

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

**INITIAL STATEMENT OF REASONS**

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

**BACKGROUND TO REGULATORY PROCEEDING:**

The Workers' Compensation Appeals Board (WCAB) proposes to amend its Rules of Practice and Procedure (Rules).<sup>1</sup> These changes are largely being proposed in light of Senate Bill 863 (Stats. 2012, ch. 363 [SB 863], (effective Jan. 1, 2013). This Initial Statement of Reasons and accompanying Notice of Proposed Rulemaking have been prepared to comply with the procedural requirements of section 5307.4 and for the convenience of the regulated public to assist it in analyzing and commenting on this largely non-APA rulemaking process.<sup>2</sup>

In the proposed Rules, changes are reflected by underlining (indicating new language) and ~~strike-throughs~~ (indicating deleted language).

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

Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10250

Preliminarily, Assembly Bill No. 1426 (Stats. 2011, ch. 639 [AB 1426]) eliminated the position of Court Administrator (*id.* § 1) and further provided:

"All regulations adopted by the court administrator shall remain in effect unless amended or repealed by either the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation. Regulations of the court administrator that have been adopted pursuant to Sections 5307, 5500.3, or subdivision (a) of Section 5502 shall be deemed to be regulations of the Workers' Compensation Appeals Board. All other regulations of the court administrator shall be deemed to be regulations of the Administrative Director of the Division of Workers' Compensation." (*Id.* § 17.)

Rule 10250 was adopted by the former Court Administrator under sections 5307, 5500.3, and 5502(a). Therefore, it is now "deemed to be" a regulation of the WCAB and it may be "amended" by the WCAB.

Prior to Senate Bill 863 (Stats. 2012, ch. 363 [SB 863]), there were relatively few restrictions on when a Declaration of Readiness to Proceed (DOR) could be filed.

However, with certain exceptions,<sup>3</sup> SB 863 provides that: (1) "[a]ll 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" (Lab. Code, § 4903.05(c));<sup>4</sup> and (2) "[a]ny lien filed pursuant to subdivision (b) of Section 4903 prior to January 1,

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<sup>1</sup> The WCAB's Rules are found in Cal. Code Regs., Title 8, Div. 1, Chapter 4.5, Subchapter 2, section 10300 et seq., with the exception that, under Assembly Bill No. 1426 (Stats. 2011, ch. 639 [AB 1426]), many former Court Administrator Rules have been deemed WCAB Rules. These former Court Administrator Rules are found in Cal. Code Regs., Title 8, Div. 1, Chapter 4.5, Subchapter 1.8.

<sup>2</sup> Under Government Code section 11351, the WCAB is not subject to Article 5 (Gov. Code, § 11346 et seq.), Article 6 (*id.* § 11349 et seq.), Article 7 (*id.* § 11349.7 et seq.), or Article 8 (*id.* § 11350 et seq.) of the rulemaking provisions of the Administrative Procedure Act (APA), with the sole exception that section 11346.4(a)(5) [publication in the California Regulatory Notice Register] does apply to the WCAB.

<sup>3</sup> The exceptions are: (1) specified health care service plans, group disability insurers, etc. (Lab. Code, §§ 4903.05(c)(7) & 4903.06(b)); and (2) persons or entities who file proof of having previously paid the filing fee required by former Labor Code section 4903.05 that was in effect from 2004 through 2006 (Lab. Code, § 4903.06(a)).

<sup>4</sup> SB 863 amended Labor Code section 4903(b) to the effect that medical-legal costs are no longer allowable as lien claims. (Stats. 2012, ch. 363, § 62.) Nevertheless, under SB 863, medical-legal costs and other "claims of costs" may be filed in the *using a lien form* (Lab. Code, § 4903.05(b)) and, if so filed, such claims are subject to the lien filing and activation fees (Lab. Code, §§ 4903.05(c)(7), 4903.06(b)), unless they are exempt.

2013, and any cost that was filed as a lien prior to January 1, 2013, shall be subject to a lien activation fee” (Lab. Code, § 4903.06(a)). Further, Labor Code section 4903.06(a)(2) expressly provides: “The lien claimant shall include proof of payment of the filing fee or lien activation fee *with the declaration of readiness to proceed.*” (Stats. 2012, ch. 363, § 64 [italics added].) Therefore, the WCAB is proposing to add Rule 10250(b)(2) so that it is consistent with section 4903.06(a)(2). It would provide that, if a lien claimant is required to pay a lien filing or activation fee, it shall not file a DOR unless it has paid the fee and entered a valid confirmation number on the DOR form.

The WCAB is also proposing to amend Rule 10250(a) to expressly state that a hearing may be set on Board motion, consistent with Rules 10256 and 10770.1(a).

The WCAB is also proposing to add Rule 10250(b)(1), which would provide that no lien claimant, with the exception of a lien claimant specified in Rule 10205.10(c)(5),<sup>5</sup> no person or entity may file a DOR unless it is a “party” as defined by proposed Rule 10301(dd)(4) (currently, Rule 10301(x)(3)).

Although current Rule 10250 states that a hearing cannot be placed on calendar “unless *one of the parties* has filed and served a declaration of readiness” (italics added), Rule 10250 does not specifically refer to proposed Rule 10301(dd)(4) (current Rule 10301(x)(3)), which defines the circumstances under which a person or entity other than the employee or a defendant becomes a “party” — i.e., only after the employee’s underlying case has resolved or the employee chooses not to proceed with it. By having proposed Rule 10250(b)(2) include the specific reference to proposed Rule 10301(dd)(4), it will make the Rule on DORs clearer and easier to understand.

The WCAB is also proposing to amend Rule 10250(c) (current Rule 10250(b)) to make it more consistent with the currently existing declaration of readiness forms (i.e., sections 10205.16 and 10205.17 [formerly, sections 10250.1 and 10252.1]), which provide: “Declarant states under penalty perjury that he or she is presently ready to proceed to hearing on the issues below” and that “unless a status or priority conference is requested, I have completed discovery on the issues listed above.”

As with current Rule 10250(b), proposed Rule 10250(c) will continue to provide that each DOR “shall state under penalty of perjury that the moving party has made a genuine, good faith effort to resolve the dispute before filing the declarations of readiness to proceed, and shall state with specificity the same on the declarations of readiness to proceed.”

Anecdotally, it appears that some members of the workers’ compensation community have suggested that this provision is unconstitutional because it violates a party’s right not to settle for an amount less than the original demand or more than the original offer. However, nothing in current Rule 10250(b) or proposed Rule 10250(c) requires any such thing. It merely requires that the moving party shall have made a pre-filing genuine, good faith effort *to resolve* the dispute. If such genuine, good faith efforts do not result in settlement, then a DOR may be filed.

This requirement is fully consonant with the mandate of Article XIV, § 4, of the California Constitution, which provides that the WCAB “shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character.” Requiring a party to make a genuine, good faith effort to resolve a dispute prior to filing a DOR furthers this constitutional mandate. The WCAB is well aware that some parties

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<sup>5</sup> In essence, lien claimants under Rule 10205.10(c)(5) [formerly, Rule 10228(c)(5)] are people who are self-represented (or represented by non-attorneys) who are seeking reimbursement for living expenses, burial expenses, or spousal/child support. These liens represent a relatively minuscule portion of those filed with the WCAB and, given their nature, the WCAB sees no reason why these lien claimants cannot file a DOR at any time.

Rule 10205.10(c)(5) is former Rule 10228(c)(5)]. On December 10, 2012, the Office of Administrative Law (OAL) approved a filing without regulatory effect by which the Division of Workers’ Compensation (DWC) and WCAB agreed to renumber certain former Rules of the Court Administrator and to move these renumbered Rules from Subchapter 1.9 into newly created Subchapter 1.8.5 in Title 8, Division 1, Chapter 4.5 of the California Code of Regulations. Accordingly, various Rules that were formerly numbered as section 10210 et seq. will now be renumbered as section 10205 et seq. The WCAB’s tentative proposed Rules will refer to the renumbered sections.

filing DORs do not even *commence* settlement discussions until the mandatory settlement conference (or lien conference). This causes a tremendous waste of the WCAB’s limited calendar time and unnecessarily pushes other cases farther out on the calendar. This provision, and the availability of sanctions to enforce it (see proposed Rule 10250(d)(1) [current Rule 10250(c)]), will help discourage this reprehensible practice.

Moreover, one purpose of the mandatory settlement conference (MSC) mandated by statute (or the lien conference mandated by WCAB Rule) “is to guarantee a productive dialogue” that, hopefully, leads “to the resolution of the dispute.” (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Welcher)* (1995) 37 Cal.App.4th 675, 685 [60 Cal.Comp.Cases 717]; *Zenith Ins. Co. v. Ramirez* (1992) 57 Cal.Comp.Cases 719, 727 (Appeals Board en banc).) No one has suggested that this aspect of an MSC is unconstitutional, nor is it likely that anyone successfully could. (*Sigala v. Anaheim City Sch. Dist.* (1993) 15 Cal.App.4th 661, 669 (“ ‘A court may not compel a litigant to settle a case, but it may direct him to engage personally in settlement negotiations, provided the conditions for such negotiations are otherwise reasonable.’ ” [quoting from *Wisniewski v. Clary* (1975) 46 Cal.App.3d 499, 505]; see also *Vidrio v. Hernandez* (2009) 172 Cal.App.4th 1443, 1459 (“The Judicial Council’s constitutional rulemaking power plainly extends to the adoption of a rule requiring individuals or entities with authority to consent to the settlement of a case to participate in a mandatory settlement conference.”).) Given that parties may be required to participate in a settlement conference to resolve a dispute, there is no reason why they cannot also be required to engage in settlement discussions before they utilize precious calendar time.

#### Specific Technologies or Equipment

The proposed amendment of this rule does *not* mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendment.

#### Effect on Small Businesses

The proposed amendment of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendment of this rule will not have a significant economic impact on California business enterprises and individuals.

### **2. Section Amended: 10260 (entitled “Consolidation Procedures”).**

#### Statement of Specific Purpose and Reasons for Proposed Amendments to Section 10260

As discussed above, AB 1426 eliminated the position of Court Administrator and further provided that any Rules that were adopted by the Court Administrator under Labor Code sections 5307, 5500.3, and 5502(a) are “deemed to be” Rules of the WCAB and that may be “amended” by it. Rule 10260 is one such Rule. It is now being amended to delete the references to “the court administrator” and to replace them with references to “the Chief Judge of the Division of Workers’ Compensation or his or her designee,” who the WCAB concludes is the best person to resolve case consolidation issues in cases at different district offices or in cases involving multiple injured employees. Also, consistent with Rule 10302, Rule 10260 is being amended to shorten “workers’ compensation administrative law judge” to “workers’ compensation judge.”

#### Specific Technologies or Equipment

The proposed amendments to this rule do not mandate the use of specific technologies or equipment.

### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

### Effect on Small Businesses

The proposed amendments to this rule will not have a significant effect on small businesses.

### Economic Impact on California Business Enterprises and Individuals

The proposed amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

## **3. Section Amended: 10300 (entitled “Adoption, Amendment or Rescission of Rules”).**

### Statement of Specific Purpose and Reasons for Proposed Amendments to Section 10300

Nothing in the WCAB’s current Rules expressly provides that its provisions are severable and that if any provision (section or subdivision) is declared invalid, then other provisions are not affected. Amending Rule 10300 to add proposed subdivision (b) would expressly declare this intention. This is consistent with uncodified provisions of past workers’ compensation reform legislation. (See Stats. 1984, ch. 252, § 7; Stats. 1993, ch. 117, § 2; Stats. 2004, ch. 34, § 48; see also Stats. 2012, ch. 363, § 46.)

This is a strictly precautionary provision. Some workers’ compensation commentators have suggested the possibility of constitutional challenges to certain provisions of SB 863. Therefore, in the event an appellate court declares that any WCAB Rule or a statutory provision on which it is based is unconstitutional, this proposed change to Rule 10300 will minimize the impact of any such declaration. It will also minimize the impact of any appellate declaration that a provision of a WCAB Rule is inconsistent with statute or in excess of the WCAB’s authority.

### Specific Technologies or Equipment

The proposed amendments to this rule do not mandate the use of specific technologies or equipment.

### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

### Effect on Small Businesses

The proposed amendments to this rule will not have a significant effect on small businesses.

### Economic Impact on California Business Enterprises and Individuals

The proposed amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

## **4. Section Amended: 10301 (entitled “Definitions”).**

### Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10301

The WCAB is proposing to make various amendments to Rule 10301, which defines various terms. Except for the proposed changes discussed below, the amendments are essentially self-explanatory, including deleting the references to “Court Administrator” because that position was eliminated by AB 1426.

The WCAB is proposing to add Rule 10301(h) to define “cost.” This definition is needed because of the proposed addition of Rule 10451 regarding petitions for costs and the proposed amendment of Rule 10770 regarding claim of costs liens.

The WCAB is also proposing to add Rule 10301(l) to define “Director” as the “Director of Industrial Relations.” This addition is needed because SB 863 enacted new Labor Code section 139.48 regarding determinations of the “director” regarding supplemental payments to injured workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss.

The WCAB is also proposing to add Rule 10301(r) to define “electronic filing.” When the Electronic Adjudication Management System (EAMS) rules were initially adopted in November 2008, only very limited e-filing was allowed under the e-filing trial rule (section 10205.11 [formerly, section 10229]). The scope of e-filing has since been expanded (including DWC’s implementation of JET-filing) and will continue to expand in the future.

The WCAB is also proposing to add Rule 10301(v), which would define “lien” and “lien claim” to include any claim of costs filed utilizing a lien claim form, even though a claim of costs is not allowable as a lien against the injured employee’s compensation, as discussed above. Under proposed Rule 10301(x) [current Rule 10301(t)], the definition of “lien claimant” would be similarly amended. Proposed new Rule 10301(z) would be similarly added.

The WCAB is also proposing to add Rules 10301(w) and (y) that, consistent with Labor Code sections 4903.06(a) and 4903.05(b), would define “lien activation fee” and “lien filing fee,” respectively.

The WCAB is also proposing to amend Rule 10301(aa) (current Rule 10301(u)) to add language reflecting that a “lien conference” means a proceeding “held in accordance with section 10770.1.” The addition of this phrase is to emphasize that a “lien conference” is subject to the provisions of Rule 10770.1 (added in 2012), including but not limited to the preparation of a pre-trial conference statement and discovery closure. Proposed Rule 10301(aa) would also emphasize that lien conferences may include the consolidation of multiple liens under Rules 10260 and 10589.

The WCAB is also proposing to amend Rule 10301(dd) (current Rule 10301(x)) to expand the definition of “party.”

First, the WCAB is proposing to define “party” to include *any* appellant from an independent medical review (IMR) or independent bill review (IBR) decision, thereby including providers and not just injured employees and defendants (who are already “parties” under Rule 10301). This will allow all IMR and IBR appellants to file declarations of readiness (DORs) to bring their appeals on the WCAB’s calendar. In this regard, all disputes over the necessity of medical treatment recommended by a treating physician go through a prolonged procedure (including the defendant’s payment of an IMR fee)<sup>6</sup> even before an IMR appeal may be filed, and the grounds for such appeals are severely limited (see Lab. Code, § 4603.6(h)). Similarly, all amount payable bill disputes go through a prolonged procedure (including the provider’s payment of an IBR fee)<sup>7</sup> before an IBR appeal may be filed, and the grounds for such appeals are also severely limited (see Lab. Code, § 4603.6(f)). Given the involved pre-appeal procedures and the WCAB’s estimation that relatively few IMR and IBR appeals will be filed, the WCAB sees no reason why all IMR and IBR appellants (not just injured employees and defendants) should not be able to bring their appeals on calendar by filing a DOR.

Second, the WCAB is proposing to define “party” to include an injured employee or a provider seeking to enforce an IMR or IBR decision. The WCAB’s rationale for this is set out in greater detail in its discussion of

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<sup>6</sup> See Lab. Code, § 4610.6(l); Cal. Code Regs., tit. 8, § 9792.10.8.

<sup>7</sup> See Lab. Code, § 4603.6(c); Cal. Code Regs., tit. 8, § 9792.5.7(d)(1)(A).

proposed Rule 10451.1 regarding petitions to enforce IMR and IBR determinations (see section 6, below), although proposed Rule 10451.1 does not call for the filing of a DOR.

Third, the WCAB is proposing to define “party” to include a non-employee petitioner for costs, but only when the employee’s underlying case has been resolved or abandoned by the employee. That is, non-employee petitioners for costs (who would have been lien claimants prior to SB 863) will have the same “party” status as a lien claimant.

The WCAB is also proposing to add Rule 10301(ii) to include a definition of “section 4903(b) lien,” which is repeatedly used in the proposed Rules. It is essentially defined to mean a lien for section 4600 et seq. medical treatment expenses filed in accordance with section 4903(b), including transportation service expenses incurred in connection with medical treatment. The specific reference to transportation service expenses is being included because section 4600 does not expressly include transportation costs as an element of medical treatment, but section 4600 has been construed to include transportation costs. (*Avalon Bay Foods v. Workers’ Comp. Appeals Bd. (Moore)* (1998) 18 Cal.4th 1165, 1173-1175 [63 Cal.Comp.Cases 902]; *Hutchinson v. Workers’ Comp. Appeals Bd.* (1989) 209 Cal.App.3d 352 [54 Cal.Comp.Cases 124].) However, a “section 4903(b) lien” does not include any amount *payable directly to the injured employee*. These would include, for example, moneys payable to the employee for reasonable transportation, meal, or lodging expenses incident to the medical treatment and temporary disability indemnity for each day of lost wages.

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

### **5. Section Amended: 10408 (entitled “Pleadings and Forms”).**

#### Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10408

Labor Code section 5500.3(a) provides: “The appeals board shall establish ... uniform forms ... for all district offices of the appeals board. No district office of the appeals board or workers’ compensation administrative law judge shall require forms ... other than as established by the appeals board.”

Current Rule 10408 provides only that inter vivos and death benefit applications “shall be on forms prescribed and approved by the Appeals Board.” Proposed Rule 10408 would expressly expand this “shall be on forms prescribed and approved by the Appeals Board” requirement to several other specified forms, as well as to “any other form the Appeals Board, in its discretion, determines should be uniform and standardized.”

Also, consistent with section 5500.3, proposed Rule 10408(c) essentially provides that, once the Appeals Board adopts and approves a particular form, no WCJ or district office can require a party to use a different version of that particular form.

### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

## **6. Section Added: 10451 (entitled “Petition for Costs”).**

### Statement of Specific Purpose and Reasons for Proposed Addition of Section 10451

Labor Code section 5811(a) has long provided that: “In all proceedings under this division before the appeals board, costs as between the parties may be allowed by the appeals board.”

Although SB 863 did not amend this particular provision of section 5811(a), SB 863 did add Labor Code section 4903.05(b). 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.” (Italics added.) This language requires that if a claim of costs is going to be made in the form of a lien, then the claim of costs lien must be filed electronically. The language, however, does not preclude a costs claimant from filing a petition for costs. 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.

Nevertheless, SB 863 makes it clear that certain types of “costs” must be claimed only through particular procedures, and not through a petition for costs. Accordingly, Rule 10451 proposes to establish when petitions for costs may and may not be filed.

Preliminarily, proposed Rule 10451(a) would expressly provide that claims for costs may be requested by the filing of a petition. This would obviate the question of whether all claims of costs must be electronically filed in the form of a lien under section 4903.05(b).

Proposed Rule 10451(b)(1) would provide that, with specified exceptions, a petition for costs shall *not* be filed for any costs that may be claimed through a Labor Code section 4903(b) lien, for virtually all medical-legal expenses, and for any cost that is subject to independent medical review (IMR) or independent bill review (IBR).

Proposed Rule 10451(b)(1) gives recognition to the fact that, under SB 863, in general:

- all disputes over the necessity of medical treatment are subject to the procedures of a treatment recommendation by a treating physician, utilization review, IMR, and very limited appeal rights before the WCAB (Lab. Code, §§ 4610, 4610.5, 4610.6; see also § 4903(b));
- all disputes over the amount payable for medical treatment goods and services are subject to the procedures of billing and documentation submission to the defendant, explanation of review (EOR),

second review, IBR, and very limited appeal rights before the WCAB (Lab. Code, §§ 4603.2, 4603.3, 4603.6; see also § 4903(b));

- all other medical treatment issues are subject to the procedures of filing a lien claim together with a filing fee (Lab. Code, §§ 4903(b) 4903.05)—except that medical treatment liens filed prior to January 1, 2013 must pay a lien activation fee (Lab. Code, § 4903.06(a))—followed by a declaration of readiness and a lien conference (Lab. Code, § 4903.06(a)(2) & (4));
- all disputes over the amount payable for medical-legal goods and services are subject to the procedures of billing and documentation submission to the defendant, EOR, second review, IBR, and very limited appeal rights before the WCAB (Lab. Code, §§ 4622(a) & (b), 4603.3, 4603.6); and
- all other medical-legal disputes are subject to the procedures of billing and documentation submission to defendant, EOR, objection by the provider, and the filing of a petition and a declaration of readiness by the defendant (Lab. Code, § 4622(a), (b), & (c); see also proposed Rule 10451.2).

Proposed Rule 10451(b)(2) would further provide, however, that a petition for costs may be filed for interpreter services rendered during a medical-legal examination or a medical treatment appointment, although it would also expressly provide that an interpreter is not precluded from electing to pursue IBR.

In proposing Rule 10451(b)(2), the Appeals Board is fully aware that: (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).

Similarly, the Appeals Board is fully aware that: (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).

Nevertheless, it is a basic tenet “that as a matter of statutory construction, a specific provision relating to a particular subject will govern that subject as against a general provision.” (*Elliott v. Workers’ Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 365 [75 Cal.Comp.Cases 81]; see also, e.g., *People v. Ahmed* (2011) 53 Cal.4th 156, 163; Code Civ. Proc., § 1859; Civ. Code, § 3534.) And, for the reasons that follow, the Appeals Board concludes that, under SB 863, disputes over interpreter services rendered during medical-legal examinations or medical treatment appointments, including disputes over amounts payable under the official interpreter fee schedule, are subject to the specific costs procedures of Labor Code section 5811 and not solely the general IBR procedures.

First, as amended by SB 863, Labor Code section 5811(a) provides that “costs as between the parties may be allowed by the appeals board.” Section 5811(b) then goes on to provide:

“*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. [¶] A qualified interpreter may render services during the following: ... (C) *A medical treatment appointment or medical-legal examination.*” (Italics added.)

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.<sup>8</sup> Consequently, claims for such interpreter fees may be made by a petition for costs.

The Appeals Board recognizes an argument could be made that, in providing that medical-legal and medical treatment interpreter fees are “costs” that “shall be paid ... under” section 5811, the Legislature meant only that disputes *other than* the amount payable under the interpreter fee schedule are “costs,” i.e., that interpreter fee schedule disputes must be resolved only through IBR. Yet, two basic principles of statutory interpretation are: (1) meaning should be given to every word of a statute if possible, and constructions making any word surplusage should be avoided (*Reno v. Baird* (1998) 18 Cal.4th 640, 658); and (2) when the Legislature expressly references a particular item in a statute, but excludes other items, this reflects an intent to treat the expressly referenced item differently than the excluded items (see *Klein v. U.S.* (2010) 50 Cal.4th 68, 80; *Louise Gardens of Encino Homeowners’ Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 657).

In this regard, with the enactment of SB 863, the Labor Code now provides for a number of different types of fee schedules, in addition to the fee schedule for interpreters. (See Lab. Code, §§ 5307.1(a)(2)(A) [physician and nonphysician practitioner fee schedule]; 5307.6(a) [medical-legal fee schedule]; 5307.7(a) [vocational expert fee schedule]; 5307.8 [home health-care fee schedule]; 5307.9 [copy service fee schedule].) Yet, notwithstanding these several different types of fee schedules, section 5811 expressly provides only that “[i]nterpreter fees ... shall be paid ... under this section, provided they are in accordance with the fee schedule adopted by the administrative director.” (Italics added.) 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?

Second, the specific language of Labor Code section 4620(d) provides that “the employer or insurance carrier shall pay the costs of the interpreter services, as set forth in the fee schedule adopted by the administrative director *pursuant to Section 5811.*” (Italics added.) Therefore, section 4620(d) expressly contemplates that medical-legal interpreter fee schedule disputes will be resolved through a petition for costs under section 5811 utilizing the schedule adopted by the AD pursuant to section 5811, which supports the interpretation of section 5811 discussed above.

Third, uncodified Section 1 of SB 863 (Stats. 2012, ch. 363, § 1) states, in relevant part:

“The Legislature finds and declares all of the following:

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“(h) That the performance of independent bill review is a service of such a special and unique nature that it must be contracted pursuant to paragraph (3) of subdivision (b) of Section 19130 of the Government Code, and that independent bill review is a new state function pursuant to paragraph (2) of subdivision (b) of Section 19130 of the Government Code. Existing law provides no method of *medical billing* dispute resolution short of litigation. Existing law does not provide for *medical billing and payment* experts to resolve billing disputes, and billing issues are frequently submitted to workers’ compensation judges without the benefit of independent and unbiased findings on these issues. *Medical billing and payment* systems are a field of technical and specialized expertise, requiring services that are not available through the civil service system. The need for independent and unbiased findings and determinations requires that this new function be contracted pursuant to subdivision (b) of Section 19130 of the Government Code.” (Italics and underlining added.)

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<sup>8</sup> Under SB 863, the AD’s interpreter fee schedule applies to services at medical treatment appointments (Lab. Code, §§ 4600(g), 5811(b)(2)(C)), medical-legal examinations (Lab. Code, §§ 4620(d), 5811(b)(2)(C)), depositions (Lab. Code, §§ 5710(b)(5), 5811(b)(2)(A)), WCAB hearings (Lab. Code, § 5811(b)(2)(B)), and any other settings which the AD determines are reasonably necessary to ascertain the validity or extent of injury to an employee who does not proficiently speak or understand the English language (Lab. Code, § 5811(b)(2)(D)).

Therefore, in establishing IBR, the Legislature was expressly focusing on “medical” billing issues, and it did *not* state that “interpreter” billing issues required special treatment outside of the usual litigation procedures before the WCAB.

Fourth, the IBR statute, Labor Code section 4603.6, repeatedly refers to payments to the “*medical provider*” (italics added). Specifically, subdivisions (c), (d), and (h) each have one such reference, while subdivision (e) has four such references. Also, subdivision (e) refers to “*medical reports*” and subdivision (f) twice refers to the “*medical bill review determination of the administrative director*” (italics added). However, section 4603.6 makes no references to interpreters. This all suggests that only “medical” bill disputes, and not interpreter bill disputes, were intended to go through IBR. Moreover, “amount payable” interpreter fee disputes have nothing to do with *medical* issues. To the contrary, under the current official interpreter fee schedule, interpreter fee disputes relate to issues such as how much time the interpreter rendered actual services, to travel time and mileage, to whether the interpreter is certified, qualified or provisionally qualified, and to the “market rate” for interpreter services. (See Cal. Code Regs., tit. 8, §§ 9795.1, 9795.3.)

Fifth, under SB 863, Labor Code section 139.5(a)(1) gives the AD authority to contract with one or more “independent bill review organizations,” but section 139.5(a)(2) provides that “until the administrative director establishes [such] contracts,” the AD may designate “independent review organizations *under contract with the Department of Managed Health Care* pursuant to Section 1374.32 of the Health and Safety Code ... to conduct reviews.” (Italics added.)

There is no suggestion in SB 863 that the Department of Managed Health Care (DMHC) currently contracts with any independent review organizations for the purpose of reviewing *interpreter* fees. To the contrary, both Labor Code section 139.5 and Health and Safety Code section 1374.32 (to which section 139.5 refers) refer to “medical professionals” who conduct reviews. (Lab. Code, § 139.5(b)(1), (d)(2)(G), (d)(3)(A), (B), (C), & (E), (d)(4); Health & Saf. Code, § 1374.32(b), (d)(2)(G), (d)(3)(A), (B), (C), & (E), (d)(4) & (d)(4)(A), (B), & (C).) There is also no indication that the designated “medical professionals” will have the knowledge or expertise necessary to conduct reviews of interpreter fee disputes under an official interpreter fee schedule adopted by the AD.

The WCAB recognizes that Labor Code section 139.5 additionally refers to “bill reviewers.” (Lab. Code, § 139.5(d)(3)(B) & (E).) There is no indication, however, that these “bill reviewers” are anything other than expert *medical* bill reviewers. Moreover, a conclusion that only “medical” bill reviewers are intended is supported by the legal standards regarding training, experience, and skill for medical bill reviewers in workers’ compensation claims. (Ins. Code, § 11761 [requiring the Insurance Commissioner to adopt regulations “setting forth the minimum standards of training, experience, and skill [for] workers’ compensation claims adjusters,” including adjusters employed by any “*medical billing entity*” which is defined as a third party that “reviews or adjusts workers’ compensation *medical bills* for insurers” (italics added)]; Cal. Code Regs., tit. 10, §§ 2592.01(h), (k), (l) [referring to “experienced medical bill reviewer,” “medical bill reviewer,” and “medical billing entity”], 2592.04 [regarding training required for “medical bill reviewers”]; see also §§ 2592.09, 2592.11, 2592.13.) As best as the Appeals Board can determine, there are no corresponding such standards for “interpreter” bill reviewers.

Proposed Rule 10451(b)(3), however, would allow a petition for costs to be filed for any medical-legal cost if a defendant breaches various legal duties imposed on it by Labor Code sections 4622 and 4603.3. Specifically, proposed Rule 10451(b)(3) would allow a petition for costs to be filed if a defendant: (A) makes less than full payment but fails to issue an EOR within 60 days after a provider submits a properly documented billing; (B) fails to make a final written determination or fails to make payment consistent with that determination within 14 days after a provider submits a timely improper request for second review; or (C) fails to file a petition and a DOR with the WCAB within 60 days after a provider submits a timely objection to an EOR regarding a dispute other than the amount payable under an official medical fee schedule.

Similarly, proposed Rule 10451(b)(4) would provide that, if a defendant breaches the legal obligations described in the paragraph above, it shall be deemed to have finally waived all objections to the provider's medical-legal billing, except: (A) objections under Labor Code sections 4620 (contested claim) and 4621 (reasonably, actually, and necessarily incurred), where the defendant has breached its legal duties relating to amount payable disputes; and (B) objections regarding the amount payable and objections under sections 4620 and 4621, where the defendant has breached its legal duties relating to disputes other than the amount payable.

The reason for the limitations on waivers discussed in the preceding paragraph is that Labor Code section 4622(f) provides:

“Nothing contained in this section shall be construed to create a rebuttable presumption of entitlement to payment of an expense upon receipt by the employer of the required reports and documents. *This section is not applicable unless there has been compliance with Sections 4620 and 4621.*” (Italics added.)

Therefore, in *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588, 1594 (Appeals Board en banc), the WCAB held: “[U]nder sections 4620 et seq., a defendant ... can raise ... certain objections to a medical-legal billing, even if those objections were not specifically raised within 60 days of the receipt of the billing.” (See also, *American Psychometric Consultants, Inc. v. Workers’ Comp. Appeals Bd. (Hurtado)* (1995) 36 Cal.App.4th 1626, 1641-1645 [60 Cal. Comp. Cases 559, 569-573] [holding that a defendant is not liable for medical-legal costs under section 4622 unless there has been compliance with sections 4620 and 4621].)

Accordingly, section 4622(f) allows a defendant to raise section 4620 and 4621 issues even if it does not raise those objections through an EOR within 60 days of receipt of the medical-legal provider's billing, if it does not respond to a provider's request for second review of an amount payable dispute within 14 days, or if it fails to file a petition and DOR regarding a non-amount payable dispute within 60 days of a timely objection to an EOR.

The WCAB concludes, however, that the language of section 4622(f) does not permit a defendant to ignore or violate its duties under sections 4622 and 4603.3 without *any* adverse legal consequences. (Cf. Civ. Code, § 3517 (“No one can take advantage of his own wrong”).) That is, if the WCAB determines that a medical-legal cost is in compliance with sections 4620 and 4621, a defendant that failed to comply with its obligations under sections 4622 and 4603.3 will run the risk of waiving all other objections and of becoming liable for the full amount of the medical-legal bill.

Proposed Rule 10451(c) would provide that no petition for costs shall be filed or served until at least 60 days after a written demand has been sent to the defendant. Otherwise, the petition shall be dismissed. This will encourage the parties to informally resolve any costs issues before presenting them to the WCAB for adjudication, thereby increasing efficiency in the workers' compensation system and reducing the burdens on limited judicial resources. The WCAB is proposing a 60-day delay period for petitions for costs by analogy to: (1) Labor Code section 4622(a)(1), which gives a defendant 60 days after receipt of a properly documented medical legal billing to make payment and issue an explanation of review; and (2) Labor Code section 4603.2(b)(2) and (b)(3), which give a non-governmental defendant 45 days and a governmental defendant 60 days after receipt of a properly documented medical billing to make payment and issue an explanation of review.

Proposed Rule 10451(d) would provide that, except as provided in subdivision (b)(2) or (b)(3), if a petition for costs seeks payment for any costs that are lienable under Labor Code section 4903(b) or subject to IMR and/or IBR, the entire petition shall be dismissed by operation of law. In addition, the petition shall not toll the Labor Code section 4903.5 statute of limitations or relieve the petitioning person or entity from any required lien filing or activation fee. This provision is consistent with the discussion under proposed Rule 10451(b)(1), above. Its purpose is to discourage the filing of petitions for costs that include any reimbursement requests that should be

filed as lien claims and, in particular, to prevent medical providers from attempting to circumvent the lien filing fee, lien activation fee, and other provisions of sections 4903.05 and 4903.06.

The provisions of proposed Rule 10451(e), (f), and (g) are self-explanatory.

Proposed Rule 10451(h) would provide that, if the petitioner is not already a party or lien claimant of record, the petitioner must provide a notice of representation, even if self-represented. This provision will help ensure that the petitioner is added to the official participant record and, therefore, will receive any appropriate notices, orders, or decisions.

Proposed Rule 10451(i) provides that a petition for costs shall not be placed on calendar unless a DOR is filed. It also provides that a DOR may only be filed by a “party” under proposed Rule 10301(dd)(4) (formerly, Rule 10301(x)(3)) (see also Rule 10250). Therefore, an injured employee or a defendant may file a DOR relating to a any petition for costs, even if the petitioner could not because the employee’s underlying case is not resolved or abandoned. However, proposed Rule 10451(i) would also establish a notice of intention procedure by which a petition for costs could be determined without setting a hearing.

Proposed Rule 10451(j) would provide that petitioners for costs other than employees and defendants shall be treated as lien claimants for certain specified purposes, i.e., (1) the duty to give written notification when a petition for costs has been resolved or withdrawn (see section 10770(g)); (2) the dismissal of the petition with prejudice by operation of law when the petitioner gives the WCAB written notification that the petition has been resolved or withdrawn (see section 10770(h)(1)); and (3) having the same rights and responsibilities as a lien claimant, for all purposes under section 10770.1.

#### Specific Technologies or Equipment

The proposed addition of this rule does not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed addition.

#### Effect on Small Businesses

The proposed addition of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed addition of this rule will not have a significant economic impact on California business enterprises and individuals.

### **7. Section Added: 10451.1 (entitled “Petition to Enforce IBR Determination”).**

#### Statement of Specific Purpose and Reasons for Proposed Addition of Section 10451.1

Proposed Rule 10451.1(a) would allow the filing of a petition to enforce if: (1) the AD has issued an IBR determination and order that requires payment; and (2) the determination and order has become final, i.e., either a petition appealing the determination and order is not timely filed with the WCAB or the WCAB has issued a final decision affirming the determination and order.

This provision is consistent with: (1) Labor Code section 4603.6(f), which provides that an IBR determination of an independent bill reviewer “shall be deemed a determination and order of the administrative director” and that “[this] determination is *final and binding*” unless an aggrieved party files a verified appeal with the WCAB within 20 days of the service of the determination; (2) Labor Code section 4603.6(h), which provides that

“[o]nce the independent bill reviewer has made a determination regarding additional amounts to be paid to the medical provider, the employer *shall pay* the additional amounts per the timely payment requirements set forth in Sections 4603.2 and 4603.4”; and (3) Labor Code section 4622(a)(1), which provides that, after a medical-legal expense has been through IBR or an IBR appeal, “payments *shall be made* within 20 days of the service of an order of the appeals board or the administrative director pursuant to Section 4603.6 directing payment.” (Italics added.) Accordingly, if a defendant fails to make payment as required by sections 4603.6(f) and (h) and 4622(a)(1), then a provider should have the right to enforce payment before the WCAB.

Proposed Rule 10451.1(b) would further provide that, under these circumstances, the provider would *not* have to file a section 4903(b) lien or a claim of costs lien and, more significantly, would *not* have to pay a lien filing or activation fee.

The WCAB proposes to adopt this provision because, when interpreting the statutory scheme, the WCAB must choose the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute and to avoiding an interpretation that would lead to absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Estate of Griswold* (2001) 25 Cal.4th 904, 911.) Under SB 863, when an amount payable dispute goes to IBR, the medical treatment or medical-legal provider must pay a fee to the AD (Lab. Code, § 4603.6(c)) and, under the AD’s current rules, this fee is \$335. (Cal. Code Regs., tit. 8, § 9792.5.7(d)(1)(A) & (B).) It would be absurd if, after paying the IBR fee and obtaining a final and binding determination that the defendant is required to pay (see Lab. Code, §§ 4603.6(f) & (h), 4622(a)(1)), a provider would have to pay a \$150 lien filing fee (Lab. Code, § 4903.05(c)(1)) or a \$100 activation fee (Lab. Code, § 4903.06(a)(1)) to enforce the binding determination and order against a recalcitrant defendant.

Subdivisions (c) through (h) of proposed Rule 10451.1 are self-explanatory and largely duplicate the provisions of proposed Rule 10451(f) through (j).

#### Specific Technologies or Equipment

The proposed addition of this rule does not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed addition.

#### Effect on Small Businesses

The proposed addition of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed addition of this rule will not have a significant economic impact on California business enterprises and individuals.

### **8. Section Added: 10451.2 (entitled “Petitions Re: Non-IBR Medical-Legal Disputes”).**

#### Statement of Specific Purpose and Reasons for Proposed Addition of Section 10451.2

As discussed above, for the most part, medical-legal disputes have special resolution procedures. In general, disputes over amounts payable under an official fee schedule must be resolved through the procedures established by Labor Code sections 4622(a) and (b), 4603.3, and 4603.6. On the other hand, other medical-legal disputes must be resolved through the procedures established by Labor Code sections 4622(a), 4603.3, and 4622(c). In particular, section 4622(c) provides, in relevant part: “If the employer denies all or a portion of the amount billed for any reason other than the amount to be paid pursuant to the fee schedules in effect on the date

of service, the provider may object to the denial within 90 days of the service of the explanation of review. ... If the provider objects to the denial within 90 days of the service of the explanation of review, *the employer* shall file a petition and a declaration of readiness to proceed with the appeals board within 60 days of service of the objection.” (Italics added.)

Labor Code section 4622(e)(2) expressly provides that: “The appeals board shall promulgate all necessary and reasonable rules and regulations to insure compliance with this section, and shall take such further steps as may be necessary to guarantee that the rules and regulations are enforced.” Therefore, proposed Rule 10451.2 would provide that, where the circumstances described in section 4622(c) are present, the defendant must concurrently file both a “Petition for Determination of Non-IBR Medical-Legal Dispute” and a declaration of readiness, together with a proof of service. Proposed Rule 10451.2 would also provide that, if the defendant has objected to the provider’s medical-legal billing on both amount payable and non-amount payable grounds, the WCAB shall hear and determine only the latter issue, unless a timely IBR appeal is concurrently pending before it.

#### Specific Technologies or Equipment

The proposed addition of this rule does not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed addition.

#### Effect on Small Businesses

The proposed addition of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed addition of this rule will not have a significant economic impact on California business enterprises and individuals.

### **9. Section Added: 10498 (entitled “Special Requirements for Pleadings Filed or Served by Attorneys or by Non-Attorney Employees of an Attorney or Law Firm”).**

#### Statement of Specific Purpose and Reasons for Proposed Addition of Section 10498

Current Rule 10232(a)(4) provides that all non-form legal pleadings filed with the WCAB shall contain a heading above the case caption containing the name of the filing attorney, their State Bar membership number, and the attorney’s law firm name and address. Proposed Rule 10498 would extend this requirement to apply not only to pleadings filed with the WCAB, but also to pleadings that are served on parties, lien claimants, and others without filing.

Proposed Rule 10498 also would extend the requirement of current Rule 10232(a)(4) to provide that when a non-attorney employee of an attorney or law firm executes a pleading, the primary supervising attorney’s State Bar number and other information must also appear on the pleading. This provision is consistent with Rule 10773 which, among other things, requires an attorney directly responsible for supervising a non-attorney employee to be identified. It will also assist the WCAB when initiating proceedings for sanctions or contempt.

#### Specific Technologies or Equipment

The proposed addition of this rule does not mandate the use of specific technologies or equipment.

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### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed addition.

### Effect on Small Businesses

The proposed addition of this rule will not have a significant effect on small businesses.

### Economic Impact on California Business Enterprises and Individuals

The proposed addition of this rule will not have a significant economic impact on California business enterprises and individuals.

*[NOTE RE: TENTATIVE PROPOSED RULE 10530: In the tentative proposed Rules that the WCAB posted on its web forum for informal public comment, the WCAB had proposed possible extensive revisions to Rule 10530, entitled "Subpoenas." In response to this posting, the WCAB received informal public comments questioning various aspects of tentative proposed Rule 10530. The revisions to Rule 10530 the WCAB had tentatively proposed were not necessitated by SB 863. Therefore, the WCAB has decided to temporarily defer any amendments to Rule 10530.]*

**10. Section Added: 10538 (entitled "Subpoenas for Medical Information by Non-Physician Lien Claimants").**

### Statement of Specific Purpose and Reasons for Proposed Amendments to Section 10538

Proposed Rule 10538 would provide that, unless a lien claimant is either a "physician" under Labor Code section 3209.3 or an entity described in Labor Code sections 4903.05(c)(7) and 4903.06(b), a lien claimant shall not issue any subpoena or subpoena duces tecum that seeks to obtain any medical information about an injured worker, but shall instead follow the procedure set forth in section 10608(c).

The reasons for proposed Rule 10538 are addressed in length in the discussion of the proposed amendments to Rule 10608. Briefly, however, Rule 10538 is being proposed because of the language added by SB 863 to Labor Code section 4903.6(d). Among other things, section 4903.6(d) provides that, with the exception of liens of physicians as defined by section 3209.3, "no lien claimant shall be entitled to any medical information ... about an injured worker without prior written approval of the appeals board."

### Specific Technologies or Equipment

The proposed amendments to this rule do not mandate the use of specific technologies or equipment.

### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

### Effect on Small Businesses

The proposed amendments to this rule will not have a significant effect on small businesses.

### Economic Impact on California Business Enterprises and Individuals

The proposed amendments to this rule will not have a significant economic impact on California business enterprises and individuals.

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## **11. Section Amended: 10582.5 (entitled “Dismissal of Inactive Lien Claims for Lack of Prosecution”).**

### Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10582.5

The WCAB is proposing to amend Rule 10582.5(c)(B)(i) to generically provide that a defendant filing a petition to dismiss for lack of prosecution shall state that it has “made a reasonable and good faith payment and, where required, an explanation of review on each billing consistent with all existing laws.” This proposed language would supersede the current requirement that “the petitioner made a reasonable and good faith payment on each billing consistent with all existing law(s), where applicable, including but not limited to the following [certain specified statutory and regulatory provisions].”

The reason for the proposed change is that, under SB 863 and the Administrative Director Rules that have been or will be adopted in accordance with it, the laws regarding payment of lien claims are changing and/or expanding. For example, Labor Code sections 4603.2(b)(2), 4603.2(e)(3), 4603.3, 4603.4(d), 4622(a)(1), and 4622(b)(1) now require defendants to issue explanations of review after initial requests for payment are made and after a request for a second review for both medical treatment and medical-legal expenses. Also, Labor Code sections 4600(g), 4620(a) & (d), 5710(b)(5), and 5811(b)(2) expressly or implicitly require the Administrative Director to adopt fee schedules for interpreters appearing at medical treatment appointments, medical-legal evaluations, depositions, and hearings. Therefore, it makes little sense for Rule 10582.5(c)(2)(B)(i) to continue referring to specific individual statutory and regulatory requirements.

The WCAB is proposing to amend Rule 10582.5(c)(2)(C) because Rule 10608 will be significantly amended in light of the restrictions of Labor Code section 4903.6(d) regarding service of “medical information” on non-physician lien claimants. [See Rule 10608 for a more detailed discussion.]

The WCAB is proposing to amend Rule 10582.5(k) to add the Uninsured Employers Benefits Trust Fund (UEBTF) as one of the governmental entities whose liens cannot be dismissed for lack of prosecution. The reason for exempting UEBTF is similar to the reason for the other Rule 10582.5(k) exemptions. In cases where insurance coverage is found after UEBTF has provided benefits, and the insurer proceeds to resolve the underlying case, the UEBTF lien is just as possible to be left unresolved at the time of award as an Employment Development Department (EDD) lien or any of the others listed. UEBTF should be just as protected as EDD, the California Victims of Crime Program, the liens listed in Rule 10205.10(c)(5)(A) through (C) [formerly, Rule 10228(c)(5)(A) through (C)], and child support or spousal support filed by a government entity.

### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

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## 12. Section Amended: 10606 (entitled “Physicians’ Reports as Evidence”).

### Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10606

The WCAB is proposing to make minor modifications to the pre-existing but now re-lettered provisions of Rule 10606(a) and (b). Most of these amendments are self-explanatory. The WCAB is proposing to delete the phrase in Rule 10606(b) stating, “Failure to comply with (a) through (o) will be considered in weighing the evidence.” This language is unnecessary in light of the pre-existing but re-lettered provisions of Rule 10606(c) that “failure to comply with the requirements of this section will not make the report inadmissible but will be considered in weighing the evidence.”

In addition, proposed Rule 10606(d) would provide that the report of an agreed medical evaluator (AME) or qualified medical evaluator (QME) shall be admissible for the purposes of making a general award of future medical treatment, assessing the adequacy of a compromise and release (C&R), or determining disputed lien claims or claims of costs.

The WCAB is proposing to add Rule 10606(d) largely because of the following amendments made to Labor Code section 4061 by SB 863 (with underlining indicating new language and ~~strike-throughs~~ indicating deleted language):

“This section shall not apply to 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.

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“(b) If either the employee or employer objects to a medical determination made by the treating physician concerning ... the need for ~~continuing~~ future medical care, and the employee is represented by an attorney, a medical evaluation to determine permanent disability shall be obtained as provided in Section 4062.2.

“(c) If either the employee or employer objects to a medical determination made by the treating physician concerning ... the need for ~~continuing~~ future medical care, and if the employee is not represented by an attorney, the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators. Either party may request a comprehensive medical evaluation to determine ... the need for ~~continuing~~ future medical care, and the evaluation shall be obtained only by the procedure provided in Section 4062.1.”

The WCAB concludes that the legislative purpose of these amendments to Labor Code section 4061 is to ensure that, where there is a *current* dispute regarding an injured employee’s entitlement to a *specific treatment* prescribed by the treating physician, this dispute shall be resolved based solely on the treating physician’s report, UR, and IMR. That is, the parties cannot obtain the opinions of AMEs and QMEs on the specific treatment dispute because this procedure would only delay what is intended to be an expedited process.

The WCAB, however, does not believe the Legislature intended that AMEs and QMEs should *never* address specific medical treatment that the employee might need in the future, i.e., treatment that has *not* been recommended by a treating physician or that is not the subject of a current dispute. Having an AME or QME report specifically address future treatment issues will assist the parties in settling cases and assist the WCAB in assessing the adequacy of proposed compromise and release agreements (C&R), both of which would reduce litigation and/or the number of hearings before the WCAB.

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### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

## **13. Section Added: 10606.5 (entitled “Vocational Experts’ Reports as Evidence”).**

### Statement of Specific Purpose and Reasons for Proposed Addition of Section 10606.5

The WCAB is proposing to add Rule 10606.5 relating to the reports of vocational experts. This proposal is prompted by SB 863’s adoption of new Labor Code section 5703(j). (Stats. 2012, ch. 363, § 81.) Section 5703(j) provides:

“Reports of vocational experts. If vocational expert evidence is otherwise admissible, the evidence shall be produced in the form of written reports. Direct examination of a vocational witness shall not be received at trial except upon a showing of good cause. 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.

“(1) Statements concerning any bill for services are admissible only if they comply with the requirements applicable to statements concerning bills for services pursuant to subdivision (a).

“(2) Reports are admissible under this subdivision only if the vocational expert has further stated in the body of the report that the contents of the report are true and correct to the best knowledge of the vocational expert. The statement shall be made in compliance with the requirements applicable to medical reports pursuant to subdivision (a).”

Proposed Rule 10606.5(a) would provide that: (1) the WCAB favors the production of vocational expert evidence in the form of written reports; (2) direct examination of a vocational expert witness will not be allowed except for good cause; and (3) a continuance may be granted for rebuttal testimony if a vocational report that was not served sufficiently in advance of the close of discovery to permit rebuttal is admitted into evidence. These provisions are all consistent with section 5703(j), and also with WCAB Rule 10606 relating to physicians.

Proposed Rule 10606.5(b) would require a vocational expert report to contain certain declarations and information. Some of these requirements are mandated by section 5703(j)(1) and (2). Other requirements are being proposed by analogy to the requirements for medical reports imposed by Labor Code section 4628, with reference to new Labor Code section 139.32.

Proposed Rule 10606.5(c) specifies various items that a vocational expert’s report should include, where applicable. Many of these requirements are being proposed by analogy to current Rule 10606 (proposed Rule 10606(b)).

### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

## **14. Section Amended: 10608 (entitled “Service of Medical Reports, Medical-Legal Reports, and Other Medical Information”).**

### Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10608

The WCAB is proposing to amend Rule 10608, relating to the service of medical reports, medical-legal reports, and other medical information. In essence, Rule 10608 will have two sets of different provisions.

The first provisions will apply only to “parties” and “physician lien claimants,” with both of these terms specially defined for purposes of the Rule. This first set of provisions will be substantially similar to the requirements of current Rule 10608.

The second set of provisions will prohibit a “non-physician lien claimant” from obtaining medical reports, medical-legal reports, and other medical information unless the WCAB orders that this medical information be disclosed based upon a showing by the non-physician lien claimant that the medical information is relevant to an element of its burden of proof regarding its lien. This second set of provisions is being proposed to make Rule 10608 consistent with Labor Code section 4903.6(d), as added by SB 863. (Stats. 2012, ch. 363, § 69.)

Labor Code section 4903.6(d) states:

“With the exception of a lien for services provided by a physician as defined in Section 3209.3, no lien claimant shall be entitled to any medical information, as defined in subdivision (g) of Section 50.05 of the Civil Code, about an injured worker without prior written approval of the appeals board. Any order authorizing disclosure of medical information to a lien claimant other than a physician shall specify the information to be provided to the lien claimant and include a finding that such information is relevant to the proof of the matter for which the information is sought. The appeals board shall adopt reasonable regulations to ensure compliance with this section, and shall take any further steps as may be necessary to enforce the regulations, including, but not limited to, impositions of sanctions pursuant to Section 5813.”

For reasons to be discussed in greater detail below, the WCAB concludes that, in referring to “subdivision (g) of Section 50.05 of the Civil Code,” the Legislature actually intended to refer to “subdivision (g) of Section 56.05 of the Civil Code.” In substance, Civil Code section 56.05(g) defines “medical information” to be “any individually identifiable information ... regarding a patient’s medical history, mental or physical condition, or treatment.” Section 56.05(g) also defines “individually identifiable” to be medical information that “includes or contains any element of personal identifying information sufficient to allow identification of the individual, such

as the patient’s name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual’s identity.”

Reading Labor Code section 4903.6(d) in conjunction both with the Civil Code section 56.05(g) definition of “medical information” and with the Labor Code section 3209.3 definition of “physician,” the WCAB concludes that a lien claimant that is not a “physician” is not entitled to *any* medical reports, medical-legal reports, deposition transcripts containing references to medical information (including but not limited to depositions of physicians), chart notes, diagnostic imaging, or any other medical information, except upon order of the WCAB.

In construing “Civil Code section 50.05(g)” to mean “Civil Code section 56.05(g),” the WCAB relies on basic principles of statutory construction.

The fundamental rule of statutory construction is to effectuate the Legislature’s intent. (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286] (*DuBois*)). The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois, supra*, 5 Cal.4th at pp. 387-388.) When the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must enforce the statute according to its plain terms. (*DuBois, supra*, 5 Cal.4th at p. 387.) Where, however, the statutory language is ambiguous, the WCAB may look to other principles of statutory construction, to legislative history, or to other evidence of the Legislature’s intent. (*Benson v. Workers’ Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1543 [74 Cal.Comp.Cases 113].)

One principle of statutory construction is that, where a statute contains a drafting error, the statute may be interpreted to “correct” the error if both the error and the intent are clear. (E.g., *People v. Skinner* (1985) 39 Cal.3d 765, 775-776; *Southern Pacific Co. v. Riverside County* (1939) 35 Cal.App.2d 380, 388.)<sup>9</sup>

Here, Labor Code section 4903.6(d) is patently not clear and unambiguous because there is no section 50.05 in the Civil Code and, consequently, no section 50.05(g).

There is, however, a Civil Code section 56.05(g). It states:

“ ‘Medical information’ means any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient’s medical history, mental or physical condition, or treatment. ‘Individually identifiable’ means that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient’s

<sup>9</sup> In *Skinner*, the Supreme Court said:

“We recognize the basic principle of statutory and constitutional construction which mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. [Citation.] That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. [Citation.]”

In *Southern Pacific*, the Court of Appeal concluded that, although the Storm Water District Act of 1909 purported to give the right to assess and tax the “property” in the district, the Legislature intended only to confer the right to tax “real property.” In so concluding, the Court stated:

“In accordance with the settled rule that courts, when possible, construe statutes so as to carry out the legislative intent, a statute will be read as apparently intended, regardless of mistakes, errors or omissions therein. It is not the duty of courts, by a blind adherence to the letter of the law, to perpetuate mistakes inadvertently made by the lawmaker. Accordingly, where the context of a statute, or other considerations arising therefrom, show that a word was erroneously used by the legislature for another word which, if substituted, will harmonize the statute with its obvious purpose and intent, the statute will be read as though the intended word had been used.”

Similar statements have been made in other cases. (See, e.g., *In re Thierry S.* (1977) 19 Cal.3d 727, 741, fn. 13 [“obvious mistake” in statute’s cross-reference to “Section 625 of this act” was corrected to read “Section 2 of this act” so as to reflect the Legislature’s “clear intent” where the Act in question had only four sections and did not contain a Section 625]; *Bonner v. County of San Diego* (2006) 139 Cal.App.4th 1336, 1346, fn. 9 [courts should use the power to rewrite statutes “with great restraint,” only where “the error is clear and correction will best carry out the intent of the Legislature.”]; *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185, 1193-1194 [courts may “correct an obvious and minor drafting error where necessary to effectuate the intent of the Legislature”]; *Carleson v. Unemployment Ins. Appeals Bd.* (1976) 64 Cal.App.3d 145, 151 [reference in statute to incorrect subdivision (c) was “the result of an inadvertent error in drafting on the part of the Legislature” and the statute was read as referring to subdivision (d) “in accordance with the obvious intent of the Legislature”].)

name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual's identity.”

Accordingly, the question is whether, in referring to non-existent Civil Code section 50.05(g), the Legislature clearly meant to refer to Civil Code section 56.05(g).

We conclude the Legislature did so intend. In fact, we can discern no other intention the Legislature might have had.

In substance, Labor Code section 4903.6(d) provides that a non-physician lien claimant is not entitled to an injured employee's “medical information, *as defined in subdivision (g) of Section 50.05 of the Civil Code*” unless the lien claimant establishes before a workers' compensation judge that the medical information is relevant to proving its claim.

One clear purpose of this provision is to protect the confidentiality of injured employees' “medical information,” which is protected under the privacy clause of the California Constitution.<sup>10</sup>

Civil Code section 56.05(g) is part of the Confidentiality of Medical Information Act. (Civ. Code, § 56 et seq.) In adopting this Act, the Legislature stated: “The Legislature hereby finds and declares that persons receiving health care services have a right to expect that the confidentiality of individual identifiable *medical information* derived by health service providers be reasonably preserved. It is the intention of the Legislature in enacting this act, to provide for the confidentiality of individually identifiable *medical information*, while permitting certain reasonable and limited uses of that information.” (Italics added.)

Moreover, apart from section 56.05(g) within the Confidentiality of Medical Information Act, there are only 46 sections of the Civil Code that refer to “medical information.” Yet, none of these sections possesses the unique combination of: (1) “defin[ing]” the term “medical information” (as Labor Code section 4903.6(d) would demand); (2) having a subdivision (g) (as Labor Code section 4903.6(d) calls for); and (3) having such a markedly kindred graphic appearance to section 50.05(g) that it could result in a scrivener's error.<sup>11</sup>

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<sup>10</sup> The right of privacy established by the California Constitution (Cal. Const., art. I, § 1) “extends to ... medical records ... .” (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198.)

As stated in *Dept. of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 374: “[M]edical information is by its nature confidential and widely treated as such. ‘A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected.’ [Citations omitted.] ... Even our state Constitution recognizes that medical information is confidential and private. (Cal. Const., art. I, § 1.)”

Similarly, *Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1147, the Court of Appeal said: “ [Fundamental] to the privacy of medical information “is the ability to control [its] circulation [.]” ’ [Citation omitted.] That brings the examination of medical records within the purview of the privacy amendment. The information that may be recorded in a doctor's files is broadranging. The chronology of ailments and treatment is potentially sensitive. Patients may disclose highly personal details of lifestyle and information concerning sources of stress and anxiety. These are matters of great sensitivity going to the core of the concerns for the privacy of information about an individual.”

<sup>11</sup> Other than section 56.05(g), there are approximately 38 sections the Confidentiality of Medical Information Act that use the term “medical information,” but none of these sections “defines” the term and only five of them even have a subdivision (g) (see Civ. Code, §§ 56.103, 56.11, 56.17, 56.21, 56.36)

There are eight other sections of the Civil Code that refer to “medical information.” Four of these define “medical information” and three of these have a subdivision (g) (Civ. Code, §§ 1786.2, 1798.29, 1798.82), but none of these three define “medical information” in their subdivision (g) and, in any event, none of them bear even a remote graphic resemblance to section 50.05.

Finally, our conclusion that section 4903.6(d)'s reference to "medical information, as defined in subdivision (g) of Section 50.05 of the Civil Code" was meant to refer to "medical information, as defined in subdivision (g) of Section 56.05 of the Civil Code" is buttressed by the language of existing Labor Code section 3762(c). Section 3762(c) states in pertinent part:

"An insurer, third-party administrator retained by a self-insured employer pursuant to Section 3702.1 to administer the employer's workers' compensation claims, and those employees and agents specified by a self-insured employer to administer the employer's workers' compensation claims, are prohibited from disclosing or causing to be disclosed to an employer, *any medical information, as defined in subdivision (b) of Section 56.05 of the Civil Code*, about an employee who has filed a workers' compensation claim, except as follows ... ." (Italics added.)<sup>12</sup>

Therefore, reading Labor Code section 4903.6(d) in conjunction with both subdivision (g) of Section 56.05 of the Civil Code and the Labor Code section 3209.3 definition of "physician" to which section 4903.6(d) refers, section 4903.6(d) requires some significant substantive amendments to Rule 10608.

Section 4903.6(d) imposes no new restrictions on what "medical information" may be served on an employee, a defendant, or a lien claimant who is a "physician" as defined in section 3209.3(a),<sup>13</sup> when requested in accordance with current Rule 10608. Accordingly, no substantive changes are being proposed with respect to service of medical reports and medical-legal reports on applicants, defendants, or physician lien claimants (see proposed Rule 10608(b)), with the exceptions that: (1) consistent with sections 4903.05 and 4903.06, no lien claimant (physician or non-physician) can invoke the provisions of Rule 10608 unless it has paid any requisite lien filing or activation fee (see proposed Rule 10608(a)(1)); and (2) the various provisions relating to service "within six (6) days" have been changed to "10 calendar days."

Proposed Rule 10608(a)(5), however, defines "physician lien claimant" to include certain lien claimants other than the "physicians" defined in Labor Code section 3209.3(a). That is, it defines "physician lien claimant" to include lien claimants that are described in Labor Code sections 4903.05(c)(7) and 4903.06(b), i.e., a health care service plan licensed pursuant to Section 1349 of the Health and Safety Code, a group disability insurer under a policy issued in this state pursuant to the provisions of Section 10270.5 of the Insurance Code, a self-insured employee welfare benefit plan, as defined in Section 10121 of the Insurance Code, that is issued in this state, a Taft-Hartley health and welfare fund, or a publicly funded program providing medical benefits on a nonindustrial basis.

In including these entities within the definition of "physician lien claimant," the WCAB observes that the appellate courts have expanded the Labor Code section 3209.3(a) definition of "physician," at least in some instances. (E.g., *Bergental v. Workers' Comp. Appeals Bd.* (1996) 45 Cal.App.4th 1272 [61 Cal.Comp.Cases 437] (licensed psychologist could be paid for services provided by his registered assistant if supervision requirements of Bus. & Prof. Code § 2913 satisfied); *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Arroyo)* (1977) 69 Cal.App.3d 884 [42 Cal.Comp.Cases 394] (Labor Code section 3209.3 definition of physician not exclude treatment under Labor Code section 4600 with a physician licensed to practice in another country).)

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<sup>12</sup> It is not clear why section 3762(c) refers to "*subdivision (b)* of Section 56.05 of the Civil Code." As it read in 1984, Civil Code subdivision (b) did define the term "medical information." (See Stats. 1984, ch. 1391, § 3.) However, Civil Code section 56.05 was substantially rewritten in 1999, and the definition of "medical information" was placed in subdivision (g) (see Stats. 1999, ch. 526, § 1), where it is now. The phrase "subdivision (b) of" was inserted into section 3762(c) in 2002 (see Stats. 2002, ch. 6, § 48), which was *after* the definition of "medical information" was moved to subdivision (g) of Civil Code section 56.05. Therefore, the reference to "subdivision (b)" appears to have been another draftsmanship error.

<sup>13</sup> Section 3209.3(a) states: " 'Physician' includes physicians and surgeons holding an M.D. or D.O. degree, psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractic practitioners licensed by California state law and within the scope of their practice as defined by California state law."

More importantly, however, the WCAB’s proposed limited expansion of the definition of “physician lien claimant” is consistent with the Confidentiality of Medical Information Act (CMIA) (Civ. Code, § 56 et seq.) of which Civil Code section 56.05(g) is a part.

Under the CMIA, there are three circumstances under which “medical information” may be disclosed: (1) authorization by the patient (Civ. Code, § 56.10(a));<sup>14</sup> (2) compelled disclosure (Civ. Code, § 56.10(b)); and (3) permissive disclosure (Civ. Code, § 56.10(c)). “Considered together, the statutory provisions require a health care provider to hold confidential a patient’s medical information unless the information falls under one of several exceptions to the act.” (*Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 38.)

Among the compelled disclosure exceptions is:

“(b) A provider of health care, a health care service plan, or a contractor shall disclose medical information if the disclosure is compelled by any of the following: ... (2) By a board, commission, or administrative agency for purposes of adjudication pursuant to its lawful authority.”

(Civ. Code, § 56.10(b)(2).)

Among the permissive disclosure exceptions are the following:

“(c) A provider of health care or a health care service plan may disclose medical information as follows:

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“(2) The information may be disclosed to an insurer, employer, health care service plan, hospital service plan, employee benefit plan, governmental authority, contractor, or any other person or entity responsible for paying for health care services rendered to the patient, to the extent necessary to allow responsibility for payment to be determined and payment to be made. ... The information may also be disclosed to another provider of health care or health care service plan as necessary to assist the other provider or health care service plan in obtaining payment for health care services rendered by that provider of health care or health care service plan to the patient.

“(3) The information may be disclosed to a person or entity that provides billing, claims management, medical data processing, or other administrative services for providers of health care or health care service plans or for any of the persons or entities specified in paragraph (2). However, information so disclosed shall not be further disclosed by the recipient in a way that would violate this part.”

(Civ. Code, § 56.10(c)(2) & (3).)

The entities listed in Labor Code sections 4903.05(c)(7) and 4903.06(b) are all expressly or implicitly among the entities listed in the permissive disclosure exceptions of Civil Code section 56.10(c)(2) and (3). Moreover, to the extent it could be asserted that these entities do not fall within these exceptions, the WCAB has the power under Civil Code section 56.10(b)(2) to compel disclosure of medical information to these entities. Nothing in that section suggests that the disclosure cannot be required by rule, rather than by an order in a specific case.

The WCAB recognizes that Civil Code section 56.10(b) and (c) allow for disclosure of medical information by “[a] provider of health care” or “a health care service plan” and that Rule 10608(b) would apply to the service of medical information by all parties and lien claimants. However, Civil Code section 56.10(b)(2) allows “a board, commission, or administrative agency” to compel disclosure of medical information to any person or entity “for

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<sup>14</sup> Under the CMIA, a patient’s authorization to disclose medical information is valid only if specified statutory conditions have been met. (Civ. Code, §§ 56.05(a), 56.11; see also §§ 56.10(a), 56.11, 56.17, 56.20.) Therefore, a consent form authorizing unrestricted release of a patient’s medical information, even if signed by the patient, is *invalid* if it fails to comply with the formal requirements of the CMIA (*Colleen M. v. Fertility and Surgical Associates of Thousand Oaks* (2005) 132 Cal.App.4th 1466, 1472-1473) and may lead to civil liability for invasion of privacy or other causes of action.

purposes of adjudication pursuant to its lawful authority,” and nothing in that section suggests that the disclosure cannot be required by rule, rather than by an order in a specific case.

The WCAB recognizes that Civil Code section 56.10(b)(3) also states:

“(b) A provider of health care, a health care service plan, or a contractor shall disclose medical information if the disclosure is compelled by any of the following:

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“(3) By a party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Section 1987 of the Code of Civil Procedure, or any provision authorizing discovery in a proceeding before a court or administrative agency.”

Accordingly, it could be argued that, under the subpoena provisions of proposed Rule 10608(c), any lien claimant could subpoena an injured employee’s “medical information.” Nevertheless, it is a basic tenet of statutory construction “that as a matter of statutory construction, a specific provision relating to a particular subject will govern that subject as against a general provision.” (*Elliott v. Workers’ Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 365 [75 Cal.Comp.Cases 81]; see also, e.g., *People v. Ahmed* (2011) 53 Cal.4th 156, 163.) Therefore, because Labor Code section 4903.6(d) specifically provides that non-physician lien claimants cannot obtain medical information without an order from the WCAB, this trumps the general rule regarding subpoenas of medical information.

Section 4903.6(d) imposes serious limitations on a “non-physician” lien claimant’s receipt of medical information.

First, a non-physician lien claimant shall not be entitled to “any medical information” about an injured worker “without prior written approval of the appeals board.” As discussed above, this limitation applies to “medical information” as defined by Civil Code Section 56.05 (g). As a practical matter, this means that, absent a WCAB order, a non-physician lien claimant cannot receive *any* medical reports, medical-legal report, or other document that “includes or contains any element of personal identifying information sufficient to allow identification of the [injured employee], such as the [employee’s] name, address, electronic mail address, telephone number, or social security number ... .”

Second, any WCAB order authorizing disclosure of medical information to a non-physician lien claimant “shall specify the information to be provided to the lien claimant and include a finding that such information is relevant to the proof of the matter for which the information is sought.” Accordingly, a non-physician lien claimant must petition the WCAB to request an order allowing it to receive *any* medical or medical-legal report. Further, before it may obtain an order, it must establish, *for each medical or medical-legal report sought*, that the information the report allegedly contains is relevant to some specific element of the non-physician lien claimant’s burden of proving its lien. (See, generally, Lab. Code, §§ 3202.5, 5705.)

In light of the above, proposed Rule 10608(c) establishes procedures by which non-physician lien claimants can receive medical information they have proven to be relevant. These procedures are available to a non-physician lien claimant who is not yet a “party” under Rule 10301(dd)(4) [currently, Rule 10301(x)(3)]. This will help protect the due process rights of such non-physician lien claimants. (See, e.g., *Boehm & Associates v. Workers’ Comp. Appeals Bd. (Brower)* (2003) 108 Cal.App.4th 137, 150 [68 Cal.Comp.Cases 548] [“Lien claimants are entitled to due process in workers’ compensation proceedings”]; *Beverly Hills Multispecialty Group, Inc. v. Workers’ Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789, 803 [59 Cal.Comp.Cases 461] [“Lien claimants are entitled to due process”].) These procedures, however, help ensure that the non-physician lien claimant will receive only the medical information that it has shown to be relevant, and no other medical information.

Finally, proposed Rule 10608(d) emphasizes that violations of its provisions can result in sanctions, attorney's fees, and costs under Labor Code section 5813 and Rule 10561. Of course, although *any* bad faith or frivolous violation of *any* WCAB Rule may result in such sanctions (see Rule 10561), Labor Code section 4903.6(d) specifically states: "The appeals board shall adopt reasonable regulations to ensure compliance with this section, and shall take any further steps as may be necessary to enforce the regulations, *including, but not limited to, impositions of sanctions pursuant to Section 5813.*" (Italics added.) Accordingly, an express reference to sanctions is appropriate.

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

### **15. Section Added: 10608.5 (entitled "Service by Parties and Lien Claimants of Reports and Records on Other Parties and Lien Claimants").**

#### Statement of Specific Purpose and Reasons for Proposed Addition of Section 10608.5

Section 1(a) of SB 863 expressly recognizes that "Section 4 of Article XIV of the California Constitution authorizes the creation of a workers' compensation system ... to accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character, all of which matters are expressly declared to be the social public policy of this state." (Stats. 2012, ch. 363, § 1(a).)

Currently, various provisions of the WCAB's Rules, particularly Rule 10608 (Cal. Code Regs., tit. 8, § 10608), require parties and lien claimants to serve various reports, records, and other documents on each other to facilitate discovery and due process.

However, nothing in the WCAB's current Rules expressly allows the server to elect to serve such documents by CD-ROM or e-mail. Therefore, the common practice has been to serve paper (hard copy) copies of the documents. Similarly, in the course of discovery, it has become common practice for legal copy services and others to request access to paper documents for scanning and/or to photocopy documents and then charge per page fees for hard copy documents, when these documents could be produced more cheaply and efficiently via CD-ROM or e-mail.

Proposed Rule 10608.5 would allow a party or lien claimant to elect to serve reports, records, and other documents in electronic format unless otherwise ordered by the WCAB. This is consistent with Article XIV, § 4, because it would make the service of reports, records, and other documents more expeditious, less expensive, and less burdensome.

Proposed Rule 10608.5 is also consistent with Labor Code section 5307.9, as enacted by SB 863 (Stats. 2012, ch. 363, § 77), which requires the Administrative Director to adopt "a schedule of reasonable maximum fees payable for copy and related services, including, but not limited to, records or documents that have been

reproduced or recorded in paper, electronic, film, digital, or other format.” Providing that parties and lien claimants may elect to serve reports, records, and other documents in electronic format will reduce the costs associated with copy and related services.

However, in recognition of the fact that some self-represented injured employees might not have ready access to computers or other technology necessary to process and read CD-ROMs, DVDs, and e-mails, proposed Rule 10608.5(b) would preclude the use of such technology or service of documents on self-represented injured employees unless either specifically requested in writing by them or ordered by the WCAB.

#### Specific Technologies or Equipment

The proposed addition of this rule does not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed addition.

#### Effect on Small Businesses

The proposed addition of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed addition of this rule will not have a significant economic impact on California business enterprises and individuals.

### **16. Section Amended: 10622 (entitled “Failure to Comply”).**

#### Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10622

The WCAB is proposing to amend Rule 10622 to add a reference to vocational expert reports, consistent with the provisions of Labor Code section 5703(j), as adopted by SB 863. [*Please refer to the discussion of proposed Rule 10606.5.*]

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

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

#### Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10770

The WCAB is proposing to amend Rule 10770 for various reasons.

Consistent with various amendments to the lien statutes made by SB 863, the provisions of proposed Rule 10770(a) are intended to reduce the number of impermissible and/or premature lien claims that are filed and served, thereby reducing the burdens on both the WCAB and defendants.

It has long been the law that a lien is allowable only if it falls within one of the statutorily enumerated classes. (*Prudential Ins. Co. v. Workers' Comp. Appeals Bd. (Wright)* (1978) 22 Cal.3d 776, 780 [43 Cal.Comp.Cases 1319]; *Ogden v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 192, 196-197 [39 Cal.Comp.Cases 297]; see also Lab. Code, § 4903 (specifying “[t]he liens that may be allowed”).)

Prior to SB 863, former Labor Code section 4903(b) allowed lien claims to be filed for both medical treatment expenses and medical-legal expenses. Section 4903(b) has now been amended to exclude medical-legal expenses from the statutory list of items allowable as a lien against compensation, leaving only medical treatment expenses as allowable liens under that subdivision. (Stats. 2012, ch. 363, § 62.)

Concurrently, the Legislature also added Labor Code section 4903.05(b). (Stats. 2012, ch. 363, § 63.) In relevant part, 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.” (Italics added.)<sup>15</sup>

SB 863 also amended Labor Code section 4903.6(a) to impose more rigorous time restrictions on when medical treatment and medical-legal lien claims may be “filed or served.” (Stats. 2012, ch. 363, § 69.) This reflects a legislative intention to significantly reduce the number of premature liens filed with the WCAB and served on defendants.

Further, section 4903.05(c) provides: “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 ...” Also, section 4903.06(a) provides: “Any lien filed pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1, 2013, shall be subject to a lien activation fee unless the lien claimant provides proof of having paid a filing fee as previously required by former Section 4903.05 as added by Chapter 639 of the Statutes of 2003.” (Stats. 2012, ch. 363, § 64.) Additionally, section 4903.06(a)(5) provides: “Any lien filed pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1, 2013, for which the filing fee or lien activation fee has not been paid by January 1, 2014, is dismissed by operation of law.” These provisions establish that, if a medical provider elects to seek reimbursement for medical-legal and other costs through the filing of a lien, the medical provider will be subject to the statutorily required lien filing and lien activation fees.

In light of these amendments, proposed Rule 10770(a)(1) would make it clear that a lien may be filed or served only if permitted by section 4900 et seq., including but not limited to the premature filing restrictions of section 4903.6. Proposed Rule 10770(a)(2) would then provide that any lien that is not statutorily allowable, in whole or in part, or that is filed before the lapse of the statutory premature filing restrictions shall be deemed dismissed by operation of law. This proposed provision will obviate the need for a party or the WCAB to take formal action to dismiss a premature or non-statutorily allowable lien, which should help deter the filing of such impermissible lien claims.

Consistent with section 4903(b), proposed Rule 10770(a)(3) would specify that medical-legal and other claims of costs are not allowable as a lien against the employee’s compensation. Yet, consistent with sections 4903.05

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<sup>15</sup> This language suggests that while medical-legal costs are no longer lienable, claims for medical-legal and other costs can be made by electronically filing a lien form. Implicit in this language is a legislative recognition that billings by medical providers and others will often contain a mix of medical treatment charges, medical-legal charges, and other costs. Therefore, instead of requiring medical and other providers to file both a medical treatment lien and a separate petition for costs, these providers may simply elect to roll all of their reimbursement and costs claims into a single lien. Of course, under Labor Code section 4903.5(b), a provider could elect to file a lien form that seeks reimbursement solely for medical-legal and other costs. However, as discussed below the provider would then also be subject to the lien filing or activation fee.

and 4903.06 (Stats. 2012, ch. 363, §§ 63, 64), proposed Rule 10770(a)(3) would further provide that claims of costs may be filed as a lien, but the filer must then timely pay the applicable lien filing or lien activation fee or the *entire* lien will be deemed dismissed by operation of law.

All of these provisions of proposed Rule 10770(a) would reduce the number of impermissible and/or premature liens that are filed and served, thereby reducing the burdens on both the WCAB and defendants, consistent with SB 863.

Proposed Rule 10770(b) relates to the format of liens that are filed.

Consistent with Labor Code section 4903.05(b), as adopted by SB 863, Rule 10770(b)(1) requires that any section 4903(b) lien and/or any claims of costs lien *must* be filed electronically (i.e., e-filed or JET-filed). Rule 10770(b)(1) further provides that any such lien submitted in paper form shall not be deemed filed, shall not toll or extend the statute of limitations, shall not be acknowledged or returned, and may be destroyed without notice.

Rule 10770(b)(1), however, would further provide that other lien claims *may* be electronically filed, but only if filed in compliance with DWC's e-filing and JET filing procedures (or future adopted similar procedures).

Proposed Rule 10770(b)(2) essentially reiterates the provisions of current Rule 10770(a), but clarifies these provisions in light of the e-filing provisions of Rule 10770(b)(1).

Proposed Rule 10770(b)(3) would provide that the claims of two or more providers of goods or services shall not be merged into a single lien. This tracks the language of Labor Code section 4903.05(c)(3).

Proposed Rule 10770(b)(3) would further expressly provide, however, that an individual provider may seek payment for more than one type of lien on a single lien form. The WCAB is proposing to add this amendment because, currently, the lien form on the Division of Workers' Compensation's website allows only one type of lien claim to be checked on each lien form.<sup>16</sup> Therefore, at present, a provider with two liens must file two separate lien forms.

There is nothing in SB 863, or in the Labor Code as it currently exists, which suggests that a provider must file separate lien claim forms for each different type of lien claim. To the contrary, the statutory language tends to refer to liens in the singular, not the plural. (See, e.g., Lab. Code, § 4903.05(a).) Moreover, SB 863 allows physicians, interpreters, and others to file a lien for medical treatment-related goods and services, and it also allows them to file a claim for medical-legal and other costs in the form of a lien. In doing this, the Legislature was giving implicit recognition to the fact that the billings of many physicians, interpreters, and others include a mix of medical treatment and medical-legal charges. However, if two separate lien forms were required under these circumstances, the providers might be subject to two sets of lien filing fees. This does not appear to be the intent of SB 863. Indeed, a requirement to file two separate liens would require the providers to go through their billings to separate out which charges are medical and which are costs, so that the total amount of each could be entered on each separate lien. This would defeat the purpose of allowing them to file a claim of costs lien because, if the different charges had to be segregated, the provider would simply file a petition for costs for those services that are allowable as costs.

Proposed Rule 10770(c) establishes requirements for all lien claims, whether or not filed electronically.

Proposed Rule 10770(c)(2), in substance, reiterates a requirement of current Rule 10770(b)(1) that only original (i.e., initial or opening) lien claims shall be filed with the WCAB (and not amended liens), except as provided in section 10233(g) and (h) or as ordered by the WCAB. It also reiterates a requirement of current Rule 10770(b)(2) that any amended lien previously filed or lodged for filing may be destroyed without notice.

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<sup>16</sup> See <http://www.dir.ca.gov/dwc/FORMS/EAMS%20Forms/ADJ/DWCFform6.pdf>

Similarly, proposed Rule 10770(c)(3) essentially reiterates the requirement of current Rule 10770(b)(1) that no supporting documentation (i.e., the “statement or itemized voucher” referred to by statute) shall be filed with any lien, except as provided in section 10233(g) and (h) or as ordered by the WCAB. It also reiterates a requirement of current Rule 10770(b)(2) that any supporting documentation previously filed or lodged for filing may be destroyed without notice.

Prior to SB 863, former Labor Code section 4903.1(c) provided that “[e]very ... lien shall be accompanied by a full statement or itemized voucher supporting the lien.” Nevertheless, to deal with the scanning backlog at the district offices, the WCAB amended Rule 10770, operative May 21, 2012, to provide that supporting documentation generally shall not be filed with any lien. In doing this, the WCAB construed former section 4903.1(c) as specifying what supporting documentation “shall” be filed, but not *when and how* the supporting documentation shall be filed.

SB 863 repealed former section 4903.1(c). However, it added section 4903.05(a), which incorporates the identical language that “[e]very ... lien shall be accompanied by a full statement or itemized voucher supporting the lien.” (Stats. 2012, ch. 363, § 66.)

Because section 4903.05(a) reiterates the language of former section 4903.1(c), section 4903.05(a) could conceivably be construed to mean that the Legislature was effectively declaring that each lien “shall be accompanied” by supporting documentation, notwithstanding the May 2012 amendments that resulted in current Rule 10770(b)(1) (i.e., proposed Rule 10770(c)(3)).

Nevertheless, where statutory language is open to construction, the Appeals Board will choose the construction that promotes rather than defeats the general purpose of the statute and that avoids absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 [66 Cal.Comp.Cases 1036].) As it did with former section 4903.1(c), the WCAB construes section 4903.05(a) as specifying only what supporting documentation must be filed with the lien, without mandating *when and how* that documentation must be filed. This interpretation avoids the absurd consequences of resurrecting scanning backlogs for paper-filed liens, of creating unnecessary extra electronic file storing costs for DWC, and of placing excessive and unnecessary demands on the server computers (servers) of both DWC and the filers for each e-filed or JET-filed lien.

Based on various new or existing statutory and regulatory requirements, Rule 10770(c)(4) would specify what documents must be concurrently filed with each lien claim or lien for making a claim of costs. Specifically, Rule 10770(c)(4) would require:

- the concurrent filing of a proof of service (see Lab. Code, § 4903.05(a) [“[t]he lien shall be accompanied by a ... proof of service”]; see also current Rule 10770(c) and proposed amended Rule 10770(d) [requirements for proof of service]);
- the verification under penalty of perjury required by current Rule 10770.5 whenever a section 4903(b) lien is filed (see also Lab. Code, § 4903.6);
- a true and correct copy of any assignment of a lien, as required by Labor Code section 4903.8(a) & (b) (see Lab. Code, § 4903.8(a) & (b) [Stats. 2012, ch. 363, § 70]);
- the declaration under penalty of perjury required by Labor Code section 4903.8(d) whenever a lien is filed on or after January 1, 2013 (see Lab. Code, § 4903.8(d)); and
- any other declaration or form required by law to be concurrently filed with a lien claim. [*NOTE: This particular provision is included so that Rule 10770 will not need to be immediately amended any time there is a new statutory or regulatory provision regarding declarations or other forms that must be filed with an original lien claim.*]

Proposed Rule 10770(c)(6) would provide that a section 4903(b) lien claimant or a person or entity having a claim of costs in the form of a lien that is required to pay a lien activation fee shall not file a lien claim or lien

form unless it has paid the requisite lien filing fee. It also provides that any lien claimant claiming an exemption from the filing fee must so indicate on the lien form.

Proposed Rule 10770(c)(6) would further provide that a section 4903(b) lien or a claim of costs lien filed in violation of the above provision shall be deemed dismissed by operation of law. This provision is consistent with Labor Code section 4903.05(c). Specifically: (1) section 4903.05(c) provides that “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*”; (2) section 4903.05(c)(1) provides for a \$150 filing fee; and (3) section 4903.05(c)(2) provides that “On or after January 1, 2013, a lien submitted for filing that does not comply with paragraph (1) *shall be invalid.*” Given that a lien submitted without the requisite filing fee is “invalid” ab initio, then it is appropriate to provide that any such lien is dismissed by operation of law.

Proposed Rule 10770(c)(7)(A) would provide that a section 4903(b) lien for services rendered on or after July 1, 2013 shall not be filed if the *only* remaining disputes are subject to independent medical review and/or independent bill review. This is consistent with Labor Code section 4903(b) (Stats. 2012, ch. 363, § 62), which provides: “The liens that may be allowed ... are as follows: ... (b) The reasonable expense incurred by or in behalf of the injured employee, as provided by Article 2 (commencing with Section 4600 [i.e., the medical treatment sections]), *except those disputes subject to independent medical review or independent bill review.*” (Italics added.) It is also consistent with Labor Code section 4604 (Stats. 2012, ch. 363, § 40), which provides: “Controversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5* [i.e., the IMR process].” (Italics added.) It is further consistent with the statutory schemes for IMR (Lab. Code, §§ 4616.3, 4616.4; see also §§ 4610.5, 4610.6) and IBR (Lab. Code, §§ 4603.2, 4603.3, 4603.6) that, in substance, establish special procedures for medical necessity and medical billing disputes separate from and exclusive of the lien claim procedure.

Proposed Rule 10770(c)(7)(B), however, would expressly provide that medical treatment lien claims *may* be filed if there are unresolved disputes other than pure medical necessity and medical billing issues. These would include, but are not necessarily limited to, disputes regarding injury, employment, jurisdiction, or the statute of limitations.

Proposed Rule 10770(c)(8) would essentially reiterate requirement of current Rule 10770(b)(1) that any lien or supporting documentation submitted in violation of subdivisions (c)(1) through (c)(7) shall not be deemed filed for any purpose, shall not be acknowledged or returned to the filer, and may be destroyed at any time without notice.

Proposed Rule 10770(c)(10) would amend current Rule 10770(b)(4), which had addressed the circumstances under which a party served with an unfiled lien must file that lien with the WCAB. These provisions of current Rule 10770(b)(4) were deemed necessary because of language in former Labor Code section 4903.1(b), which had provided that [w]hen a compromise of claim or award is submitted to the appeals board ... the parties shall file... any liens served on the parties.” However, this language was stricken from section 4903.1 by SB 863 (see Stats. 2012, ch. 363, § 66.5)<sup>17</sup> and the language was not re-adopted elsewhere, so these provisions of current Rule 10770(b)(4) have become unnecessary.

Proposed Rule 10770(d)(1) makes it clear that *all* original *and* amended liens and *all* documents related to a lien, including supporting documentation, still must be *served* on the parties, even if Rule 10770 otherwise precludes these documents from being *filed* with the WCAB.

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<sup>17</sup> Both Sections 66 and 66.5 of SB 863 contained amendments to Labor Code section 4903.1. However, uncodified Section 85 of SB 863 provided that Section 66.5 would become operative, and section 66 would not become operative, if Senate Bill 1105 was enacted, which it was. (Stats. 2012, ch. 712.) SB 1105 also contained two sets of amendments to Labor Code section 4903.1. (Stats. 2012, ch. 712, §§ 1, 1.5.) However, the amendments in Section 1.5 of SB 1105 are the same as those in Section 66.5 of SB 863 (See Stats. 2012, ch. 712, § 2) and SB 1105 provided that these amendments would become operative if SB 863 was enacted. (*Id.*)

Proposed Rule 10770(d)(2) would delete the requirement of current Rule 10770(c)(2) regarding the requirement of proof that the lien claimant is the owner of the alleged debt. This language no longer appears to be necessary in light of the provisions of Labor Code section 4903.8 regarding the filing and service of any assignment of the lien. Instead, proposed Rule 10770(d)(2) will require “proof of ownership of the debt if the lien claimant is not the original service provider.”

Proposed Rule 10770(h)(1) provides that when a lien claimant notifies the WCAB that its lien has been resolved or withdrawn, then the lien claim will be deemed dismissed with prejudice by operation of law. This will allow the WCAB to automatically “end date” these resolved or withdrawn liens. It will also have the beneficial effect of, among other things, relieving the WCAB of the duty to serve lien claimants whose liens have been resolved or withdrawn with notices of hearing, minutes of hearing, orders, etc. Additionally, it would also minimize confusion at lien conferences (see Cal. Code Regs., tit. 8, § 10770.1) that might arise when the lien claimant failed to appear. Furthermore, the provision for dismissal “with prejudice” will help ensure that, once a lien claimant has notified the WCAB that its lien has been resolved, the lien cannot somehow be later reactivated, i.e., resurrected as a “zombie” lien.

Proposed Rule 10770(h)(2) provides that if a petition for costs is filed for any goods or services for which a lien claim had previously been filed, the lien claim will be deemed dismissed without prejudice by operation of law. This will allow a lien claimant that can file a petition for costs under SB 863 and Rule 10451 to do so without also taking the unnecessary additional step of requesting the dismissal of its lien claim (which, arguably, could also conceivably subject it to a lien activation fee).

Proposed Rule 10770(i) would add the Uninsured Employers Benefits Trust Fund (UEBTF) to the list of lien claimants not subject to certain provisions of Rule 10770. This is because UEBTF is a governmental entity that furnishes benefits when a defendant the employee asserts is liable does not initially provide them. Therefore, UEBTF is similar in that respect to the Employment Development Department and the California Victims of Crime Program.

Proposed Rule 10770 would also make various non-substantive amendments to current Rule 10770. Most of these involve re-lettering and/or re-numbering subdivisions.

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

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

### Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10770.1

The WCAB is proposing to amend Rule 10770.1 for various reasons.

The proposed addition of Rule 10770.1(a)(2) would codify and confirm the WCAB’s already existing authority to set a lien conference at a district office, other than the one having venue, simply by issuing a notice of hearing and *without* issuing an order changing venue.<sup>18</sup>

In addition to the WCAB’s existing authority to issue a notice of hearing that sets a lien conference at a district office other than the one having venue, proposed Rule 10770.1(a)(2) is consistent with SB 863’s amendment of Labor Code section 4903.4. As amended, section 4903.4(b) now provides: “If [a] dispute [concerning a lien for medical treatment expenses] is heard at a separate proceeding it shall be calendared for hearing or hearings as determined by the appeals board based upon the resources available to the appeals board and other considerations as the appeals board deems appropriate and shall not be subject to Section 5501.” The reference to Labor Code section 5501 (regarding who may file an application and how the application should be served) appears to be clerical or inadvertent error. The WCAB believes the Legislature intended to refer to section 5501.5, relating to venue.

The value of the proposed codification would be to affirm the WCAB’s flexibility in setting lien conferences, thereby using judicial resources efficiently and managing calendar time effectively. Lien conferences that otherwise would have to be calendared very far out at very busy district offices, or that would displace hearings at these busy offices regarding injured employees’ entitlements to benefits, are instead heard at under-utilized district offices having WCJs with more readily available calendar time.

The WCAB is also proposing to add Rule 10770.1(c). It would provide, in substance, that: (1) no lien claimant that is required to pay a lien filing or activation fee shall file a DOR; (2) no lien claimant that is required to pay a lien filing or activation fee shall participate in any lien conference, including obtaining an order allowing its lien in whole or in part, without submitting written proof at the lien conference of prior timely payment of the fee in the form provided by the Administrative Director; (3) if proof of prior timely payment of the activation fee is not submitted, the lien claim shall be dismissed with prejudice; (4) if proof of prior timely payment of the filing fee is not submitted, the lien claim shall be dismissed by operation of law, except that if the lien claimant filed a declaration of readiness its lien shall be dismissed with prejudice; and (5) a lien claimant shall not avoid dismissal by attempting to pay the fee at or after the hearing.

The first provision is mandated by Labor Code section 4903.06(a)(2), which expressly provides: “The lien claimant shall include proof of payment of the filing fee or lien activation fee with the declaration of readiness to proceed.”

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<sup>18</sup> Labor Code section 133 already gives the WCAB “power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it.” Among the inherent powers of a court is the power to control its proceedings and do whatever is necessary and appropriate to ensure the prompt and orderly administration of justice. (E.g., *Neary v. Regents of Univ. of Cal.* (1992) 3 Cal.4th 273, 276; *Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267.) This includes the inherent power “to control [its] own calendars and dockets.” (*Walker, supra*, 53 Cal.3d at p. 267; see also, e.g., *People v. Ingram* (2010) 50 Cal.4th 1131, 1146 (“It is ancient and undisputed law that courts have an inherent power over the control of their calendars ...”).) More particularly, it includes the inherent power to transfer the location of a hearing. As stated in *Gray v. Municipal Court* (1983) 149 Cal.App.3d 373, 377: “[Courts] possess inherent judicial powers ancillary to their express statutory powers. The transfer of a ... hearing falls within the [Court’s] inherent power to manage the calendar.” (See also *Walker, supra*, 53 Cal.3d at p. 267 (“transfer authority is one of the inherent powers of a court”).)

Furthermore, venue is not jurisdictional. (*Newman v. County of Sonoma* (1961) 56 Cal.2d 625, 627 (“[e]xcept in a few cases in which the Constitution ... or a statute makes [the] place of trial part of the grant of subject matter jurisdiction, venue is not jurisdictional”); see also *People v. Simon* (2001) 25 Cal.4th 1082, 1096 (“[T]he issue of venue in criminal as well as in civil cases does not involve a question of ‘fundamental’ or ‘subject matter’ jurisdiction over a proceeding ... . Thus, *venue is not jurisdictional in the fundamental sense.*” (Italics in original).) Of course, the WCAB has statewide subject matter jurisdiction over workers’ compensation matters. (Lab. Code, §§ 5300, 5301.) Accordingly, there is no jurisdictional bar to having a particular hearing take place at any district office in California, even if the case is not venued there.

The second provision, to the extent it provides that a lien claimant required to pay a *filing fee* shall not participate in the lien conference or obtain any order, is mandated by: (1) section 4903.05(c), which provides that, with certain exceptions specified in subdivision (c)(7), “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 ...”; (2) section 4903.05(c)(1), which sets a \$150 filing fee; and (3) section 4903.05(c)(2), which provides that “On or after January 1, 2013, a lien submitted for filing that does not comply with paragraph (1) shall be invalid.” If a lien submitted without the requisite filing fee is “invalid” ab initio, then it is impermissible for the lien claimant to participate in the lien conference or obtain any order.

The second provision, to the extent it provides that a lien claimant required to pay an *activation fee* shall not participate in the lien conference or obtain any order, is mandated by: (1) section 4903.06(a)(2), which provides that if the lien claimant filed the DOR, “[t]he lien claimant shall include proof of payment of the ... activation fee”; and (2) section 4903.06(a)(4), which provides that “[a]ll lien claimants that did not file the [DOR] and that remain a lien claimant of record at the time of a lien conference shall submit proof of payment of the activation fee at the lien conference” and “[i]f the fee has not been paid or no proof of payment is available, the lien shall be dismissed with prejudice.” Given these requirements, it is appropriate to preclude lien claimants who have not paid the requisite activation fee from participating in the lien conference or obtaining any order.

The third provision is justified by the statutory provisions relating to the second provision above.

The first element of the fourth provision is derived from: (1) section 4903.05(c), which provides that, with certain exceptions specified in subdivision (c)(7), “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 ...*”; (2) section 4903.05(c)(1), which sets a \$150 filing fee; and (3) section 4903.05(c)(2), which provides that “On or after January 1, 2013, a lien submitted for filing that does not comply with paragraph (1) *shall be invalid.*” If a lien submitted without the requisite filing fee is “invalid” ab initio, then it is appropriate to provide that any such lien is dismissed by operation of law *as of the time of its filing*.

The second element of the fourth provision is derived from section 4903.06(a)(2), which again provides: “The lien claimant shall include proof of payment of the filing fee ... with the declaration of readiness to proceed.” Given that section 4903.05(c) already deems a lien filed without the requisite filing fee to be invalid, the WCAB concludes that something more than a dismissal *by operation of law* is appropriate for a lien claimant who files a DOR without proof of the requisite filing fee. The provision that the lien will be dismissed *with prejudice* accomplishes this purpose.

The WCAB recognizes that section 4903.06(a)(5) provides: “Any lien filed pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1, 2013, for which the filing fee or lien activation fee has not been paid by January 1, 2014, is dismissed by operation of law.” Accordingly, an argument could be made that a lien claimant subject to an *activation fee* can participate in any lien conference that occurs on or before December 31, 2013, even if the activation fee has not been paid. Again, though, section 4903.06(a)(4) states: “All lien claimants ... that remain a lien claimant of record at the time of a lien conference shall submit proof of payment of the activation fee at the lien conference. If the fee has not been paid or no proof of payment is available, the lien shall be dismissed with prejudice.” Therefore, this language specifically indicates that if a lien conference occurs, *regardless of its date*, a lien claimant must submit proof of having paid the requisite fee or its lien will be dismissed with prejudice.

The fifth provision — i.e., that lien claimant shall not avoid dismissal by attempting to pay the fee at or after the hearing — also flows from the statutory provisions discussed above.

The WCAB is also proposing to add Rule 10770.1(c)(1), which would create a rebuttable presumption that a lien claimant is required to pay a lien filing or activation fee. Under proposed Rule 10770.1(c)(1)(A), this presumption may be rebutted by proof or a stipulation that the lien claimant is an entity exempted by Labor

Code sections 4903.05(c)(7) or 4903.06(b). The WCAB may also take judicial notice of a lien claimant’s status as an exempt entity under those sections through the “common knowledge” or “not reasonably subject to dispute” judicial notice provisions of Evidence Code section 452(g) and (h). Under proposed Rule 10770.1(c)(1)(B), this presumption may be rebutted by proof that the lien claimant paid the old filing fee in effect from 2004 through 2006 under former section 4903.05.

Proposed Rule 10770.1(c)(2) would establish various ways that a lien claimant can show it made prior timely payment of a requisite lien filing or activation fee. Proof shall be in the form provided by the Rules of the Administrative Director or by printout from the Public Information Search Tool of EAMS (although the WCAB is *not* required to independently conduct a search using the Public Information Search Tool). However, given the statutory requirements discussed above, it must be shown that the filing fee was paid contemporaneously with the filing of the lien. Also, for any lien claimant that filed the DOR, it must be shown that the activation fee was filed contemporaneously with a DOR. For lien claimants who did not file the DOR, it must be shown that the activation fee was paid before the scheduled starting time of the lien conference set forth in the notice of hearing.

Proposed Rule 10770.1(c)(3) would establish consequences for a failure to prove timely payment: (1) dismissal of the lien claim with prejudice if proof of the activation fee is not submitted; (2) dismissal of the lien claim by operation of law as of the time of its filing if proof of the filing fee is not submitted; and (3) dismissal of the lien claim with prejudice if proof of the filing fee is not submitted by a lien claimant who filed a DOR.

The WCAB is further proposing to amend Rule 10770.1(g) (current Rule 10770.1(h)) to provide that “good cause” for a one-time continuance or order taking off calendar shall not include the delayed or late appointment of an attorney or other representative by a defendant or lien claimant or the delayed receipt of the defendant’s or lien claimant’s file by that attorney or other representative.

Finally, the WCAB is proposing to amend Rule 10770.1(n) (current Rule 10770.1(m)) to exclude UEBTF from certain provisions of the Rule. The reasons for this have been discussed in other contexts.

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

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**19. Section Amended: 10770.5 (entitled “Verification to Filing of Lien Claim or Application by Lien Claimant”).**

Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10770.5

The WCAB is proposing to amend Rule 10770.5 to reflect the changes made to Labor Code section 4903.6(a) by SB 863. (Stats. 2012, ch. 363, § 69.)<sup>19</sup> The opening line of section 4903.6(a) refers only to a lien or application “under subdivision (b) of Section 4903.” However, section 4903.6(a)(2)(B) specifically refers to section 4622, which relates only to medical-legal costs and not to section 4903(b) medical treatment lien claims. Therefore, the proposed amendments to Rule 10770.5 include not only medical treatment liens, but also medical-legal costs, whether filed as a claim of costs lien or a petition for costs.

The WCAB is proposing to add Rule 10770.5(b) and (d)(2) in recognition not only of SB 863’s amendments to Labor Code section 4903.6(a), but also its amendment to Labor Code section 4903(b), which in relevant part provides that a lien can be allowed for reasonable medical treatment expense “except those disputes subject to independent medical review or independent bill review.”<sup>20</sup> Therefore, if the only remaining medical treatment cost disputes relate to independent medical review (IMR) or independent bill review (IBR), then a medical treatment lien claim should not be filed, “[e]xcept as necessary to meet the requirements of Section 4903.5.” (Lab. Code, § 4903.6(a).)

Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

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<sup>19</sup> Section 4903.6(a) was amended as follows (with *italicizing* indicating new language and ~~strike-throughs~~ indicating deleted language):

(a) Except as necessary to meet the requirements of Section 4903.5, ~~no~~ a lien claim or application for adjudication shall *not* be filed or served under subdivision (b) of Section 4903 until ~~the expiration of one of the following:~~ *both of the following have occurred:*

(1) Sixty days *have elapsed* after the date of acceptance or rejection of liability for the claim, or expiration of the time provided for investigation of liability pursuant to subdivision (b) of Section 5402, whichever date is earlier.

(2) *Either of the following:*

~~(A)~~ (A) The time provided for payment of medical treatment bills pursuant to Section ~~4603.2.~~ *4603.2 has expired and, if the employer objected to the amount of the bill, the reasonable fee has been determined pursuant to Section 4603.6, and, if authorization for the medical treatment has been disputed pursuant to Section 4610, the medical necessity of the medical treatment has been determined pursuant to Sections 4610.5 and 4610.6.*

~~(B)~~ (B) The time provided for payment of medical-legal expenses pursuant to Section ~~4622.~~ *4622 has expired and, if the employer objected to the amount of the bill, the reasonable fee has been determined pursuant to Section 4603.6.*

<sup>20</sup> The IMR statutes are Labor Code sections 4610.5 and 4610.6 (for treatment outside of a Medical Provider Network (MPN)) and sections 4616.3 and 4616.4 (for treatment within an MPN). (See also Lab. Code, § 4062 (b) & (c).) The IBR statutes are sections 4603.2, 4603.3, and 4603.6.

**20. Section Amended: 10770.6 (entitled “Verification to Filing of Declaration of Readiness By or on Behalf of Lien Claimant”).**

Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10770.6

As with the proposed amendments to Rule 10770.5, above, the WCAB is proposing to amend Rule 10770.6 to reflect the changes made to Labor Code section 4903.6(a) by SB 863. The proposed amendments to Rule 10770.6 also reflect the new IMR and IBR appeals requirements of SB 863.

Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

**21. Section Added: 10774.5 (entitled “Notices of Representation, Change of Representation, and Non-Representation for Lien Claimants”).**

Statement of Specific Purpose and Reasons for Proposed Addition of Section 10774.5

SB 863 enacted Labor Code section 4903.6(b), which specifically provides: “(b) All lien claimants under Section 4903 shall notify the employer and the employer’s representative, if any, and the employee and his or her representative, if any, and the appeals board within five working days of obtaining, changing, or discharging representation by an attorney or nonattorney representative. The notice shall set forth the legal name, address, and telephone number of the attorney or nonattorney representative.” (Stats., ch. 363, § 69.)<sup>21</sup>

The proposed addition of Rule 10774.5 will give force and effect to Labor Code section 4903.6(b) because, in addition to requiring a lien claimant to give notice of the change or discharge of an attorney or non-attorney representative (as current Rule 10774 provides), it will also require a lien claimant to file a notice of representation when it first obtains an attorney or non-attorney representative.

Also, requiring that the forms be captioned as “Notice of Change of Representation” and “Notice of Non-Representation” (rather than the current “Substitution of Attorneys” and “Notice of Dismissal of Attorney” forms) is more consistent with Labor Code section 4903.6(b) because: (1) that section applies both to attorneys and non-attorneys; and (2) it specifically refers to “changing ... representation” rather than “substitut[ing].”

Proposed Rule 10774.5(e) would provide that, whenever a lien claimant becomes represented by an attorney, the lien claimant’s duties, as set forth in proposed Rule 10774.5(a) through (d), may be satisfied by a letter of representation filed and served by the attorney. This provision was added based on an informal response the

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<sup>21</sup> Both attorneys and certain non-attorneys may appear before the WCAB. (See Lab. Code, §§ 5501, 5700; *Eagle Indemnity Co. v. Industrial Acc. Com.* (Hernandez) (1933) 217 Cal. 244, 248 [19 I.A.C. 150]; *99 Cents Only Stores v. Workers’ Comp. Appeals Bd.* (Arriaga) (2000) 80 Cal.App.4th 644, 648 [65 Cal.Comp.Cases 456]; *Longval v. Workers’ Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 798 [61 Cal.Comp.Cases 1396]); but see WCAB Rule 10779; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61 [“defrocked” attorneys cannot appear].)

WCAB received to the tentative proposed Rules it posted on its web forum. The informal response properly pointed out that, although there have been some historical problems regarding notices of representation filed by non-attorneys, there have not been similar problems with attorneys. Moreover, any attorney who might make knowingly false statements regarding representation of a client would be subject to disciplinary action by the State Bar, which the WCAB believes is a sufficient deterrent to such false statements.

Labor Code section 4903.6(a) requires notice “within five working days of obtaining, changing, or discharging representation by an attorney or nonattorney representative.”

It is not uncommon, however, for lien claimant to obtain an attorney or representative (or to change an attorney or representative) within a day or two of a scheduled hearing. Therefore, proposed Rule 10774(e)(2) would provide that, if a lien claimant obtains initial or new representation less than five working days before a scheduled hearing, then a copy of the fully executed notice of representation or change of representation shall be lodged with the WCJ at the hearing and concurrently personally served on each party or lien claimant appearing. This will help ensure that when a new non-attorney representative “unexpectedly” appears, the WCJ and the other parties and lien claimants will know that the non-attorney representative has the authority to appear and, among other things, negotiate and settle.

Similarly, proposed Rule 10774.5(e)(5) would provide that, if no fully executed notice of representation or change of representation has been filed at or before the time of any hearing, then: (A) the lien claimant shall be deemed not to be represented even if a non-attorney representative who purportedly has assumed representation appears; and (B) if the lien claimant does not appear at the hearing, it shall be subject to all of the consequences of a failure to appear. These provisions will help ensure that lien claimants actually and timely comply with the notice of representation requirements.

Also, proposed Rule 10774(e)(6) would provide that a notice of representation or change of representation shall not be filed for the sole purpose of allowing a third-party agent, such as a copy service, to sign and issue a subpoena or subpoena duces tecum under Labor Code section 130, Labor Code section 5710, or Rule 10530. Given the significance and impact of a subpoena or subpoena duces tecum, the responsibility for signing and issuing them should not be delegated to a third-party agent. Instead, the responsibility should be assumed by (1) an attorney or (2) a non-attorney representative who is employed or intended to be employed on a continuing or extended basis.

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

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**22. Section Amended: 10845 (entitled “General Requirements for Petitions for Reconsideration, Removal, and Disqualification, and for Answers and Other Documents”).**

Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10845

On December 10, 2012, the Office of Administrative Law (OAL) approved a filing without regulatory effect by which the Division of Workers’ Compensation (DWC) and WCAB agreed to renumber certain former Rules of the Court Administrator and to move these renumbered Rules from Subchapter 1.9 into newly created Subchapter 1.8.5 in Title 8, Division 1, Chapter 4.5 of the California Code of Regulations. Accordingly, various Rules that were formerly numbered as section 10210 et seq. are now renumbered as section 10205 et seq. Rule 10845 is being amended for the sole purpose of correcting the re-numbered references.

Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

**23. Section Amended: 10886 (entitled “Service on Lien Claimants”).**

Statement of Specific Purpose and Reasons for Proposed Amendments of Section 10886

Current Rule 10886 provides that, where a lien is on file with the WCAB “or where a party has been served with a lien,” a copy of any compromise and release agreement or stipulations shall be served on the lien claimant.

However, SB 863 requires that “[e]very lien claimant shall file its lien with the appeals board.” (Lab. Code, § 4903.05(a).)

Moreover, SB 863: (1) eliminated the language of former Labor Code section 4904(a), which in essence provided that a lien existed if notice was given in writing to a defendant of any claim that would be allowable as a lien; and (2) eliminated the provision of former Labor Code section 4903.1(b), which provided that, when a compromise and release agreement was filed with the WCAB, the parties were also required to file any liens previously served on them.

Therefore, SB 863 eliminated what, in effect, were constructive liens. Accordingly, the WCAB concludes that Rule 10886 should be amended to delete the requirement for service of a C&R or stipulation on a provider who has not actually filed the lien, even if the parties were served with the provider’s billing. Indeed, the elimination of this language is consistent with Labor Code section 4903.05, which requires specified lien claimants to pay a filing fee. If providers who have not actually filed a lien with the WCAB are no longer entitled to service of a copy of a C&R stipulation, then this will encourage providers to file their liens.

Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

## Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

## Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

## Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

*[NOTE RE: TENTATIVE PROPOSED RULE 10956: In the tentative proposed Rules the WCAB posted on its web forum for informal public comment, the WCAB had included a tentative proposed Rule 10956, entitled “Petition Appealing Determination of Director of Industrial Relations Regarding Return to Work Fund Benefits.” This tentative proposed rule would have established procedures for any petition filed by an injured employee appealing a Determination of the Director made pursuant to Labor Code section 139.48 regarding the employee’s eligibility for, or the amount of, supplemental payments under the Return to Work Fund (RTWF).*

*However, under section 139.48, it is the Director who “administer[s]” the RTWF and “[e]ligibility for [RTWF] payments and the amount of payments shall be determined by regulations adopted by the director.” (Underlining added.)*

*The Director has not yet adopted any RTWF regulations and, therefore, has not issued any Determinations based on any such regulations for the WCAB “to review.” Accordingly, the WCAB has determined that it is not yet necessary to propose a Rule establishing procedures for RTWF appeals.]*

**24. Section Added: 10957 (entitled “Petition Appealing Independent Bill Review Determination of the Administrative Director”).**

## Statement of Specific Purpose and Reasons for Proposed Addition of Section 10957

The WCAB is proposing to add Rule 10957 in light of SB 863’s addition of Labor Code section 4603.6(f). (Stats. 2012, ch. 363, § 39.) Section 4603.6(f) provides that independent bill review (IBR) determinations of the Administrative Director are subject to appeal to the WCAB, although it imposes significant restrictions on such appeals.

Proposed Rule 10957(a) would allow an “aggrieved party” to appeal an IBR determination. It would also make clear that a “determination” includes an AD decision that a dispute is *not* subject to IBR.

Proposed Rule 10957(b) would provide that a petition appealing an IBR determination of the AD shall be filed with the WCAB no later than 20 days after the determination. This is consistent with Labor Code sections 5900(a) and 5903 relating to petitions for reconsideration. It would further provide, however, that the time for filing would be extended under Rule 10507 where the determination is not personally served, and under Rule 10508 where the time for filing falls on a weekend or holiday.

Proposed Rule 10957(c) would essentially provide that, except for e-filed petitions (which are filed in cyberspace), the petition must be filed with the district office of the WCAB having venue if an application was previously filed. If no application was previously filed, an application shall be filed together with the petition and the petition shall be filed only with the district office where venue is being asserted.

Proposed Rule 10957(d) would provide that the petition shall be captioned “Petition Appealing Administrative Director’s Independent Bill Review Determination.”

Proposed Rule 10957(f) would require that a document cover sheet and document separator sheet be filed with the petition and would also specify that “Appeal of Determination of AD-IBR” must be entered in the document title field of the document separator sheet.

Proposed Rule 10957(h)(1) would provide that the petition shall be limited to raising one or more of the five grounds specified in Labor Code section 4603.6(f).<sup>22</sup> The WCAB sees no need for its proposed Rule to expressly set forth each of the five grounds specified in section 4603.6(f) because these statutory provisions are self-implementing.

Proposed Rule 10957(h)(2) would require the petition to set forth specifically and in full detail its factual and/or legal grounds and would also provide that all objections, irregularities, and illegalities not raised in the petition are deemed waived. This is consistent with the language of Labor Code section 5902 and 5904.

Proposed Rule 10957(h)(3) provides that the petition must be verified, which is consistent with the language of Labor Code section 5902.

Proposed Rule 10957(h)(4) and (5) provide, respectively, that the petition shall comply with various WCAB Rules relating to petitions for reconsideration and that a failure to comply with the provisions of subdivision (h) is a ground for summarily dismissing or denying the petition.

Proposed Rule 10957(i) provides that a copy of the petition shall be concurrently served on: (1) the adverse party(ies) or provider(s) or, if represented, their attorney or non-attorney representatives; (2) the injured employee or, if represented, the employee’s attorney; and (3) the Division of Workers’ Compensation, Independent Bill Review Unit. A failure to file a proof of service concurrently with the petition appealing shall constitute valid ground for summarily dismissing the petition.

Proposed Rule 10957(j) would allow for the filing of answers to the petition, including an answer by DWC’s IBR Unit. The 10 days allowed for an answer is consistent with Labor Code section 5905.

Proposed Rule 10957(k) provides that, upon receiving notice of the petition, the IBR Unit may download the record of the IBR organization into EAMS. This provision would increase the efficiency of DWC, and would minimize the wasteful expenditure of resources, because it will reduce DWC’s need to re-scan documents that have already been electronically scanned by the IBR organization. However, proposed Rule 10957(k) would further provide that, in its discretion, the WCAB may admit all or any part of the downloaded IBR record into evidence and/or permit the parties to offer in evidence documents that are duplicates of ones already existing in the downloaded IBR record. This provision will allow the WCAB to admit in evidence documents submitted by the parties where, for example: (1) the IBR record is not downloaded or not successively downloaded into EAMS; (2) there are numerous documents in the downloaded IBR record, but the parties only need to offer a very few of them in evidence; or (3) the downloaded IBR record is voluminous and the documents in it are not well-organized and indexed and, therefore, neither the WCAB nor the parties can efficiently and effectively find needed documents.

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<sup>22</sup> The five grounds of appeal specified in section 4603.6(f) are:

- (1) The administrative director acted without or in excess of his or her powers.
- (2) The determination of the administrative director was procured by fraud.
- (3) The independent bill reviewer was subject to a material conflict of interest that is in violation of Section 139.5.
- (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.
- (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review and not a matter that is subject to expert opinion.

Proposed Rule 10957(l) addresses how a petition gets on the WCAB's calendar.

Proposed Rule 10957(m) provides that the petition shall be adjudicated by a WCJ at the trial level of the WCAB, utilizing the same procedures applicable to claims for ordinary benefits. However, consistent with Labor Code section 4603.6(f), proposed Rule 10957(l) further provides that the Administrative Director's determination shall be presumed correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the Labor Code section 4603.6(f) statutory grounds for appeal.

Proposed Rule 10957(n) provides for a petition for reconsideration to the Appeals Board.

Proposed Rule 10957(o) provides that the AD's IBR determination is reversed by a WCJ or the Appeals Board, the dispute shall be remanded to the AD in accordance with Labor Code section 4603.6(g).<sup>23</sup> Again, the WCAB sees no need for its proposed Rule to expressly include the language of section 4603.6(g) because its provisions are self-implementing.

Proposed Rule 10957(p) provides that if a final decision of the WCAB results in the defendant being liable for any payment, the defendant shall make the payment forthwith. If the defendant fails to do so, the provider need not file a lien claim, and may file a petition to enforce under proposed Rule 10451.1.

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

### **25. Section Added: 10957.1 (entitled "Petition Appealing Independent Medical Review Determination of the Administrative Director").<sup>24</sup>**

#### Statement of Specific Purpose and Reasons for Proposed Addition of Section 10957.1

The WCAB is proposing to add Rule 10957.1 in light of SB 863's addition of Labor Code section 4610.6(h). (Stats. 2012, ch. 363, § 39.) Section 4610.6(h) provides that independent medical review (IMR) determinations of the Administrative Director are subject to appeal to the WCAB, although it imposes significant restrictions on such appeals.

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<sup>23</sup> Section 4603.6(g) provides: "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent bill review by a different independent review organization. In the event that a different independent bill review organization is not available after remand, the administrative director shall submit the dispute to the original bill review organization for review by a different reviewer within the organization."

<sup>24</sup> In the tentative proposed Rules that the WCAB posted on its web forum for informal public comment, the WCAB had erroneously numbered this as Rule 10958. However, although vocational rehabilitation is no longer available as a workers' compensation benefit (see *Beverly Hilton Hotel v. Workers' Comp. Appeals Bd. (Boganim)* (2009) 176 Cal.App.4th 1597 [74 Cal.Comp.Cases 927]; *Weiner v. Ralphs Co.*) (2009) 74 Cal.Comp.Cases 736, 737 (Appeals Board en banc), current Rule 10958 (relating to the burden of proof on vocational rehabilitation appeals) has never actually been repealed.

Proposed Rule 10957.1(a) would provide that this section applies only to petitions appealing IMR determinations regarding treatment for: (1) an injury occurring on or after January 1, 2013; and (2) an injury occurring on or before December 31, 2012, if the decision is communicated to the requesting physician on or after July 1, 2013. This provision is being included for the following reasons.

First, the utilization review language of Labor Code section 4610.5(a) states: “This section applies to the following disputes: (1) Any dispute over a utilization review decision regarding treatment for an injury occurring on or after January 1, 2013. (2) Any dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury.”

Second, the IMR review language of Labor Code section 4610.6(a) applies only “[u]pon receipt of the case pursuant to Section 4610.5.”

Third, the IMR provisions of Labor Code section 4610.6(h) apply only to these IMR determinations.

Given that the utilization review provisions of SB 863 apply only to (1) injuries occurring on or after January 1, 2013 and (2) any UR decision communicated to the requesting physician on or after July 1, 2013, regardless of date of injury, then the IMR appeal procedure necessarily applies only under these same circumstances.

Proposed Rule 10957.1(c) would provide that a petition appealing an IMR determination of the AD shall be filed with the WCAB no later than 20 days after the determination. This is consistent with Labor Code sections 5900(a) and 5903 relating to petitions for reconsideration. It would further provide, however, that the time for filing would be extended under Rule 10507 where the determination is not personally served, and under Rule 10508 where the time for filing falls on a weekend or holiday.

Proposed Rule 10957.1(d) would essentially provide that, except for e-filed petitions (which are filed in cyberspace), the petition must be filed with the district office of the WCAB having venue if an application was previously filed. If no application was previously filed, an application shall be filed together with the petition and the petition shall be filed only with the district office where venue is being asserted.

Proposed Rule 10957.1(e) would provide that the petition shall be captioned “Petition Appealing Administrative Director’s Independent Medical Review Determination.”

Proposed Rule 10957.1(g) would require that a document cover sheet and document separator sheet be filed with the petition and would also specify that “Appeal of Determination of AD-IMR” must be entered in the document title field of the document separator sheet.

Proposed Rule 10957.1(i)(1) would provide that the petition shall be limited to raising one or more of the five grounds specified in Labor Code section 4610.6(h). The WCAB sees no need for its proposed Rule to expressly set forth each of the five grounds specified in section 4610.6(h) because these statutory provisions are self-implementing.

Proposed Rule 10957.1(i)(2) would require the petition to set forth specifically and in full detail its factual and/or legal grounds and would also provide that all objections, irregularities, and illegalities not raised in the petition are deemed waived. This is consistent with the language of Labor Code section 5902 and 5904.

Proposed Rule 10957.1(i)(3) provides that the petition must be verified, which is consistent with the language of Labor Code section 5902.

Proposed Rule 10957.1(i)(4) and (5) provide, respectively, that the petition shall comply with various WCAB Rules relating to petitions for reconsideration and that a failure to comply with the provisions of subdivision (i) is a ground for summarily dismissing or denying the petition.

Proposed Rule 10957.1(j) provides that a copy of the petition the AD's determination shall be concurrently served on: (1) the adverse party(ies) or provider(s) or, if represented, their attorney or non-attorney representatives; (2) the injured employee or, if represented, the employee's attorney; and (3) the Division of Workers' Compensation, Independent Medical Review Unit . A failure to file a proof of service concurrently with the petition appealing shall constitute valid ground for summarily dismissing the petition.

Proposed Rule 10957.1(k) would allow for the filing of answers to the petition, including an answer by DWC's IMR Unit. The 10 days allowed for an answer is consistent with Labor Code section 5905.

Proposed Rule 10957.1(l) provides that, upon receiving notice of the petition, the IMR Unit may download the record of the IMR organization into EAMS. This provision would increase the efficiency of DWC, and would minimize the wasteful expenditure of resources, because it will reduce DWC's need to re-scan documents that have already been electronically scanned by the IMR organization. Proposed Rule 10957.1(l) would further provide that, in its discretion, the WCAB may admit all or any part of the downloaded IMR record into evidence and/or permit the parties to offer in evidence documents that are duplicates of ones already existing in the downloaded IMR record. This provision will allow the WCAB to admit in evidence documents submitted by the parties where, for example: (1) the IMR record is not downloaded or not successively downloaded into EAMS; (2) there are numerous documents in the downloaded IMR record, but the parties only need to offer a very few of them in evidence; or (3) the downloaded IMR record is voluminous and the documents in it are not well-organized and indexed and, therefore, neither the WCAB nor the parties can efficiently and effectively find needed documents.

Proposed Rule 10957.1(m) addresses how a petition appealing gets on the WCAB's calendar.

Proposed Rule 10957.1(n) provides that the petition appealing shall be adjudicated by a WCJ at the trial level of the WCAB, utilizing the same procedures applicable to claims for ordinary benefits. However, consistent with Labor Code section 4610.6(h), proposed Rule 10957.1(n) further provides that the Administrative Director's determination shall be presumed correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the Labor Code section 4610.6(h) statutory grounds for appeal.

Proposed Rule 10957.1(o) provides for a petition for reconsideration to the Appeals Board.

Proposed Rule 10957.1(p) provides that the AD's IMR determination is reversed by a WCJ or the Appeals Board, the dispute shall be remanded to the AD in accordance with Labor Code section 4610.6(h). Again, the WCAB sees no need for its proposed Rule to expressly include the language of section 4603.6(g) because its provisions are self-implementing.

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.

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

Statement of Specific Purpose and Reasons for Proposed Addition of Section 10959

The WCAB is proposing to add Rule 10959 in light of SB 863’s addition of Labor Code section 4616(b)(5). (Stats. 2012, ch. 363, § 47.) Section 4616(b)(5) provides that a medical provider network (MPN) determination of the Administrative Director “may be reviewed only by an appeal of the determination of the administrative director filed as an original proceeding before the reconsideration unit of the workers’ compensation appeals board on the same grounds and within the same time limits after issuance of the determination as would be applicable to a petition for reconsideration of a decision of a workers’ compensation administrative law judge.”

Proposed Rule 10959(a) would provide that any aggrieved person or entity may file a petition appealing various kinds of MPN determinations. This provision is based on the language of section 4616(b)(5), which provides in substance that: (1) the AD may deny, revoke, or suspend approval of an MPN plan; (2) any person contending that an approved MPN is not validly constituted may petition the AD to suspend or revoke the approval; (3) in lieu of revocation or suspension, the AD may impose administrative penalties of \$5000 per violation, or probation, or both; and (4) the AD’s approval of an MPN shall be binding on all persons and all courts.

In light of this language, it appears that the Appeals Board has no authority to review the AD’s approval of an MPN. Instead, the only avenue for challenging an approved MPN is to petition the AD to suspend or revoke the approval. Then, if the AD subsequently suspends or revokes (or deny suspension or revocation) based on the petition, the petitioner may file an appeal with the WCAB.

Proposed Rule 10959(a) would also define an “aggrieved person or entity” to include an MPN, an MPN applicant, an insurer, an employer, or any other entity that provides or seeks to provide MPN services. This language is based in part on section 4616(b)(1), which states that “[a]n insurer, employer, or entity that provides physician network services shall submit a plan for the medical provider network to the administrative director for approval.” (See also Lab. Code, § 4616(a)(1).)

However, proposed Rule 10959(a) would also define an “aggrieved person or entity” to include an injured employee or a group of injured employees who complained that the AD should have suspended or revoked a previously approved MPN plan. This is consistent with the provision of section 4616(b)(5) that “[a]ny person contending that a medical provider network is not validly constituted may petition the administrative director to suspend or revoke the approval of the medical provider network.” It is also consistent with the provision of section 5502(b)(B) relating to expedited hearings on “[w]hether the injured employee is required to obtain treatment within a medical provider network.”

Proposed Rule 10959(b)(1) would provide that a petition appealing an MPN determination shall be filed no later than 20 days after the determination, except the filing time is extended in accordance with sections 10507 and 10508. This is consistent with Labor Code section 4616(b)(5), which states that the AD’s MPN determination “may be reviewed only by an appeal ... filed ... within the same time limits ... as would be applicable to a petition for reconsideration.” Labor Code section 5900(a) and 5903, pertaining to petitions for reconsideration, impose a 20-day time limit for the filing of petitions for reconsideration; however, Rules 10507 and 10508 extend the time limit when a decision is served by mail or when the last day for filing falls on a weekend or holiday.

Proposed Rule 10959(b)(2) and (b)(3) would provide that, notwithstanding any other provision of the WCAB Rules or of AD Rules 9767.8(i), 9767.13(f), and 9767.14(f), a petition appealing an MPN determination shall be filed solely with the Office of the Commissioners of the Appeals Board in San Francisco. This is consistent with section 4616(b)(5), which provides: “A[n] [MPN] determination of the [AD] may be reviewed only by an

appeal of the determination ... filed as an original proceeding before the reconsideration unit of the workers' compensation appeals board ... ."<sup>25</sup>

Proposed Rule 10959(c), (d), and (e) all establish procedural provisions regarding the captioning of the petition appealing an MPN determination and the inclusion of a copy of that determination and its proof of service with the appeal.

Proposed Rule 10959(f)(1) would provide that a petition may appeal an MPN determination only on the following grounds: (1) the determination was without or in excess of the AD's powers; (2) the determination was procured by fraud; (3) the evidence does not justify the determination; (4) the petitioner has discovered new evidence; and (5) the AD's findings do not support the determination. This provision is consistent with section 4616(b)(5), which provides that review of the AD's MPN determination "may be reviewed ... on the same grounds ... as would be applicable to a petition for reconsideration." The grounds just discussed track the grounds for petitions for reconsideration listed in Labor Code section 5903.

Proposed Rule 10959(f)(2) essentially requires the petition to set forth specifically and in full detail all of the factual and/or legal grounds for the petition, and any objections not specifically raised are waived. This again is consistent with section 4616(b)(5), which provides that review of the AD's MPN determination "may be reviewed ... on the same grounds ... as would be applicable to a petition for reconsideration." The language of proposed Rule 10959(f)(2) is consistent with Labor Code section 5902, which provides that a petition for reconsideration "shall set forth specifically and in full detail the grounds upon which the petitioner considers [the decision of the WCAB] to be unjust or unlawful, and every issue to be considered by the [WCAB]," and section 5904, which provides that a petitioner for reconsideration "shall be deemed to have finally waived all objections, irregularities, and illegalities... other than those set forth in the petition for reconsideration." The provisions of proposed Rule 10959(f)(2) are also consistent with various WCAB Rules applicable to petitions for reconsideration (see Cal. Code Regs., tit. 8, §§ 10842(a), 10846, 10852).

Proposed Rule 10959(f)(3) requires the petition to be verified, which tracks the language of the first part of the first sentence of Labor Code section 5902.

Proposed Rule 10959(h) provides that the AD may file an answer to an MPN appeal within 10 days of the service of the petition. This is consistent with Labor Code section 5905, which allows an answer to be filed within 10 days after the service of a petition for reconsideration. However, the period for filing an answer is extended by sections 10507 and 10508.

Proposed Rule 10959(i) requires that the MPN appeal shall be assigned to a panel of the Appeals Board in accordance with Labor Code section 115. This is consistent with the language of section 4616(b)(5), which provides that an MPN determination "may be reviewed only by an appeal of the determination of the administrative director filed as an original proceeding before the reconsideration unit of the workers' compensation appeals board."

Proposed Rule 10959(j) establishes procedures for an evidentiary hearing regarding the MPN appeal.

Proposed Rule 10959(k) allows the Appeals Board to appoint a WCJ as its hearing officer for the evidentiary hearing, consistent with Labor Code section 5309(b). That section allows the Appeals Board to direct a WCJ "[t]o hold hearings and ascertain facts necessary to enable the appeals board to determine any proceeding or to make any order, decision, or award that the appeals board is authorized to make under Divisions 4 or 5, or necessary for the information of the appeals board."

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<sup>25</sup> AD Rules 9767.8(i), 9767.13(f), and 9767.14(f) each provide that an MPN applicant may appeal an AD decision "by filing ... a petition at the district office of the Workers' Compensation Appeals Board closest to the MPN applicant's principal place of business, together with a Declaration of Readiness to Proceed." (Cal. Code Regs., tit. 8, §§ 9767.8(i), 9767.13(f), 9767.14(f).) After SB 863, however, these provisions are each inconsistent with section 4616(b)(5).

Proposed Rule 10959(m) gives recognition to the fact that, under AD Rules 9767.8(f), 9767.13(c), and 9767.14(c), an MPN applicant may request that the AD re-evaluate an initial MPN determination. Therefore, proposed Rule 10959(m)(1) provides that if such a request for re-evaluation is made prior to filing a petition appealing with the WCAB, the time for filing the petition is tolled until the AD issues a determination regarding the re-evaluation request. Similarly, proposed Rule 10959(m)(2) provides that if the request for re-evaluation is made after the filing of a petition for appealing, the WCAB can dismiss the petition without prejudice.

#### Specific Technologies or Equipment

The proposed amendments of this rule do not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

The WCAB has identified no alternative that would be either more effective, or equally effective and less burdensome than the proposed amendments.

#### Effect on Small Businesses

The proposed amendments of this rule will not have a significant effect on small businesses.

#### Economic Impact on California Business Enterprises and Individuals

The proposed amendments of this rule will not have a significant economic impact on California business enterprises and individuals.