for the preparation of vocational testimony under Sec. 5811 depended on the admissibility of the report was before the Court because, “Barr's lawyer then hired a vocational rehabilitation consultant to evaluate Barr's then-existing condition, some seven years after the industrial accident.” *Id.* 164 Cal.App.4th at 176.

In Johnson v. Workers' Comp. Appeals Bd. (1984) 37 Cal.3rd 235, 207 Cal.Rptr. 857; 689 P.2d 1127, the Supreme Court held that the costs paid by an applicant filing an answer to a Petition for Review were allowable under Sec. 5811. In this case, the applicant paid \$531.93.

Subdivision (f) of Sec. 4600, relating to med-legal interpreting, states that “These services shall be provided by the employer.” Subdivision (g) of Sec. 4600, relating to treatment interpreting, states, “Upon request of the injured employee, the employer or insurance carrier shall pay for interpreter services.”

As noted in the Assembly Floor Analysis, *supra*, in its summary of SB 863, the legislation: “Provides that where interpreter services are needed, the injured worker shall make a request to the employer or insurer, and the employer or insurer shall pay for the interpreter services.” – Assembly Floor Analysis, SB 863, September 1, 2012, p.4.

Finally, subdivision (b) of Labor Code § 3751 states:

“If an employee has filed a claim form pursuant to Section 5401, a provider of medical services shall not, with actual knowledge that a claim is pending, collect money directly from the employee for services to cure or relieve the effects of the injury for which the claim form was filed, *unless the medical provider has received written notice that liability for the injury has been rejected by the employer and the medical provider has provided a copy of this notice to the employee.* Any medical provider who violates this

² Lolley addresses the issue of whether attorney’s fees were “incurred” in an appeal of an order to pay unpaid wages pursuant to Labor Code § 98.2 where the former employee was represented by the Labor Commissioner. The issue of whether attorney’s fees were “incurred” even though there was no obligation on the part of the employee to pay them involved considerably different issues than the question of whether an injured worker incurs costs pursuant to Labor Code § 5811 for interpreter services pursuant to § 4600.

subdivision shall be liable for three times the amount unlawfully collected, plus reasonable attorney's fees and costs." (Emphasis added)

Labor Code § 4603.2(b)(1) states:

"Any provider of services provided pursuant to Section 4600, including, but not limited to, physicians, hospitals, pharmacies, interpreters, copy services, transportation services, and home health care services, *shall* submit its request for payment with an itemization of services provided and the charge for each service, a copy of all reports showing the services performed, the prescription or referral from the primary treating physician if the services were performed by a person other than the primary treating physician, and any evidence of authorization for the services that may have been received." (Emphasis added)

The proposed Board regulations require the bill to be submitted pursuant to this Section as a condition precedent to filing a petition for costs. [Proposed 8 CCR § 10451(b)(2)]

The submission of a request for payment commences the bill review process that culminates, in terms of adjudication, with independent bill review. The process goes as far as the provider wishes to take it, but there are no off-ramps to seek alternative resolution of a dispute in Labor Code §§ 4603.2, 4603.3, or 4603.6.

Nevertheless, as amended Labor Code § 5811 clearly states that a petition for costs can be filed for interpreter fees that are "reasonably, actually, and necessarily incurred" by a party. As we have seen, in the case of an accepted claim there will be no circumstance where the applicant will "incur" interpreter fees payable pursuant to Sec. 5811 due to the amendments to Labor Code §§ 4600 and 4603.2. However, as noted in Labor Code § 3751, there may be circumstances in a case where liability is in dispute and, where the proper procedures have been followed as set forth in subdivision (b) of Sec. 3751, the injured worker will incur an obligation to pay an interpreter. Furthermore, there can be circumstances, again during the resolution of a dispute over compensability, where an applicant's attorney advances the costs of interpreter services pending the resolution of a dispute.

It may be argued that there is no bright line distinction between accepted and denied claims when it comes to operation of these various statutes. Respectfully, that is not the case. The provider does have an option when the issue of compensability is in dispute. That may occur if the provider decides not to bill the claims administrator pending a determination of compensability, as mentioned earlier, pursuant to Section 3751 or if the fees for interpreter services have been advanced by the applicant's attorney. In these circumstances, and only these circumstances, will the applicant "incur" a cost that may be awarded pursuant to Labor Code § 5811. However, once a claim is compensable, if the provider wishes to get paid the provider must request payment from the claims administrator and the process that commences with Section 4603.2 is the exclusive process for this.

Once the provider bills the claims administrator – even in a claim where compensability is in dispute – there is no longer a cost "incurred" by the applicant and resolution of the

billing is deferred under all other issues affecting liability for treatment are resolved. [Labor Code § 4603.6(a)] If an applicant wishes to self-procure an interpreter in an accepted claim, or if the costs for an interpreter are advanced for those services, the services are then provided pursuant to Section 4600 and are subject to Sec. 4603(b)(1).

The clear intent of the amendments creating IBR was to take billing disputes away from the Appeals Board and to reduce liens. Unless the circumstances in which a petition for costs can be filed are narrowly defined consistent with requirement that "...all acts relating to the same subject matter or having the same general purpose should be read together as constituting one law," Browne, *supra* the intent of SB 863 will be frustrated.

Consistent with the scope and intent of the changes in SB 863, we recommend that the Board reconsider its expansive proposed rule regarding a petition for costs for interpreter services and instead adopt a rule allowing a petition for costs only when liability for payment has been incurred on the part of the injured worker and, upon a determination of compensability on an injury or condition, the provider has elected *not* to submit a bill for costs pursuant to Labor Code § 4603.2 for costs incurred *prior* to the determination that the injury or condition is compensable. Under no circumstances should a petition for costs be allowed after the employer is liable for providing treatment under Article 2 (Commencing with Sec. 4600) of Chapter 2 of Part 2 of Division 4.

3.

The provisions regarding a petition for costs for interpreter services for med-legal examinations in proposed 8 CCR § 10451 are contrary to the plain language of Labor Code § 4622

Labor Code § 4622 states: "All medical-legal expenses for which the employer is liable shall, upon receipt by the employer of all reports and documents required by the administrative director incident to the services, be paid to whom the funds and expenses are due, as follows." Paragraph (2) of Subdivision (b) of Section 5811, as it relates to interpreter services payable under Labor Code § 4622, was not substantially amended by SB 863.³ Consequently, Labor Code § 4622 is a later-enacted statute. Furthermore, Sec. 4622 relates specifically to med-legal expenses while Section 5811 only generally discusses "costs". Thus this new procedure is contained both in a later-enacted statute and one that is specifically addressed to med-legal costs.

³ As originally enacted in 1993 in Assembly Bill 110 (Peace and Brulte), the interpreter language in subdivision (b) of Sec. 5811 read:

"It shall be the responsibility of any party producing a witness requiring an interpreter to arrange for the presence of a qualified interpreter. A qualified interpreter is a language interpreter who is certified, or deemed certified, pursuant to Section 11513 or 68566 of the Government Code.

Interpreter fees which are reasonably, actually, and necessarily incurred shall be allowed as cost under this section, provided they are in accordance with the fee schedule set by the administrative director.

A qualified interpreter may render services during the following:

(1) A deposition.

(2) An appeals board hearing.

(3) During those settings which the administrative director determines are reasonably necessary to ascertain the validity or extent of injury to an employee who cannot communicate in English.

The analysis in Los Angeles Police Protective League v. City of Los Angeles (1994) 27 Cal.App.4th 168 is illustrative. At issue in this case was whether a public entity is required to indemnify public employees for legal fees incurred in successfully defending themselves against criminal prosecutions arising from actions taken within the course and scope of their employment. It required reconciling Government Code § 995.8 with Labor Code § 2802.

Citing numerous cases, the Court applied two maxims of statutory construction: “When two acts governing the same subject matter cannot be reconciled, the later in time will prevail over the earlier. Moreover, a particular or specific provision will prevail over one which is more general.” 27 Cal.App.4th at 178. Applying these maxims to the question of statutory construction presented in that case, the Court held:

“Under these principles, it is manifest that Government Code section 995.8 must prevail to the extent necessary over Labor Code section 2802 in cases involving public employees. Government Code section 995.8 is more recent and more particular than Labor Code section 2802.” *Id.*

The same analysis occurs here. Labor Code § 4622 is both later enacted and more specific than Section 5811 as it relates to med-legal costs.⁴ As noted in the Assembly Floor Analysis of SB 863, *supra* the express intent of the Legislature was to reduce the volume of bill review disputes before the Appeals Board. This intent is further reinforced by the amendment to subdivision (b) of Section 4903, in which lien rights are granted for providers of services pursuant to Article 2 (commencing with Section 4600), “except those disputes subject to independent medical review or independent bill review.”

As noted earlier, Sections 4600, 4603.2, 4622, 4903, and 5811 are *in pari materia*. The unquestionable intent expressed in the amendments to Sections 4600, 4603.2, 4622, and 4903 is the development of a comprehensive procedure to process billings of providers of services through an IBR process and not through a proceeding before the Appeals Board. In reconciling the conflict between Section 4622 and 5811, that intent must be honored.

It may be argued that in order to do as we recommend, the Board and the Division would be suggesting that SB 863 effects a limited repeal by implication of part of Labor Code § 5811. While it is required, “... to maintain the integrity of both statutory provisions if the two can stand together,” Wolfe v. Dublin Unified School Dist. (1997) 56 Cal.App.4th 126, 65 Cal.Rptr.2d 280, and repeals by implication are not favored, “... when, as here, a subsequently enacted specific statute directly conflicts with an earlier, more general provision, it is settled that the subsequent legislation effects a limited repeal of the former statute to the extent that the two are irreconcilable.” Wolfe v. Board of Medical Quality

⁴ It should be noted that unlike medical treatment costs, med-legal costs are the liability of the employer regardless of the ultimate determination of compensability (Labor Code § 4064) and that case law allowing med-legal costs under Labor Code § 5811 predate the creation of the current med-legal process. See: Adams v. Workers' Comp. Appeals Bd. (1976), 18 Cal.3d 226, State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1977), 76 Cal.App.3d 136.

Assurance (1981) 124 Cal.App.3d 703, 709, 177 Cal.Rptr. 538. (Citations omitted). See also: Governing Board v. Mann (1977), 18 Cal.3d 819.

The language in the proposed regulations regarding the availability of a petition for costs for med-legal expenses, consequently, is without statutory authority and as such should be removed.

4.

The procedure for filing and hearing a petition for costs under proposed 8 CCR § 10451 is unworkable and contrary to the plain language of the Labor Code

The proposed regulations require an interpreter to follow the process commencing with Section 4602.3 (or Section 4622) at least through the request for a second review of a disputed billing. The proposed regulations acknowledge that the claims administrator is required to provide an explanation of review (EOR) to an interpreter under Sec. 4603.3. Once the EOR is provided, if the provider of interpreter services disagrees with the amount paid the provider may request a second review. [Labor Code Sec. 4603.2(e)(1)]. The second review is a condition precedent to asking for independent bill review (IBR) under Sec. 4603.6. Section 4603.6(a) contains the following language:

“If the provider fails to request an independent bill review within 30 days, the bill shall be deemed satisfied, and neither the employer nor the employee shall be liable for any further payment.”

Given that Labor Code §§ 4603.2, 4603.3, 4603.6 and 5811 are *in pari materia*, it would be impossible to reconcile these provisions by allowing an interpreter to elect to proceed with a petition for costs rather than or concurrent with pursuing IBR. Yet, this is precisely what the Board is suggesting in proposed 8 CCR § 10451(b)(2):

“A petition for costs may be filed for interpreter services rendered during a medical treatment appointment or a medical-legal examination. Such a petition may raise all issues, including the amount payable under an official fee schedule whether or not independent bill review was previously pursued. Such a petition may be filed only if the Labor Code section 4603.2 and 4622 procedures of billing and report submission, explanation of review, and second review (as applicable) have been completed or have been timely attempted without timely response. Nothing in this subdivision shall preclude an interpreter from electing to pursue independent bill review.”

Proposed 8 CCR § 10451(b)(2) states, “Nothing in this subdivision shall preclude an interpreter from electing to pursue independent bill review”. Pursuant to Labor Code § 4603.6, the provider has 30 days to request IBR after a decision on a demand for a second review. The DWC has 30 days to assign a reviewer and the reviewer has 60 days from that assignment to render a decision. [Labor Code § 4603.6(e)]

The proposed regulations state that the petition for costs may be filed only if the procedures in Labor Code §§ 4603.2 or 4622 have been followed and the second review has been completed. By saying the petition cannot be “filed” prior to the completion of

this process, the proposed regulations suggest that the demand that is required before the petition can be “filed” [Proposed 8 CCR § 14151(c)] can be made simultaneous with the submission of the original bill or at any time during the 4603.2 or 4622 bill review process.

If we accept that the petition for costs can be “filed” immediately on receipt of the opinion on second review as long as the demand occurred 60 days prior to the filing, then the proposed regulations allow the petition to be placed on the calendar on the filing of a declaration of readiness or on the Workers’ Compensation Appeals Board’s own motion. [Proposed 8 CCR § 10451(i)(1)(A) and (B)] The proposed regulations also allow the Board to serve a notice of intention to allow or disallow costs and give the parties 10 days to respond. [Proposed 8 CCR § 10451(i)(2)]

A hearing on a petition for costs is not conferred priority status under Labor Code § 5502 or regulations adopted thereunder.

Consequently, the proposed regulation would have the effect, in at least some cases, of placing the Appeals Board in a somewhat awkward position of being asked to pass judgment on a petition for costs where by operation of law the employer has no liability for payment because the time for requesting IBR under Labor Code § 4603.6(a) has elapsed and no IBR request has been made.

That, of course, presupposes that the provider has not requested IBR. In order to resolve this conflict, at least in the procedure envisioned by the Board, the provider would have to request IBR (and pay the IBR fee) in order to preserve his or her rights under the petition for costs because it is not guaranteed that the Board will dispose of the petition before 30 days have elapsed from receipt of the second review decision. The IBR fee, per 8 CCR § 9792.5.7(d)(1), is \$335.00, more than double to price of the lien filing fee. And the filing fee is not refunded if the IBR request is withdrawn. [8 CCR § 9792.5.11(b)]

So, while it is true that, “...section 4903.05(c) provides that all claims of costs liens ‘shall be subject to a filing fee,’ a person or entity seeking reimbursement for claims of costs may prefer to file a petition for costs, rather than seeking reimbursement through the filing of a lien form,” (Initial Statement of Reasons, p.7) the only certain way to preserve all rights to payment for services subject to a fee schedule [See: 8 CCR § 9792.5.4(i)] through a petition for costs is to pay a filing fee to commence the IBR process because of the timeframes in which the Board may schedule a hearing on the petition and the clear and unambiguous language of Labor Code § 4603.6(a).

Can it really be said that this is what the Legislature intended?

The language of a statute is not to be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. Los Angeles Police Protective League *supra*. The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole. Silver v. Brown (1966), 63 Cal.2d 841.

While describing the role of the courts in resolving ambiguities, the language in American Friends Service Committee v. Proconier (1973), 33 Cal.App.3d 252 is applicable to the Board's authority under Government Code § 11342.600: "Such an uncertainty invites the application of the well-established principle that courts will supply where possible by construction or interpretation of the statute a consistent and logical resolution of the ambiguity." 33 Cal.App.2d at 261.

The process commenced when a bill is submitted pursuant to Section 4603.2 must be exclusive.⁵ To do otherwise is simply not reconcilable with the language and intent of SB 863.

5.

If the Appeals Board adopts proposed Section 10451 the Division should revise its IBR regulations to provide consistency in the overall regulatory framework.

It is clear that the existing IBR emergency regulations and proposed permanent regulations do not contemplate the bifurcated processes envisioned in the Appeals Board proposed regulations as it relates to petitions for costs. If the proposed WCAB rules go forward as proposed, then we recommend that the IBR regulations be amended to provide for notice to the claims administrator that a petition for costs has been filed if there is also a pending billing or second or independent review. If the WCAB believes that the law supports an election by the payee in the limited circumstances in proposed 8 CCR § 10451, then there should also be an election by the payor – manifested in the filing of a petition for costs immediately terminating all other review processes by operation of law.

"Broadly speaking, an election of remedies is the choice by a plaintiff to an action of one of two or more coexisting remedial rights, where several such rights arise out of the same facts, but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to or a repudiation of the other." Mercantile Mortgage Co. v. Chin Ah Len (1935), 3 Cal.App.2d 504.

The Board regulations do not clearly set forth an election. In fact, they imply just the opposite. In order to address the potential costly duplication of pursuing these coexisting remedies, it is recommended that 8 CCR § 9792.5.7 be amended to provide that upon making a demand on the claims administrator pursuant to 8 CCR § 10451 (c), the provider shall be deemed to have conclusively waived its rights to independent bill review pursuant to this Section.

Further, we recommend that 8 CCR § 9792.5.9 be amended to state that a request for IBR will be denied if the bill that is the subject of the IBR request has previously been or is

⁵ Proposed 8 CCR § 10451(b) also states, "Such a petition may raise all issues, including the amount payable under an official fee schedule whether or not independent bill review was previously pursued." It is unclear whether this means that if a provider is not granted the requested relief under IBR they may nonetheless pursue a petition for costs. This would be in direct conflict, and not authorized, under subdivision (f) of Sec. 4603.6. If, on the other hand, it means that even once IBR has been commenced a provider can file a petition for costs, it only further emphasizes the extra-statutory process contemplated under these rules.

currently the subject of a petition for costs pursuant to 8 CCR § 10451 regardless of the status of the petition. This is, essentially, the reverse of proposed 8 CCR § 10451(b)(2) which, in part, states that a petition for costs, "... may raise all issues, including the amount payable under an official fee schedule *whether or not* independent bill review was previously pursued." (Emphasis supplied)

We do not make these recommendations lightly. As we have attempted to state, we do not feel the proposed WCAB regulations are supported either by the law or by good public policy. However, if both the WCAB and DWC adopt the current regulatory proposals as drafted, there will be considerable conflict, costs, and delays to resolving billing disputes that will significantly undermine the purported benefits of SB 863. To the extent these can be mitigated, we request that you engage in a substantive effort to reconcile these procedures.

Thank you in advance for your consideration of these comments.

Sincerely,



Mark E. Webb
Vice President & General Counsel
Pacific Compensation Insurance Company
30301 Agoura Rd.
Agoura Hills, CA 91301

Office: 818.575.8500
Direct: 818.575.8506
Cell: 626.437.3573
Fax: 818.474.7706

mwebb@pacificcomp.com

March 31, 2013
Abel Calderon Esq
Goldman, Magdalin & Krikes LLP

The proposed CCR 10205(h) which modifies the term "cost" states:

"Costs" means any claim for reimbursement of expense or payment of service that is not allowable as a lien under Labor Code section 4903. "Costs" include, but are not limited to: (1) expenses and fees under Labor Code section 5710; (2) costs under Labor Code section 581 I, including qualified interpreter services rendered during a medical treatment appointment or medical-legal examination; and (3) any amount payable under Labor Code section 4600 that would not be subject to a lien against the employee's compensation, including but not limited to any amount payable directly to the injured employee for reasonable transportation, meal, and lodging expenses and for temporary disability indemnity for each day of lost wages.

Please be advised that the **new proposed regulation is overbroad and would open the door to a significant amount of abuse and litigation expenses at the WCAB.** It is a fact that some physicians and/or their immediate families have opened up separate interpreter, transportation, and medical equipment companies and regularly refer the applicant to these entities without fully disclosing the ownership interest. Although Labor Code 139.3 specifically states that this is not allowed, these physicians still engage in this practice.

There is no dispute that interpreters and transportation, lodging, or meals for medical legal examinations which fall under Labor Code sections 4060, 4061, 4062, and 4062.1 should be considered costs. However, interpreting sessions for acupuncture, chiropractor visits, or follow up visits should not. Under the proposed language of Regulation 10205(h), this could occur since the regulations indicates "Qualified interpreter services rendered during a medical treatment appointment".

Allowing interpreter services or other services connected to a follow up visit as a cost under Labor Code 581 I would prevent the defendant from investigating whether these services are reasonable or necessary or legally compensable. Moreover, the WCAB would be inundated with petitions for costs from interpreters for treatment visits especially when we consider that it is possible for one single applicant to have 121 interpreter sessions by one interpreter company (a currently lien litigated case of mine) and there are 3 other interpreter companies on this file.

I strongly urge the administrator to limit the language of what the WCAB should consider as costs. Only medical legal services should be considered costs or services for discovery or court costs. All others should be instructed to file a lien and to have the WCAB or an independent unit determine whether the services or items are reasonable or necessary to cure and relieve the effects of the industrial injury.

Thank you for your time regarding this matter.

March 18, 2013
Abel Calderon Esq
Goldman, Magdalin & Krikes LLP

SERVICE ON CD

Board Rule 10505(b) indicates that service through the US mail is the preferred service. However, the rule is silent as to whether a party can serve its evidence via a CD through the US mail. Defendants contend that allowing for service of documents especially to numerous lien claimants is the most expeditious and cost effective manner. Please have the rules indicate whether service of documents on a CD is acceptable as long as it is sent via US mail and that the opposing party must show good cause to the contrary.

Thank you!

March 14, 2013
Scott Schoenkopf
Work Comp Collections
Rehab Solutions

While it is outlined over and over that the WCAB encourages parties, defendants and lien claimants, to engage in informal discussions and negotiations to avoid the continued frivolous litigation, wasting calendar time and resources for matters which should at least for preliminary purposes be handled outside the Board.

However, a finger is being shaken at lien claimants as though that is the reason these informal good-faith negotiations are not occurring. Keep in mind that lien claimants are the parties seeking reimbursement, so they have the incentive already in place to try and resolve these matters outside a hearing and avoid paying lien fees, hearing representation costs/legal fees as well as the passage of time. A dollar today is better than a dollar a year from now. However, there is no peril, no risk and advantageous for defendants, especially defense attorneys, to simply make token offers (10%) without any basis or to just not respond to the continued efforts of lien claimant via phone messages, written correspondence via U.S. mail and/or fax and e-mail.

With regards to proposed rulemaking, again it calls out the encouragement and provides for specific penalties for lien claimants in every step of the process, but doesn't mandate or regulate the practice of some of the largest insurance carriers in the State and/or defense firms to modify their internal policies or general practice. For example, the largest carrier, State Compensation Insurance Fund, has a lien unit in every SCIF office. Yet, the lien unit is not assigned cases until 2 weeks prior to a hearing. Prior to that, the cases and liens are in a purgatory. Technically, they are still in the hands of the claims examiner, who has already settled the claim and not concerned with the lien matters post-settlement. They do not answer phone calls, nor return phone message or respond to any written communication. They defer to the lien unit. The lien unit has nobody assigned until just before the hearing, so the only window is this 2 week period, which again it is unlikely that you will actually receive any type of response....just wait to discuss at a hearing. This is the practice at many carriers including Zenith and Liberty Mutual. So you have three of the largest carriers forcing additional hearings. The result is unnecessary lien conferences and because they are titled as such, it gives presumption that it must be lien claimants as the cause. This practice has no risk for the carriers. In-house counsel, lien units, etc., do not impose additional financial onus. All the lien claimants combined don't add up to the financial resources of one of those carriers.

I suggest that there should be more specific mandates and regulations pertaining to parties, not just lien claimants to actually participate in the stated mission of encouragement for informal resolution of issues. Just saying "This is what we (DWC) want" has little or no effect on the practices and policies since it has no teeth or risk for the parties that don't participate.

March 13, 2013
Scott Schoenkopf
Work Comp Collections
Rehab Solutions

Dear Sirs,

While the clear legislative intent of SB863 may have been to reduce the amount of frivolous litigation and the waste of WCAB calendar time and resources, it seems apparent that the narrow focus on lien claimants and the proposed CCR amendments may actually have the opposite effect.

Regarding the proposed amendments to CCR 10886 regarding Service on Lien Claimants, specifically settlement documents whether Compromise & Release or Stipulations with Request for Award; it is stated that the intent for the amendment is to encourage lien claimants to file their liens. However, that concern is addressed in the change in Statute of Limitations of lien filing timeframes that are no longer tied to the date of claim settlement. Deletion of the requirement that the settlement documents be served on lien claimants, whether or not a formal lien has been filed with WCAB is a contradiction to the further stated amendments that encourage the parties including lien claimants to engage in informal settlement without necessitating a hearing. In order to engage in any meaningful informal discussion, the parties have to have the availability of facts and information. With the advent of LC 4903.6(d) regarding the service of medical information and reports on non-physician lien claimant, that availability of information is greatly diminished, but to further that reduction in information by not even requiring the service of settlement documents on lien claimants or potential lien claimants (the defendants know who the providers are that they have received bills from or provided treatment/service) also diminishes the mere possibility that informal resolution or substantive discussion can/will take place.

While a broad stroke of lien claimants has been painted as the easiest most viable way to ease the clogs in the system, there are many at every step and in each role. Those contentions will be realized over time and the hand that has been dealt for the time being is SB863. While the WCAB is proposing amendments to bring them more in line with the Labor Code changes pursuant to SB863, just simply creating an over burdensome environment for lien claimants, which are predominately health care providers with all these hoops to jump through, all these fees to pay or you will receive no payment of any sort for the medical goods and/or services that were provided to assist injured workers in returning to work is not a solution. It is a tool that not only hurts Applicants or Health Care providers, but the economy of the State of California. The availability of physicians even willing to consider treatment to Work Comp patients is already dwindling. The ancillary providers are not the corporate conglomerates that insurance carriers are; which have the resources to pay attorney fees every step of the way. The WCAB is single handedly cutting a hole in the Small Business community of the State.

Additionally, while it is delineated that non-physician lien claimants are not entitled to medical information unless by order of the WCAB it is already a problem in several ways. Although the Code is the Code, it is apparent that this is being utilized by the WCAB to essentially pad their pockets. In December 2012 there was the En Banc decision of ***Tito Torres vs. A J C Sandblasting*** that allowed for sanctions for lien claimants and their hearing representatives for proceeding to trial with evidence utterly incapable of establishing by a preponderance of evidence the validity of their lien. Citing the new Labor Code, WCJ's are regularly denying our petitions to the court requesting relevant medical documents with the boilerplate reasoning "You are not entitled to this information" which is self-serving because now the WCAB has created a scenario that allows them to sanction lien claimants for not having the very evidence that they wouldn't allow in order to meet any level of burden. I am curious to know why the WCAB is going after the parties with the shallowest pockets to fund their operation, whether it be filing/activation fees, sanctions, etc.

March 11, 2013
Dr. Aghlara

Dear WCAB/DIR:

I have been treating work related injuries for the past 15 years, and I have a large database of patients on liens, that even as a MPN provider, I have not yet been paid. I have about 8000 patient files that I have helped/healed/relieved/cured patients, however on Jan 2nd 2014 all my hard work will be dismissed by law on those patients. How is this fair/legal?

Insurance companies refuse to settle at this time until a lien conference and I have to pay close to **1 million dollars** just in lien filling fees just to protect all my hard work done for the past few years that I have not collect on yet. If I don't pay this 1 million dollar fee I lose all my hard work done for patients and I will never collect a dime. Just like any other business, I have

Again how is this legal/fair? I am not a frivolous lien claimant. I am a MPN doctor

This lien dismissal should only be for new liens going forward and should not apply to older liens, or there won't be many physicians willing to treat work related injuries

March 8, 2013
Abel Calderon Esq
Goldman, Magdalin & Krikes LLP

Thank you for your opportunity to provide my comments regarding the proposed rules. Below are my comments on two areas:

Interpreters:

Regarding interpreters, please have the rules comment on whether interpreters must apportion their fees and full disclose how many applicants are serviced in one day. At the WCAB interpreters assist various applicant attorneys and charge the full 1/2 day fee for each applicant. Additionally, at primary treating doctors office and chiropractor/physical therapy offices where these facilities see 20-50 applicants in one day, the interpreters charge \$90 for each applicant or more when they really only spend 10 to 15 minutes actually interpreting.

LC 5811 petition for costs:

Lien providers are beginning to request cost orders on items that are not really costs or on items where there is a "reasonable fee dispute". Lien claimants who provide MRI's or other diagnostic studies at the request of the primary treating physician or a secondary treating physician such as a pain management doctor or psychologist are filing petitions for costs indicating that the study is "med legal". The rules should specify what services are costs within the meaning of LC 5811 (AME, QME, depo fees). Additionally, the rules should allow for some flexibility to object to the order such as a copy service fee when a provider's fees are not reasonable. An opposing party should be allowed 20 days to object to a cost order that may be unreasonable.