

1/9/2013

STEVEN SUCHIL

State Affairs

These comments on the Workers' Compensation Appeals Board Practice and Procedures proposed regulations for California Code of Regulations Title 8, Chapter 4.5, Subchapters 1.9 and 2, are submitted on behalf of the members of the American Insurance Association (AIA).

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

Introduction:

We agree with an overwhelming majority of the proposed regulation changes and additions and wish to extend our appreciation for the work done to provide the workers' compensation community with the rationale for these revisions.

Sec. 10608

Our only major concern is with the very abbreviated time allowed for the parties to serve medical reports found in CCR Sec. 10608 (b) (1), (3), and (4). To limit the available time to gather and serve what could be many reports to six calendar days appears needlessly restrictive.

During the last two months we have had three weekends extend to four days - this situation reduces the available service time to two days. Further, any one filing toward the end of the week would reduce the available time as well.

We recommend ten business days in all cases, with the possible exception of six business days for expedited hearings found in Sec. 10608 (b) (3) if that is felt to be necessary.

Thank you for your consideration regarding this issue.

1/9/2013

Tom Alkema

Ronsin Litigation Support Services

In reviewing the proposal of Regulation 10530 of requiring a “wet’ signature, we see nothing but complications, difficulties and cost prohibitive measures. As a stake holder in the discovery industry it is our hope to have a system that advances policies which streamline the discovery process and not complicate it. Most copy services are set up with systems of issuing subpoenas in a timely and legal manner; a value added service sought after by many clients, to add this regulation would shift the process backwards in time. Any such shift will add costs and, more importantly, time delays to the existing processes already established by the courts and the litigants.

I do wonder where this requested change is coming from. If it is by the behest of one entity or department, such as the EDD, then making a whole sale shift of established procedures for the benefit of one party seems slanted and prejudicial. The injured workers in California will not be better served by this policy and, in fact, will be negatively impacted by the delays and cost increases borne out within the claims adjudicating process.

Lastly, there are no existing problems with the current system and this change would most definitely be a step that would create problems.

1/9/2013

Mark E. Webb

Pacific Compensation Insurance Company

Thank you for the opportunity to comment on the proposed Rules of Practice and Procedure. For purposes of this Forum, comments are limited to proposed subdivision (c) of 8 CCR Sec. 10608. The proposed rule states that, “(n)othing in this subdivision shall preclude an injured employee from signing an authorization to release medical information.” This is inconsistent with both the language and intent of new Labor Code Sec. 4903.6(d). This provision was added to create a process to allow the WCJ an in camera review of what medical information should be provided to a lien claimant with whom the injured worker has no physician-patient or even contractual relationship. This sensitive information should only be disclosed to a non-physician lien claimant if it is shown that the information is relevant to the lien claim. This is a judicial function that should not be vitiated by a general release.

Robert Nava & Bret Graham

Commerce Plaza, Ste. 301
420 N. Montebello Blvd.
Montebello, CA 90640

TEL: (323) 888-1818
FAX: (323) 888-7788

January 9, 2013

Comments on Tentative Proposed Regulations 10451, 10530 and 10606

As President of LatinoComp I wanted to comment on the Tentative Proposed Regulations relating to changes to the WCAB Rules of Practice and Procedure. Although I applaud the efforts by the Administration to review and revise rules governing the everyday practice before the WCAB, unfortunately, a number of the proposals will have exactly the opposite result of their intended effect, namely to delay resolution of matters, increase costs and cause increased litigation – problems that SB 863’s intend to reform.

Regulation 10451(b): This applies to all Petitions for Costs. The Regulation proposes a 90 day waiting period prior to filing of a Petition for Costs.

(b) No petition for costs shall be filed or served until at least 90 days after a written demand for the costs has been mailed to or personally served on the defendant.

Experience demonstrates that if the employer has not paid the cost within 30 days of written demand they will not do so until ordered to do so by a WCJ. The stated rationale makes no sense:

“This will encourage the parties to informally resolve any costs issues before presented [sic] them to the WCAB for adjudication”

By adding a 90 day payment period, employers will have ZERO incentive to pay any costs prior to 90 days. This will merely increase the burden on the applicants (and their representatives) who have advanced these costs initially and now will have to carry these costs for an additional 90 days. These are costs which should have been advanced by the employer in the first instance. Indeed, LC 5710 fees (defined as costs), under current case law, are supposed to be voluntarily paid by the employer without any requirement that there first be a WCAB order. Under this Regulation, the employers will simply hold onto these costs for an additional 90 days. Other than ensuring additional delays in payment, how does this encourage anyone to resolve the costs issues prior to filing a Petition?

Suggestion: Change the period to 30 days. There is no reason the employers cannot pay their bills on a monthly basis like everyone else does.

Regulation 10530(a),(b),(k): These changes would apply to ALL subpoenas not just those requiring personal attendance at WCAB Trial. The principal changes are:

10530(a)(4) The second page of a subpoena duces tecum shall contain an affidavit, executed with an original signature by one of the persons identified

in subdivision (a)(3), specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

* * *

(b) For purposes of this section, an “original” signature shall include:

(2) a signature of an attorney or non-attorney representative of record executed in pen;

* * *

(k) All subpoenas or subpoenas duces tecum shall be issued The Workers’ Compensation Appeals Board shall issue subpoenas and subpoenas duces tecum upon request in accordance with the provisions of Code of Civil Procedure sections 1985 and 1987.5 and Government Code section 68097.1.

The stated reasons for these changes are:

[I]n the past, subpoenas were issued using arguably invalid photocopied subpoenas bearing the signature or signature stamps of WCJs who have long been retired or even deceased . . . [and to] help discourage subpoena abuses.

Unfortunately, this is a return to discovery practice techniques of twenty (20) years ago. Requiring an original signature in PEN on a paper hard copy flies in the face of electronic case management, EAMS and modern discovery. It will increase both litigation and case management costs dramatically as well as causing untold delays in obtaining documents. If there truly are “subpoena abuses” by parties or their agents in obtaining records the WCAB has a full panoply of remedies under current law at its disposal to deal with this including sanctions, audit penalties, costs, attorneys fees, contempt, criminal referrals and prohibitions against appearing before the WCAB.

The larger problem relates to the failure to consider **California Code of Civil Procedure (CCP) Section 2020.410**. This section deals with precisely the issue at hand – subpoenas for business records where no appearance by a party or custodian of records is needed. This is currently the code section under which both applicant and employer issue over 99% of all subpoenas and over 99% of all records are obtained. (Parties RARELY invoke CCP Sections 1985 or 1987.5 except for appearance at Trial.)

Indeed, CCP 2020.410 was enacted to LOWER discovery costs by relieving the subpoenaing party of need less technical requirements (i.e., signing an additional affidavit, specifying the exact documents to be produced, explaining their materiality, and stating the witness has the documents in his or her possession). Rather the streamlined CCP 2020.410 process currently only requires attorney signature of the subpoena and “designat[ion] of the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item[s].” CCP 202.410(a).

This also relieves the burden on the custodian of records to physically appear with the records – they only need to send the records and an affidavit of compliance or declaration under penalty of perjury.

For reasons unknown, the Proposed Regulations ignore CCP 2020.410. Worse, as written, the Proposed Regulations would PROHIBIT the use of CCP 2020.410 subpoenas for business records – the exact procedure that is used in every other court in California for the quick, low cost and non-litigated obtaining of business records.

Lastly, by requiring a detailed explanation of the “materiality” of the records, this regulation will force the party subpoenaing records to reveal attorney-client or attorney work product or attorney case strategy to the opponent just to conduct discovery. This is contrary to applicants’ and employers’ due process rights and the whole concept of discovery, namely the ability, with notice, to obtain records that are “reasonably calculated to lead to the discovery of admissible evidence.” This regulation will, as written, eliminate discovery via CCP 2020.410 business records subpoenas from the workers compensation system. This was not the intent of SB 863 and, thus, the Regulation has no statutory basis.

Suggestions:

- (1) Eliminate the requirement for an original pen signature; or
- (2) Allow for signatures by electronic signature lock; and
- (3) Eliminate the affidavit requirement for subpoenas of business records per CCP 2020.410 (but not for Trial subpoenas per CCP 1985 or 1987.5).

Regulation 10606: This Regulation deals with admissibility of QME/AME reports on disputed continuing medical treatment issues. The most important changes are:

10606 (d)(1) The report of an agreed or qualified medical evaluator shall not be admissible for the purpose of resolving an applicant’s or a defendant’s objection to a determination made by a treating physician concerning the need for continuing medical care, unless:

(A) it has been stipulated or determined that a defendant’s utilization review was untimely or otherwise invalid and the report is being offered in a proceeding to determine whether the applicant is entitled to the disputed treatment;

** * **

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

Although this arguably could be an interpretation of LC 4061 as revised by SB863, it completely ignores AND IS CONTRARY TO LC 4062 which was also revised by SB 863. It also is contrary to virtually all of the recent case law related to provision of medical care and “disputes” related to medical care. For example, contrary to 10606(d)(1)(A) there is no “dispute” (and hence no need for QME/AME comment) where the UR denial is untimely or invalid – the employer must authorize the treatment. SB 863 did not change this principle.

LC 4061 concerns ONLY disputes over FUTURE medical care it does not cover disputes over CONTINUING medical care. Those disputes are dealt with in other portions of the labor code:

- (1) 4610 UR for specific treatment request denials;
- (2) 4616.3, 4616.4 for MPN disputes over diagnosis/treatment; or
- (3) 4062 for all other medical disputes.

Therefore, this Proposed Regulation, which apparently gets its statutory support from LC 4061, is misguided and contrary to other provisions of the Labor Code as it attempts to limit medical evidence for medical disputes that are the subject matter of other Labor Code provisions which have no limitation(s) on QME's and AME's commenting on the need for continuing medical care.

Finally, this Proposed Regulation leaves those injured workers who are not in an MPN without remedy if they dispute their treating physician's continuing treatment recommendation (or decision to prematurely release them without continuing medical care). As worded, the only course of action for such an applicant would be to obtain a QME/AME report which provides for future medical care, go to the WCAB and obtain a "general award" of future medical care, and then re-open the case and use the "future" medical care. This is a needless, drawn out procedure involving additional WCAB resources when the dispute is properly resolved under LC 4062.

Suggestions:

- (1) Eliminate 10606(d); or
- (2) Amend language of Proposed Regulation to read :"(d)(1) The report of an agreed or qualified medical evaluator obtained under LC 4061 . . ."

Thank you for the opportunity to comment on the Tentative Proposed Regulations and the opportunity to express the concerns of LatinoComp on these matters that affect the all of the participants in the workers' compensation system.

Very truly yours,

Bret Graham
President LatinoComp

BG/tc



California Workers' Compensation Institute

1111 Broadway Suite 2350, Oakland, CA 94607 • Tel: (510) 251-9470 • Fax: (510) 251-9485

January 9, 2013

VIA E-MAIL to: wcabrules@dir.ca.gov

Workers' Compensation Appeals Board
PO Box 429459
San Francisco CA 94142-9459

ATTN: WCAB Forum

Introduction

These written comments on the proposed changes to the Board's Rules of Practice and Procedure are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 80% of California's workers' compensation premium, and self-insured employers with \$36B of annual payroll (20% of the state's total annual self-insured payroll).

The Institute wishes to acknowledge the remarkable effort expended by the WCAB and its staff in drafting regulations to implement the significant and innumerable changes made by the Legislature in Senate Bill 863 regarding lien litigation. The goal of the Board's regulatory implementation is to craft a lien process and a litigation procedure that turns the chaos of the recent past into a functional and rational practice for all concerned. The proposed regulations are thoughtful, clear, and well integrated into the Board's procedures and institute every significant aspect of the Legislature's reforms in this area. The explanations provided by the Board are a great assistance to the workers' compensation community in understanding exactly what is required of the parties and lien claimants when litigating these issues going forward.

With these proposals, the Board has implemented some of the comprehensive changes generated by the Legislature, revised its regulatory process to accommodate new systems, and amended certain longstanding procedures to improve overall functionality. The Institute applauds the Board and its staff for accomplishing such a fundamental change so quickly and so thoroughly. In a few areas, as outlined below, more specificity may be required, or a more reasonable timeline may be necessary, to ensure optimal management of the new system.

The Institute wishes to emphasize the following areas:

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

Section 10530 -- Subpoenas and Subpoenas Duces Tecum

The timeframes for moving to quash a subpoena or oppose a motion to quash are very restrictive and while there is value in moving litigation efficiently, unreasonably tight deadlines may lead to determinations made on the basis of procedural technicalities rather than the merits.

Section 10606 -- Reports of the Vocational Expert

It would clarify the utility and relevance of vocational expert reports if the Board would outline in greater detail the issues to be addressed in these reports, as it has done for medical legal reports. In this way the function of the vocational expert will be clarified and the parameters of their reporting can be clearly established. Issues to be addressed might include the employee's work history, his or her residual skills and abilities, the specific effect of the industrial injury on the worker's employability, and any non-industrial factors that contribute to the worker's ability to return to work.

Section 10606 -- Reports of an Agreed or Qualified Medical Evaluator

As the Board notes, SB 863 has changed the role of the AME/QME with regard to the medical necessity for continuing medical care. The medical legal evaluator is still charged with the responsibility of establishing the need for future medical treatment. The WCAB regulations must clarify this fine line and maintain the integrity of the IMR process, which requires a second independent medical review when the determination of the independent medical reviewer is disputed. The role of the medical legal evaluator is limited to expressing an opinion regarding the need for and nature of medical care in the future. The Board should note that differentiation more clearly by including the concept of "medical necessity" in subdivision (d)(1).

Section 10608(b)(1) & (2) -- Service of Medical and Medical Legal Reports

Labor Code section 4903.5(a) states that in the context of lien litigation medical records shall be filed only if they are relevant to the issues being raised by the lien. In a number of areas, the proposed regulation says that service is to be made of "copies of medical reports and medical-legal reports relating to the claim." In the past this phrase has been construed to mean "any and all records" without reference to their relevance to the underlying dispute. To clarify that records to be served in this context must be relevant to the issues being raised by the lien, the Board should specifically qualify these records as relevant to the lien dispute.

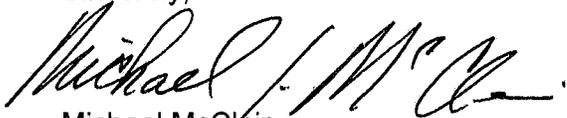
While the 6-day timeframe stated in these subdivisions are not new or required by SB 863, the Board is addressing other procedural processes that require updating as well. The 6-day deadline for action is often too stringent, particularly in the context of lien litigation. The Board should consider a more reasonable limit or permit the litigants to seek an extension of time to file, as supported by the circumstances.

Section 10957 -- Petition Appealing IBR Determination of the Administrative Director

We agree with the comments made by the Employer Coalition that subdivision (c)(2) requires a separate and specific mechanism to dismiss the application. If the only dispute is an appeal of the IBR determination, then the injured worker is not a part of that and a method to dismiss that litigation should be established.

Thank you for considering our commentary.

Sincerely,



Michael McClain
General Counsel, California Workers' Compensation Institute

MMc/pm

cc: Christine Baker, Director, Department of Industrial Relations
Destie Overpeck, DWC Acting Administrative Director
CWCI Claims Committee
CWCI Legal Committee
CWCI Medical Care Committee
CWCI Regular Members
CWCI Associate Members
CWCI RTW Group

January 10, 2013

Workers' Compensation Appeals Board
Attn: Forums
P.O. Box 429459
San Francisco, CA 94142-9459

RE: Workers' Compensation Appeals Board (WCAB) - Tentative Proposed Rules of Practice and Procedure

To Whom It May Concern:

The above-listed organizations thank you for the opportunity to provide comments on the tentative changes to the WCAB Rules of Practice and Procedure. Combined, our organizations represent tens of thousands of insured and self-insured public and private California employers and insurance companies.

While there have been several estimates of the savings associated with SB 863 (De Leon, 2012), it is clear that the ultimate impact on employers (large and small, insured and self-insured) will depend largely on the regulatory framework that is constructed over the next several months. The tentative changes proposed to the WCAB Rules of Practice and Procedure are vitally important to ensuring that the statutory changes made in SB 863 are appropriately administered at appeals boards across the state.

Generally speaking, the tentative proposed changes do a very good job of harmonizing the WCAB Rules of Practice and Procedure with the statutory changes contained in SB 863 (De Leon, 2012). The WCAB Rules of Practice and Procedure are vital to the effective administration of California's workers' compensation system, and our organizations strongly support the tentatively proposed changes.

While we are generally supportive of the tentative proposed changes, we would also respectfully offer several specific observations, comments, and recommendations:

- **§ 10530. Subpoenas and Subpoenas Duces Tecum**
(l)(1) – The timeframes related to a petition to quash a subpoena are too restrictive. Our coalition would recommend increasing the timeframes for filing both a petition to quash (currently 10 days) and filing opposition to a petition to quash (currently 5 days) to 20 days.
- **§ 10606. Physician and Vocational Expert Reports as Evidence**
The WCAB should include in these regulations a list of required components for vocational expert reports [similar to § 10606(b)(1) – (15)]. This addition would eliminate ambiguity and ensure that vocational expert reports have the necessary components.

Our coalition is concerned that § 10606(d)(1)(B) may send the wrong message to Workers' Compensation Judges (WCJ). Specifically, we believe that the language could be interpreted to allow the WCJ to order disputed medical treatment denied through the Independent Medical Review (IMR) process based only the report of an AME/PQME or PTP report adopting the medical legal opinions. This should be clarified so that the supremacy of IMR is clear. For example, we recommend changing the last line of (d)(1) from "continuing medical care, unless:" to "continuing medical necessity, unless:".

- **§ 10608. Service of Medical Reports, Medical-Legal Reports, & Other Medical Information**

References to lien claimants (both physician and non-physician) should be eliminated from this section, and make this regulation applicable to injured workers and defendants (referencing multiple defendants in one claim), and instead inserted in a resurrected §10609 (Repealed 2002):

Copies of all physicians' reports shall be served on lien claimants whose liens for medical or unemployment compensation disability benefits are proposed to be reduced or disallowed. Such service shall be made not later than the time such reduction or disallowance is proposed.

Service of records on lien claimants should be considered separately. Our coalition believes strongly that service on lien claimants should not be an ongoing process since they are not parties until the case in chief is resolved. Instead, we would recommend the parties have 30 days following the resolution of the claim in chief to resolve the dispute or serve medical records.

We would also recommend that the timeframes for service of records be changed from 6 days to 20 days to be consistent with other provisions.

Finally, we would recommend the WCAB create a separate verification form for non-physician lien claimants to avoid the unnecessary production of confidential medical records. This class of lien claimants only request medical reports for the purpose of proving the service was actually provided as alleged. A Verification of Services form signed under penalty of perjury by the lien claimant, the evaluating or treating physician and the applicant would achieve this same purpose and obviate the need to provide full medical records. The form should include the date, time and location the services began and ended, in addition information pertinent to claim identification.

- **§ 10770. Filing and Service of Lien Claims**

(h)(1) – If a lien claimant notifies the WCAB that their lien is withdrawn or resolved, the liens should be deemed Dismissed with Prejudice, not "without prejudice." If the issue is resolved they should not be allowed to resurrect the same issue at a later date. If the notification is filed on the wrong case, the dismissal with prejudice is only pertinent to the case(s) from which it was dismissed and would not preclude filing in the correct claim.

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

(c)(2) - Requires the filing of an Application with a petition in a previously non-litigated claim. Our coalition strongly believes that this will place an unnecessary burden on the defense community to dismiss an Application that might otherwise have never been filed

by the applicant. If the sole dispute of an appeal of the Independent Bill Review (IBR) decision, then this is not the dispute of the injured worker, rather it is a provider dispute. Our coalition feels strongly that there needs to be a mechanism to dismiss the application, if one is needed. Two possible proposals:

1. On receipt of the Petition Appealing the IBR, that the Administrative Director provides an ADJ# for the sole purpose of resolving the dispute. At the conclusion of the issue the ADJ# would be dismissed without prejudice, by operation of law.
2. If a filing of an Application is necessary, then there should be a mechanism to capture that the Application is filed for the sole purpose of disputing an IBR decision and the grounds on which it is being disputed. This would enable the WCAB to track the purpose of the Application and to categorize it so that when the issue is resolved, the ADJ# can be dismissed without prejudice by operation of law.

Thank you once again for the opportunity to provide commentary on the proposed regulations. We look forward to the opportunity to engage more thoroughly when the DWC moves forward with a regular rulemaking process.

Sincerely,



Jeremy Merz
California Chamber of Commerce



Jason Schmelzer
California Coalition on Workers' Compensation

cc: David Lanier, Chief Deputy Legislative Secretary, Office of Governor Edmund G. Brown
Christine Baker, Director, Department of Industrial Relations
Destie Overpeck, Acting Administrative Director, Division of Workers' Compensation

1/9/2013

Susan Ford
Law Offices of Ford-Farrar
Broadstone Center

This is a comment on the proposed rules regarding subpoenas requiring original signatures. I understand EDD's position about being inundated by subpoena requests, however, there could be a less inclusive rule allowing a modification for EDD only and continuing to allow the subpoena process as it is currently practiced to continue for all other sources.

There is a check and balance regarding subpoenas, as the opposing party has an opportunity to object if they suspect that a subpoena falls short of its burden to show cause for obtaining the records. Therefore, the cases that are suspect could be brought to a judge for a ruling, leaving the balance of the subpoenas to flow through and avoid a bottleneck in the courts or delays in obtaining relevant records.

The delays that would likely be caused by the proposed rules would negatively outweigh the benefits of avoiding bottlenecks in the court, delaying parties' rights to relevant evidence and delaying the processing of cases.

1/9/2013

Carlyle R. Brakensiek, MBA, JD
AdvoCal Government Relations

On behalf of our various clients, particularly the California Workers' Compensation Services Association, we endorse the comments of Dan Mora regarding the proposed revisions to Regulation 10530, and incorporate them by reference, below.

1/9/2013

Mark Gerlach
California Applicants' Attorneys Association

The California Applicants' Attorneys Association appreciates the opportunity to comment on the Tentative Proposed Rules of Practice and Procedure currently posted on the WCAB Forum.

1. With regard to proposed amendments to §10530, we agree that this rule should be updated. However, we believe the first priority of both the Division of Workers' Compensation and the Board should be adoption of regulatory amendments necessary to implement the extensive statutory changes in SB 863. Because there is nothing in SB 863 that requires amendment of §10530, we recommend that the Board defer amendment of this section to a later date.

Furthermore, new Labor Code §5307.9 requires the Administrative Director to adopt a schedule of reasonable fees for copy and related services by 1/1/14. That schedule is required to specify the services allowed and may not allow payment for services provided within 30 days of a request by an injured worker to an employer, claims administrator, or insurer for copies of relevant records in the possession of those parties. We urge the Board to defer any changes to §10530 so that any amendments to this section can be coordinated with and complement the new fee schedule and rules adopted by the AD.

However, whether or not the Board chooses to defer amendment of this section, we urge the Board to consider several changes in the proposed rule. First, we recommend that §10530 be amended to include separate rules regarding issuance of subpoenas that compel only the production of documents. In workers' compensation, the single most common form of subpoena is the use of a Subpoena Duces Tecum for the production of "records only." Adopting separate rules for production of records would clarify the rules and prevent misunderstandings and disputes that can arise under the current rules.

Furthermore, adopting separate rules for the production of records only would be consistent with the Code of Civil Procedure provisions governing non-party discovery that are cited in Labor Code §5710. Specifically, Labor Code §5710 provides that the Board, a workers' compensation judge, or a party may cause a deposition of a witness, including attendance of the witness and production of records, in the manner prescribed under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. Title 4 of Part 4 of the CCP governs civil discovery. Significantly, the provisions of Title 4 that govern non-party discovery include different statutory provisions governing (1) a subpoena commanding only attendance and testimony of the deponent [see CCP §2020.310], (2) a subpoena commanding only production of business records for copying [see CCP §§ 2020.410 - 2020.440], and (3) a subpoena commanding both production of business records and attendance and testimony of the deponent [see CCP §2020.510].

We believe adoption of rules that differentiate between a subpoena compelling attendance and a subpoena compelling only the production of records would promote systemwide efficiencies, eliminate unnecessary disputes, and decrease system costs.

Second, although we strongly support the amendment to this rule that will allow attorneys to sign and issue a subpoena, we recommend that the Board eliminate the proposal to require a signature "executed in pen...." The Administration has spent considerable time and financial resources over the past several years to transform the workers' compensation system to a paperless format. The new standard in virtually all situations is to allow, and in specified circumstances even require, electronic filing of documents. Many system participants, including many CAAA members, have followed the Administration's lead in this regard by becoming paperless. In conjunction with these changes, rules have been adopted to provide a secure method of electronic signatures.

A proposed change to section 10530(b)(1) would allow the use of an electronic signature for a commissioner, deputy commissioner, presiding workers' compensation judge, or a workers' compensation judge. We strongly urge that the rule be amended to allow the electronic signature of any party authorized to sign a subpoena. We acknowledge the concerns raised by the Board;

specifically, that there have been some instances of abuse involving invalid photocopied subpoenas. However, if the Board believes (and we agree) that current technologies and rules provide sufficient safeguards to permit the use of electronic signatures for commissioners and judges, then we see no reason why the same procedure cannot be used for attorneys.

Furthermore, we do not believe that requiring a signature by pen is the most effective method to curtail these abuses. In fact, aside from the practical difficulty of identifying who actually signed the document, we believe attempting to enforce this requirement when facing an alleged abusive situation would, at best, be both time consuming and expensive, and at worst may not even be possible. We believe rules can be adopted to assure a clear evidentiary trail of the authorization and use of an electronic signature. Proposed section 10530(j) creates new penalties for abuse or misuse of Subpoenas and Subpoenas Duces Tecum, and we believe that strict enforcement of these penalties would be a more effective method to curtail the problems cited by the Board.

2. A significant portion of these draft changes involve the question of how to deal with the statutory change to Labor Code §4903, and specifically the deletion of the reference to medical-legal expenses in subdivision (b). According to the Board's draft proposal, that amendment should be viewed in conjunction with the language that refers to claims of costs in new Labor Code §4903.05(b). Based on this language, the Board has concluded that "while medical-legal costs are no longer lienable, claims for medical-legal and other costs *may* be made by electronically filing a lien form."

We believe this interpretation is at odds with other provisions of SB 863. Pursuant to Labor Code §§ 4622 and 4603.6, a provider should rarely, if ever, use the lien procedures for a medical-legal expense. These sections permit two – and only two – avenues for contesting the payment of medical-legal expenses. The first is where the provider contests the amount paid. Independent Bill Review is the sole remedy for this dispute, and if the provider fails to timely request either a second review or subsequent IBR the bill is deemed satisfied. The second is where there is a denial of all or a portion of the bill for any reason other than the amount paid pursuant to the fee schedule. In this situation the provider must object to the denial within 90 days or neither the employer or employee are liable for the disputed amount. If the provider does timely object, the employer must file a petition and DOR within 60 days of receipt of the objection, and that dispute will be resolved through the hearing process.

Since by statute any disputed medical-legal billing must be resolved either through IBR or a hearing, the only reason the provider may find it necessary to use the lien process is if the employer fails to fulfill its responsibilities. For example, the provider may request a second review of a medical-legal billing within 90 days of service of an explanation of review. What remedy does the provider have if no EOR is provided? Likewise, the provider may request IBR within 30 calendar days of receipt of the second review, but what is the provider's remedy if the second review is never provided? And even if the IBR process goes to completion and it is determined that an additional payment is owed to the provider, what is the provider's remedy if the employer simply doesn't pay?

We recognize that amended Labor Code §4903.6(a)(2)(B) appears to contemplate filing a lien claim after completion of IBR. However, we believe it would be an absurd result if the final step

of the IBR process – which is intended to provide a more expeditious and inexpensive procedure for resolving billing disputes than the current lien process – is the filing of a lien. Regulations implementing SB 863 should provide clear and enforceable rules to assure that all parties fulfill their responsibilities in the billing process. We recognize that the Administrative Director is principally responsible for adopting regulations to implement IBR, but the Board's Rules of Practice and Procedure should complement the effort by creating an efficient and expeditious process for resolving problems that may occur during IBR.

Unless there is a process by which providers can hold claim adjusters accountable for their inaction, adoption of this new Independent Bill Review process may not provide the improvement it hopes to accomplish. We recommend that the Board rules be amended to permit a provider to file a petition to enforce Independent Bill Review.

3. Section 10608.5 appears to give the choice of providing discovery documents in electronic format to the person delivering the documents. While this may be proper for applicants who have attorney representation, we question whether it is appropriate for unrepresented workers. It is our experience that many workers have neither computers nor easy access to computers, and that even those with a computer may not have the software or hardware needed to open and print out the documents. We recommend that this rule be amended to provide that where an injured worker is a party In Pro Per, discovery documents must be sent to the worker as a hard copy unless otherwise ordered by the WCAB after a hearing and decision.

4. We are extremely disappointed that the Board proposes to delay adoption of rules governing the appeal of a Return to Work Fund determination of the Director of Industrial Relations. Section 84 of SB 863 states:

SEC. 84. This act shall apply to all pending matters, regardless of date of injury, unless otherwise specified in this act, but shall not be a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits.

Inasmuch as Section 6.5 of SB 863, which adopts new Labor Code §139.48, specifies no separate effective date, the effective date of this section is governed by Section 84. Consequently, Labor Code §139.48 took effect and became applicable to all pending cases, regardless of date of injury, as of January 1, 2013. We are aware that this may not have been the intention of the parties that negotiated this bill, but the language of Section 84 is clear and unambiguous. As the Board noted in the Tentative Rules of Practice and Procedure posted on the WCAB Forum:

"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.)"

The failure of the Director of Industrial relations to adopt regulations to implement this section is not justification for the Board to likewise defer its responsibility to adopt necessary regulations. The absence of regulations will not prevent disabled employees who believe they may be eligible for benefits from this Return to Work fund from applying for these benefits. The absence of

regulations will simply leave workers' compensation judges with no guidance on how such applications should be handled. If individual judges are forced to apply the new statute according to their own interpretation, the only possible result will be a broad range of widely differing decisions.

In order to prevent unnecessary confusion and the delays and higher costs that follow, we strongly urge the Board to immediately begin the regulatory process to adopt necessary Rules of Practice and Procedure governing the filing of an appeal of a Return to Work Fund determination of the Director of Industrial Relations.

1/9/2013

Lindsay Viviano, MBC Systems

Our office handles several providers throughout CA and we have made changes in our office and in our clients offices to comply with SB 863 however we have concerns over authorizations. If we fax the RFA form and make several attempts to contact the carrier via the designated authorization line and/or the adjuster and we don't get a response what recourse do we have? If you could please provide additional information on this matter or direct me to where I can find out I would appreciate it.

1/9/2013

Carlyle R. Brakensiek, MBA, JD
AdvoCal Government Relations

On behalf of our various clients, particularly the California Workers' Compensation Services Association, we endorse the comments of Dan Mora regarding the proposed revisions to Regulation 10530, and incorporate them by reference, below.

1/8/2013

**Dan Mora, President /CEO
Gemini Duplication, Inc.**

Please accept this email as formal comment regarding proposed changes to Title 8, California Code of (WC) Regulations, Section 10530 from the California Workers' Compensation Services Association (CWCSA).

Suggested regulation changes to 10530, requiring "original pen signature" on subpoenas is burdensome, unnecessary and WILL delay due process to injured workers.

The detailed requirements of an "original pen signature" on discovery forms is unnecessary and burdensome. This inefficient requirement opens the door for costly DISPUTE by both sides of the discovery process. Unnecessary motions to quash and objections, based on form and not

content, are expected if not amended. Digital signatures should be allowed by parties in the same manner and form as the Judges and WCAB.

To effectively use an "original pen signature" for discovery causes unnecessary resource waste on all parties. Consider that a form must be filled out in a computer (typewriters are obsolete), printed, signed, and then scanned so copies can be made and stored in the digital document management system (such as EAMS). Digital signatures, efficient and unencumbered processes should be supported by the Administration.

There are other ways to discourage "subpoena abuse" in discovery. Forcing ALL PARTIES (including the defendant) into an antiquated and inefficient paper system to perform discovery is unnecessary.

If adopted, the change to require "original pen signature" implicates a substantial process change. Proper time should be allowed for parties within the system to adjust to these changes. The regulations should not be adopted without reasonable time frames for parties to find new ways of operating to comply with these procedures.

Proposed changes to the discovery process and required forms couldn't come at a worse time. Considering the sweeping changes required by SB863, the Administration should consider such vast changes with practical timelines.

1/8/2013

Eric H. Werner

The Workers' Compensation Appeals Board has issued proposed rule changes. I disagree with changes to section 10530. We, the attorneys, issue a subpoena. It is then issued at our request by a copy service with a printed signature. That moves things along better than requiring old-fashioned signatures.

Please leave alone section 10530.

1/8/2013

Asuncion, Deanna, EDD

For clarification, the Employment Development Department (EDD) recommends that proposed subsection (e) of section 10530 be revised to read as follows:

“(e)(1) Notwithstanding any other provision of law to the contrary, any subpoena or subpoena duces tecum for records of the Employment Development Department shall contain the declaration under penalty of perjury and affidavit described in subsections (a)(3) and (4), and

shall be completed and executed with an original signature of one of the persons specified in subsections (a)(2)(B) to (E).

(2) Upon receipt of a request for records of the Employment Development Department pursuant to subsection (e)(1), any subpoena or subpoena duces tecum for records shall only be issued with the original signature of a commissioner, deputy commissioner, presiding workers' compensation judge, or workers' compensation judge of the Workers' Compensation Appeals Board.

(3) Any subpoena or subpoena duces tecum must have the requisite original signatures to constitute valid service on the Employment Development Department.”

Additionally, EDD recommends the clarification of the rationale language regarding subsection (e) on page 24 of the comments following section 10530 to read as follows:

“Proposed Rule 10530 would also provide that a subpoena for records from the Employment Development Department (EDD) shall be signed only by a WCJ or other WCAB judicial officer and only after an affidavit has been completed and signed which demonstrates good cause. This provision is being proposed at the request of EDD, which indicates that it has been inundated with questionable or invalid subpoenas for claim and wage information. The EDD is concerned with Unemployment Insurance (UI) and Disability Insurance (SDI) fraud and identity theft. The WCAB concludes that the EDD, which is a state agency subject to federal confidentiality regulations which govern the manner in which claim and wage information is disclosed, should not have to respond to subpoenas unless a party demonstrates to a WCJ or other WCAB judicial officer that the records are material to a worker's compensation claim filed by an injured worker and the party submits a valid subpoena to EDD.”

1/8/2013

Rob Huston
ARS Legal Regional Sales Manager

I'm employed at a copy service company. I've reviewed the SB863 regulations and have two problems I would like to see corrected. These changes do not help injured workers and make it more difficult for applicant attorneys that represent injured workers to resolve cases quickly.

1) Labor Code 5307.9

I ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files ONLY and not medical records. I want applicant copy services to be able to get medical records for injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

2) Section 10530

I object and disagree with the proposed requirement to prohibit copy services from issuing Subpoena Duces Tecum for the purpose of acquiring records or commanding the appearance of someone required to appear to a deposition. This is an extreme burden placed upon applicant attorneys to do this. Further, I object and disagree with the proposal to require an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

1/7/2013

Jon C. Brissman

Between now and 01/01/2014, the DWC will receive a substantial number of \$100.00 lien activation fees on claims for which the underlying case has not resolved. The lien claimants who pay those fees cannot file Declarations of Readiness to Proceed, so L.C. Sect. 4903.07 is unhelpful. Since SB863 does not address the issue of activation fees in unresolved cases, either the DIR or the WCAB must fashion a regulation specifying the circumstances in which a lien claimant can recover the fee from defendant. Absent regulation specifying a recovery mechanism, the \$100.00 will be deemed an irrecoverable lien tax and could be vulnerable to challenges.

1/7/2013

**Patty Waldeck, President
Macro-Pro, Inc.**

Subject: Objection to Proposed Regulation 10530

This letter is in objection to proposed Regulation 10530, a burdensome obstruction to discovery in Workers' Compensation cases.

The proposed regulation is the product of a special interest record-holder, record custodian, attempting to change the rules in their favor by attempting to reduce the number of subpoenas served to them and the number of records they have to produce.

The regulation will cause increased costs, excessive time delays, add additional workload for the WCAB, deny some parties their rights to discovery, add requirements over and above those for civil or federal subpoenas and, further, purports to avoid problems that do not currently exist.

I am attaching the Proposed Regulation and the Rationale. I have bolded some parts of the proposed regulation and have added my comments in the Rationale.

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Article 7. Subpoenas

§ 10530. Subpoenas and Subpoenas Duces Tecum.

(a) A subpoena or subpoena duces tecum shall be valid only if all of the following conditions have been met:

(1) The subpoena or subpoena duces tecum is on a form prescribed and approved by the Appeals Board.

(2) The **first page** of the subpoena or subpoena duces tecum is fully completed and executed with the **original signature** of one of the following:

(A) a commissioner, deputy commissioner, presiding workers' compensation judge, or workers' compensation judge of the Workers' Compensation Appeals Board;

(B) an **attorney-at-law** licensed in California who is established to be the attorney of record for a party, including a lien claimant that is a "party" as defined in section 10301(dd)(3);

(C) a non-attorney **hearing representative** or **claims adjuster** who is established to be the representative of record for a party defendant;

(D) a non-attorney hearing representative who, based on a notice of representation or a change of representation that is signed, filed and served in accordance with section 10774, is established to be the representative of record for a party lien claimant; or

(E) in the case of a self-represented injured employee, dependent or employer, an information and assistance officer employed by the Division of Workers' Compensation. In Pro Per

(3) The **declaration** under penalty of perjury on the **second page** of the subpoena or subpoena duces tecum is fully completed and executed with an **original signature** of the person signing and issuing the subpoena except that, if the subpoena is signed by a judicial officer under subdivision (a)(2)(A) or by an information and assistance officer under subdivision (a)(2)(E), the original signature shall be that of the party or lien claimant requesting the subpoena.

(4) The **second page** of a subpoena duces tecum shall contain an **affidavit**, executed with an **original signature** by one of the persons identified in subdivision (a)(3), specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

(5) The subpoena or subpoena duces tecum form utilized shall **not** be one that was initially blank except for a photocopied non-original signature of a commissioner, deputy commissioner, workers' compensation judge, attorney, non-attorney representative, or information and assistance officer.

(6) At least one application for adjudication of claim shall have been filed with the Workers' Compensation Appeals Board for the injured employee and the date(s) of injury to which the subpoena or subpoena duces tecum relates.

(7) The name of the injured employee, the defendant(s), and the case number(s) for the relevant adjudication file(s) (i.e., the ADJ number(s)) shall appear in the caption of the subpoena or subpoena duces tecum.

(b) For purposes of this section, an "**original**" signature shall include:

(1) a signature of a commissioner, deputy commissioner, presiding workers' compensation judge, or workers' compensation judge executed in pen or electronically affixed in accordance with sections 10205(q) and 10246;

(2) a signature of an **attorney or non-attorney representative** of record executed in pen; or

(3) a signature of an information and assistance officer executed in pen.

An "**original**" signature shall not include an electronic signature affixed by any person or entity other than the Workers' Compensation Appeals Board.

(c) A signature on a subpoena or subpoena duces tecum by a commissioner, deputy commissioner, presiding workers' compensation judge, workers' compensation judge, or information and assistance officer is a ministerial act that is not subject to a petition for reconsideration, removal, or disqualification. Nevertheless, each of these persons shall have the discretion not to sign a subpoena or subpoena duces tecum if he or she deems it to be overbroad or otherwise improper and may instead advise the party or lien claimant requesting its issuance to revise it. Further, an information and assistance officer shall have the discretion at any time to refer a self-represented employee or employer to a workers' compensation judge or a presiding workers' compensation judge.

(d) Where a subpoena or subpoena duces tecum has been fully completed and signed in accordance with subdivisions (a) and (b), a photocopy or electronically scanned copy of it shall have the same legal effect as the original.

(e) Notwithstanding any other provision of this section, a subpoena duces tecum for records of the Employment Development Department: (1) shall be signed only by a commissioner, deputy commissioner, presiding workers' compensation judge, or workers' compensation judge of the Workers' Compensation Appeals Board; and (2) only after the affidavit has been completed and signed demonstrating good cause.

(f) Any subpoena or subpoena duces tecum issued on or after the effective date of this section that does not comply with its provisions shall be deemed null, void, and unenforceable by operation of law.

(g) Every subpoena or subpoena duces tecum shall be served as follows:

(1) The subpoena or subpoena duces tecum shall be served by the party or lien claimant who signed the declaration(s) required by subdivisions (a)(3) and/or (a)(4) or by an employer or agent of that party or lien claimant. The Workers' Compensation Appeals Board shall not serve a subpoena or subpoena duces tecum even if page one was signed by a commissioner, deputy commissioner, presiding workers' compensation judge, workers' compensation judge, or information and assistance officer.

(2) The subpoena or subpoena duces tecum shall be served on the person or entity to whom it is directed and a copy shall be concurrently served in accordance with section 10505 on each party or, if represented, their attorney or other agent of record.

(3) Service a subpoena or subpoena duces tecum that commands personal attendance shall be accompanied by payment of the witness fees and **mileage** payable to witnesses who appear in court, regardless of whether such payment is requested by the deponent or witness and regardless of whether the testimony is to be taken at a deposition or a hearing.

(4) The subpoena or subpoena duces tecum shall be accompanied by proof of service executed under penalty of perjury declaring how and upon whom service was made and, if witness fees and mileage are required, that payment was made at the time of service.

(h) The original of the subpoena or subpoena duces tecum and its proof of service shall be retained by the person who signed the declaration(s) required by subdivision (a)(3) and/or (a)(4), or by the employer or an agent of that person, until the later of either: (A) at least 60 days after the time for filing a petition to quash has lapsed; or (B) at least six months after all appeals relating to a petition to quash have been exhausted or the time for seeking appellate review has

expired. The Workers' Compensation Appeals Board shall not retain the original even if page one was signed by a commissioner, deputy commissioner, presiding workers' compensation judge, workers' compensation judge, or information and assistance officer.

(i) A lien claimant that is not a "physician" as defined in Labor Code section 3209.3 shall not issue a 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).

(j) Penalties for Abuse or Misuse of Subpoenas and Subpoenas Duces Tecum:

(1) Except for those persons listed in subdivisions (a)(2)(A) and (a)(2)(E), a person who signs or issues a subpoena or subpoena duces tecum under this section shall be subject to sanctions, attorney's fees, and costs under Labor Code section 5813 and section 10561 if the signing or issuance:

(A) violated any provision(s) of this section; or

(B) otherwise constituted a bad faith action or tactic that was frivolous or solely intended to cause unnecessary delay.

In addition, the privilege of a non-attorney representative to appear before the Workers' Compensation Appeals Board may be removed, denied, or suspended in accordance with Labor Code section 4907.

(2) If jurisdiction over the injury has not already been invoked by the filing of an application for adjudication of claim or other case opening document, the Workers' Compensation Appeals Board may invoke such jurisdiction by creating and opening an ADJ case file for the limited purpose of conducting proceedings under Labor Code section 5813. The Workers' Compensation Appeals Board may invoke such jurisdiction on its own motion or on the request of any person or entity directly or indirectly affected by the improper subpoena or subpoena duces tecum. After such proceedings are concluded, the Workers' Compensation Appeals Board may dismiss the case if no application or other case opening document has been filed.

(3) Sanctions, attorney's fees, and costs imposed based on a violation of this section may be imposed jointly and severally against: (A) the person who signed and issued the subpoena or subpoena duces tecum; (B) the law firm or other entity that employed this person; and/or (C) the person or entity who utilized the services of the law firm or other entity that employed the person.

(4) The alteration and reuse of a properly executed subpoena or subpoena duces tecum form in any case other than the case in which it was originally issued, or the use of any signature other than as provided by this section, may result in the imposition of penalties specified in this subdivision.

~~(k) All subpoenas or subpoenas duces tecum shall be issued. The Workers' Compensation Appeals Board shall issue subpoenas and subpoenas duces tecum upon request in accordance with the provisions of Code of Civil Procedure sections 1985 and 1987.5 and Government Code section 68097.1. Subpoenas and subpoenas duces tecum shall be on forms prescribed and approved by the Appeals Board, and for injuries occurring on or after January 1, 1990, shall contain, in addition to the requirements of Code of Civil Procedure 1985, an affidavit that a claim form has been duly filed pursuant to Labor Code section 5401, subdivision (c).~~

(l) Procedures for a Petition to Quash a Subpoena or Subpoena Duces Tecum

(1) A party or any other person or entity directly or indirectly affected by a subpoena or a subpoena duces tecum may challenge it by filing a petition to quash within ten calendar days of the subpoena's date of service. Any such petition shall be served on each party or, if represented, the attorney or non-attorney representative of record for each party.

Any opposition to the petition to quash shall be filed within five calendar days of the petition's date of service.

The time limits for filing a petition to quash or opposition shall be extended in accordance with sections 10507 and 10508.

(2) If no timely opposition to a petition to quash is filed, the Workers' Compensation Appeals Board may summarily issue an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the Board shall declare, including protective orders. In addition, the Board may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person.

(3) Whether or not opposition is timely filed, the Board may: (1) issue a notice of intention to grant or deny the petition, in whole or in part; or (2) set the petition for a mandatory settlement conference, either on its own motion or upon the filing of a declaration of readiness to proceed.

(4) Nothing in this subdivision shall be deemed to restrict utilization of the emergency petition for temporary stay procedure of section 10281.

Note: Authority cited: Sections 133, ~~and~~ 5307, 5309, and 5708, Labor Code. Reference: Sections 130 and 5401, Labor Code; Sections 1985, 1986.5, 1987.5, 2020.220, Code of Civil Procedure; and Section 68097.1, Government Code.

RATIONALE:

In 1979, Code of Civil Procedure section 1985 was amended to allow “an attorney at law who is the attorney of record” in a case to “sign and issue” a subpoena.

NOT SO! CCP 1985 (c) actually reads “An attorney at law who is the attorney of record in an action or proceeding, may sign and issue a subpoena.”

Additionally, there is no law that requires an original signature or any signature on a civil or federal subpoena. It is commonly accepted practice for all subpoenas to be imprinted with the issuers name and /s/ which means signature on file. The original subpoena is retained by the issuer and can be produced in court.

CCP 1987.5 reads in part: “The party causing the subpoena to be served shall retain the original affidavit until final judgment in the action, and shall file the affidavit with the court only upon reasonable request by any party or witness affected thereby. This section does not apply to deposition subpoenas commanding only the production of business records for copying under Article 4 (commencing with Section 2020.410) of Chapter 6 of Title 4.”

Requiring original signatures on Workers’ Compensation subpoenas would be insanely expensive and would delay the discovery process unnecessarily.

However, current Rule 10530, which became effective in 1981 (i.e., after the amendment to Code of Civil Procedure section 1985), provides that only the Workers’ Compensation Appeals Board may issue a subpoena or subpoena duces tecum (collectively, “subpoena”). Anecdotally, attorneys were not allowed to sign and issue subpoenas because the WCAB did not want a subpoena to be issued unless its jurisdiction had been invoked. (See *Yee-Sanchez v. Permanente Medical Group* (2003) 68 Cal.Comp.Cases 637 (significant panel decision.)

Yet, this concern can be addressed by providing that no subpoena shall be valid unless an application has been filed and an ADJ case number is included in the caption.

Already in effect.

Moreover, allowing attorneys at law to issue and sign their own subpoenas will save time for WCAB and DWC judicial and/or clerical staff.

Not correct! This proposal greatly increases the workload for the WCAB.

Of course, in civil proceedings before a Superior Court, a non-self-represented party ordinarily may be represented only by a licensed attorney.

Incorrect, any party may appear and any party may issue a subpoena in a civil case or federal case, including those *in pro per*. 1985 (c) “The clerk, or a judge, shall issue a subpoena or subpoena duces tecum signed and sealed but otherwise in blank to a party requesting it, who shall fill it in before service”.

In WCAB proceedings, however, a non-attorney hearing representative may appear. (*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].) This is under a statutory exception (Lab. Code, §§ 5501, 5700) that allows a lay person to appear in workers' compensation proceedings. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 65; *In the Matter of John H. Hoffman, Jr.* (2006) 71 Cal.Comp.Cases 609, 614-616 (Significant Panel Decision).)

Accordingly, extending the right to sign and serve subpoenas to lay hearing representatives and claims adjusters is consistent both with the statutory exception and with Code of Civil Procedure section 1985.

However, to help **limit potential abuses of subpoenas**, proposed Rule 10530 will require that subpoenas may be issued only by non-attorneys who are established to be the representative of record.

Interesting that this section is concerned with “potential” abuses.

This will add some force to proposed Rule 10530 because, if a non-attorney abuses the subpoena process, the non-attorney then may have his or her right to appear before the WCAB suspended or revoked under Labor Code section 4907. It will also help impose some **constraints on the issuance of subpoenas**. In particular, an agent of a party or lien claimant represented by an attorney or non-attorney (such as a copy service) will not be allowed to issue a subpoena. Rather, the subpoena will have to come from the attorney or non-attorney who is the representative of record.

Why does the author want to impose constraints on the issuance of subpoenas? There are no such “constraints” on civil subpoenas.

However, Code of Civil Procedure section 1985 does not allow a self-represented party to sign and issue a subpoena.

Incorrect, see CCP 1985 (c) above.

Consistent with this provision, proposed Rule 10530 also would not extend the right to sign and issue subpoenas to self-represented injured employees or dependents.

Why would the Workers' Compensation regulations discriminate against any party and not allow the same privileges as civil law affords to every party?

Nevertheless, the issuance of a subpoena is a ministerial act (see *People v. Blair* (1979) 25 Cal.3d 640, 651)* and Code of Civil Procedure section 1985 expressly provides that a “clerk” of a court may sign and issue a subpoena. Because under civil law the issuance of a subpoena is a ministerial act that may be performed by a “clerk,” proposed Rule 10530 would provide that, in the case of a self-represented injured employee or dependent, a subpoena may be signed and issued by an Information and Assistance Officer (I&A Officer). By statute, the role of an I&A Officer is to advise and assist self-represented injured employees, dependents, or employers.

(Lab. Code, § 5451; see also Cal. Code Regs., tit. 8, § 9921 et seq.) Moreover, allowing an I&A Officer to sign and issue subpoenas will help preserve the WCAB's limited judicial resources. Nevertheless, proposed Rule 10530(c) would give WCJs and I&A Officers the discretion not to sign a subpoena if they deem it overbroad or otherwise improper. Instead, they can ask the requesting person to revise the proposed subpoena. Further, an I&A officer will have the discretion to refer a self-represented employee's request for a subpoena to a WCJ or PJ. This is in recognition of the fact that I&A Officers are not attorneys and have limited experience and training in handling of subpoenas. They also lack the tools, such as sanctions and contempt, that can assist in restraining the behavior of some of the more difficult self-represented injured workers.

Another example of increasing the WCAB workload!

For the reasons that follow, proposed Rule 10530 would not allow non-attorney representatives of non-party lien claimants to sign and serve subpoenas.#

Under the WCAB's, a lien claimant cannot file a declaration of readiness until it has become a "party." This necessarily means that each other lien claimant will also have become a "party." Further, under Rule 10770.1(a), no lien conference or lien trial will be set, at least ordinarily, unless the lien claimants have become "parties." Given that no declaration of readiness may be filed by a lien claimant, and no lien conference or trial will ordinarily be set, until each lien claimant has become a "party," there does not appear to be a compelling need to allow non-party lien claimants to unilaterally issue subpoenas. If a non-party lien claimant needs a subpoena, the proposed amendments to Rule 10530 would allow the non-party lien claimant to have an attorney issue the subpoena or, alternatively, to obtain one from the WCAB. This will protect the due process rights of non-party lien claimants.

I am unfamiliar with lien law. However, if the current system allowing lien claimants to issue subpoenas is acceptable, what reason is there to change? I defer to those more knowledgeable.

The proposed amendments to Rule 10530 contain provisions that would define the term "original signature." This provision is necessary because, in the past, subpoenas were issued using arguably invalid photocopied subpoenas bearing the signature or signature stamps of WCJs who have long been retired or even deceased.

The use of old signatures could certainly have occurred and may occur again but the remedy would be for the record-holder to object to the subpoena. This appears to be an unintended error due to a lack of knowledge of who is in and who is out at the WCAB. There is no reason to knowingly serve a subpoena with a signature that is invalid.

Proposed Rule 10530 would also provide that a subpoena for records from the Employment Development Department (EDD) shall be signed only by a WCJ or other WCAB judicial officer and only after an affidavit has been completed and signed which demonstrates good cause. This provision is being proposed at the request of EDD, which indicates that it has been inundated with subpoenas for wage information. The WCAB concludes that EDD, which is a state agency, should not have to respond to numerous

subpoenas unless a party demonstrates to a WCJ or other WCAB judicial officer that good cause supports the subpoena request.

Why does the EDD need this special privilege, one which is not afforded to any other entity, public or private? Could it be to limit the number of subpoenas they receive?

The proposed amendments to Rule 10530 would also specify how and when a subpoena must be served, and also specify when witness fees and mileage must be paid. This will provide clarity to anyone issuing a subpoena and, again, will help discourage **subpoena abuses**.

What subpoena abuses? Witness fees for appearance are paid at the time of service. Mileage is usually paid when, and if, the witness appears. Witness fees for records do not, by law, have to be paid until records are produced but are usually paid at the time of service.

However, consistent with Labor Code section 4903.6(d), which precludes non-physician lien claimants from obtaining medical information about an injured employee, the proposed amendments to Rule 10530 would provide that such lien claimants cannot issue subpoenas that seek to obtain such medical information. Instead, those lien claimants must follow the procedure set forth in section 10608. [See section 10608 for a more detailed discussion of section 4903.6(d).]

Additionally the proposed amendments to Rule 10530 would make it expressly clear that subpoenas that are **frivolous or in bad faith** may result in sanctions, attorney's fees, and costs under Labor Code section 5813. Further, non-attorney representatives who abuse the subpoena process may be subject to possible suspension or revocation of their right to appear before the WCAB under Labor Coat section 4907. These provisions will help ensure against abuse or misuse of the subpoena process.

Is there any proof that there are a significant number of subpoenas that are frivolous or in bad faith? Perhaps the record holder(s) does not know that all parties are entitled to the discovery they require to prove their case. It is not the record holders job or right to determine which subpoenas are frivolous or in bad faith.

Lastly, current Rule 10530 does not specify the procedures to be followed when a petition to quash a subpoena is filed. The proposed amendments would specify these procedures.

The time frames for filing a Motion to Quash, ten (10) calendar days, and the time for response, five (5) calendar days are absurdly short and do not allow for proper process.

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Proposed regulation changes have been initiated by the EDD. I believe the result will be a huge cost increase to insurance companies and employers. At issue is the requirement for an original signature on each subpoena and the ramifications of the proposed change on costs and timeliness in the Workers' Compensation system.

Reforms are necessary to correct errors, remove defects or improve systems; however, in the case of Workers' Compensation subpoenas, the process is not flawed. The EDD receives a large number of subpoenas annually. This organization is looking for ways to reduce the number of subpoenas they need to process by burdening the system with additional requirements for each subpoena (e.g. wet signatures). This proposed regulation will have the following ramifications:

- Require I&A officers to get a subpoena signed by the WCAB
- Unduly burden courts to handle subpoena duty
- Reduce the time to quash a subpoena from 20 to only 10 days. It's unclear if mailing time is included or not.
- Allows only 5 days to respond to a Motion to Quash request
- Increase the cost for subpoenas
- Increase copy service fees and greatly slows down the process
- Increase attorneys fees as they will have to review every subpoena

In theory requiring an original signature doesn't sound like a big deal, but it is. It will place unnecessary burdens and cost on the payer, examiner, judges and copy services to name a few. The examiners/attorneys workload will increase as they will have to diary and review the documents.

There will be a lot of chaos created from this single change. I respectfully ask the WCAB to not enact this regulation but, find another way to assist the EDD with their burden.

Date: 1/7/13

Attention Ms. Christine Baker, Director DIR

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

First let me say that to put this forum out for public comment over the Christmas and New Year's holidays does a disservice to all attorneys who would like to respond to this forum and are away for the holidays. We ask you to extend the response period from January 9, 2013 to at least January 31, 2013 to allow all attorneys who would like to respond a chance to do so.

Our response to your suggested regulations is as follows:

(1) Section 10530 – Subpoenas and Subpoenas Duces Tecum

We object and disagree with the proposed requirement to prohibit copy services from issuing subpoena Duces Tecum for the purpose of acquiring records or commanding the appearance of someone required to appear to a deposition. I recommend that the previous policy of having the copy service issue the subpoena be continued as this otherwise places a large burden on the applicant attorney.

We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy. From a practical standpoint, how will you be able to tell if the signature is wet or copied. We should either continue the previous practice of using a copy of a judge's signature, a digital signature, or a copy of the attorney's signature.

(2) Rule 10608.5

Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(3) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim files and employment files only and not medical records. Applicant copy services should be able to get medical records for our applicant attorneys and their injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

(4) Liens Filed in 2012 or earlier

With the advent of SB 863 and the new proposed regulations, copy services are in jeopardy of losing thousands or millions of dollars because the statute of three years will run out on many cases as they may not close for 3 to 5 years. To avoid this loss the law should be changed so that liens can be resolved at the time the case in chief settles or at least allow the lien claimant to become a party upon filing the activation fee and extend the statute 6 years.

(4) How are Copy Services to file for costs in 2013 Before the Fee Schedule?

Presumably we are to file a petition for costs to the WCAB, as opposed to a lien. However, if there is a dispute and the dispute is only on the fee charged, would it instead be subject to Bill Review? If there are more issues than the fee, would we have to submit it to bill review and also file a petition for costs?

Sincerely,

Dan R. Jakle
Vice President, Sales and Client Services
ARS Legal



(Signature) Date: 01/07/2013

Philip M. Cohen, Esquire

1/7/2013

I am strongly opposed to the changes regarding Section 10530. This change will raise costs and drain resources for applicant, defendants and defense counsel alike.

Please strongly reconsider this inefficient change and the pejorative effects it will have on all parties.

Maruca Posadas

1/5/2013

As an Interpreting Agency, I want to comment on the proposed/ new regulations relating to ELECTRONIC DOCUMENT FILING AND LIEN FILING FEE. We have been working as an Interpreting Company for many years, and as any other service provider we have to constantly file liens and in many occasions for services that were authorized and requested by the Claims Administrator or Nurse Case Managers. We have follow the rules by trying to pre-authorized every single assignment and in most cases it is impossible to get in touch with the Claims Administrators or when we do, we are told that they have there "Preferred Providers", this situation further more limits the role of Small Interpreting Companies that have been providing a reliable efficient services for many years.

As a Small Business we would be terribly affected from this new regulations due to the fact that we have hundreds of unpaid liens in the amount of \$90.00 to \$110.00 dollars. This regulation would give Insurance Companies another excuse for not paying. With this Rule we would be totally defend less for reimbursement of small amounts.

I respectfully request that this tentative proposed rule delete any requirement for LIEN FILING FEE, for Interpreting Companies.

Another concern that we have are the Interpreter Fees, which I was told by a Judge that are developing at this moment.

It's amazing that rule makers are so out of touch in regards of the cost of doing business and cost of living. Interpreter Fees have been unchanged since 1989 which is absolutely ridiculous. Navigating Work Comp System is complex enough. Getting authorization and/or reimbursement is extremely difficult and time consuming and due to these processes doing business is getting more expensive.

We are aware that the prior regulations says " FEE SCHEDULE OR MARKET RATE WHICHEVER EVER IS GREATER" the problem is that in many cases the MARKET RATE even if its documented, MARKET RATE is not honored. There is a big Insurance carrier that even pays less than FEE SCHEDULE.

I hope our comments are taken into consideration for the benefit of SMALL BUSINESSES.

Date: 1/4/2013

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

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Sincerely,

Attorney: Debra Pearlman Strunk
Robbins & Strunk
7459 Monterey St. #A
Gilroy, CA 95020


(Signature) Date: 1/8/13

RECEIVED BY
JAN 09 2013
WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS

Date: 1/4/2013

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
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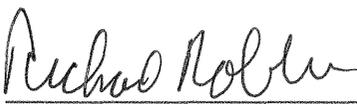
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My paralegal and I carefully reviewed and agree with the above.
Sincerely,

Attorney: Richard Robbins
Robbins & Strunk
7459 Monterey St. #A
Gilroy, CA 95020


(Signature)

Date: 1-7-13

RECEIVED BY
JAN 09 2013
**WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS**

Bonnie Binder Wilson

1/4/2013

I find as an applicant's attorney that it would be difficult to obtain a 'wet' signature on all subpoenas that I am trying to obtain. How many attorney's will be standing in line each day to have a judge sign the subpoena? What about judicial time constraints that were not considered in this regulation. Please let the copy services continue with the signature they have on record.

It is imperative that I be able to have the copy service provide me with the record summary as I am not paid by the hour as are defense firms to collate the medical records to make linear sense of many large cases.

The fee schedule should not be the issue. It is only the 'wet' signature and medical record summary that is my burden and a drain on my resources.

Date: 1/4/2013

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Sincerely,

Attorney: Bruce Baum
Law Offices of Bruce Baum
223 River St. 1st FL
Santa Cruz, CA 95060

(Signature)

Date: 1/4/13

Date: 1/4/2013

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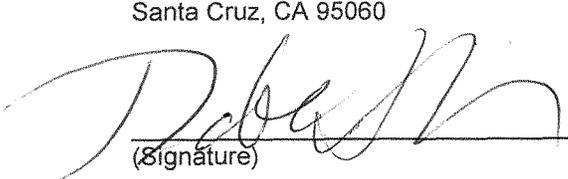
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Sincerely,

Attorney: Robert E. Taren
Law Office of Robert E. Taren
310 Locust St., Ste A
Santa Cruz, CA 95060


(Signature)

Date:

1/4/13

Date: 1/4/2013

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Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

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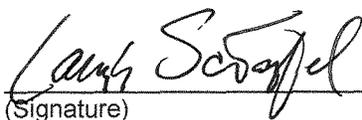
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Sincerely,

Attorney: Langley Schwartzapfel
Samarron & Schwartzapfel
54 Penny Ln. Ste E
Watsonville, CA 93901


(Signature)

Date: 1/4/13

Bonnie Binder Wilson

January 4, 2013

I find as an applicant's attorney that it would be difficult to obtain a 'wet' signature on all subpoenas that I am trying to obtain. How many attorney's will be standing in line each day to have a judge sign the subpoena? What about judicial time constraints that were not considered in this regulation.

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Discovery and obtaining records in California workers compensation

January 3, 2013

Executive Summary: Regulation 10530 (current and proposed) only provides for the Subpoena and Subpoena Duces Tecum to compel witnesses to APPEAR. The section needs to be amended to include and provide for a Deposition Subpoena for production of business records only (non-appearance).

Labor Code 5710 specifically incorporates the CCP for use in depositions, and when compelling production of documents only (discovery) a Deposition Subpoena and process must be used. CCP 2020.010(b) A Subpoena or SDT under CCP 1985 and 1987.5 is the wrong form to use for document production only (non-appearance) under Labor Code 5710. Furthermore, the more detailed requirements under CCP 1985 and 1987.5 promotes excessive and unnecessary dispute within the system (motions to quash). The Deposition Subpoena does not require an Affidavit of Good Cause, or the documents and matters to be described exactly. Not only would providing a Deposition Subpoena and process accurately comply with Labor Code 5710, but also dramatically reduce cost and dispute in the system by reducing the volume of motions to quash.

The proposed requirement in Regulation 10530 of an “original pen signature” on the Subpoena is an unnecessary and expensive burden to the parties. Such a detailed requirement in form over content will again promote costly dispute (increase billable hours by defense law firms) and unnecessary challenges and motions to quash in the discovery process. Pen signatures will slow the process of discovery by employers as well as applicants, cause inefficiency and higher cost, and cause unnecessary paper storage by the parties in the digital age. There are better ways to curb abuses and more secure methods for ensuring a party is truly issuing a Subpoena. It’s hard to imagine the necessity of demanding to personally inspect the archived original pen-signed form when a simple statement or affidavit from the issuing party would suffice. While perceived abuses by applicant copy services are an issue for the Administration, the requirement of original pen signatures will cause added expense and complexity to the employer-side, as well. Digital signatures by the parties should be allowed in the same manner and form as Judges and the Appeals Board.

Records and the discovery process

Medical, employment, claims and other records are important and necessary in workers compensation proceedings for many reasons:

- Determine all disabilities under the AMA Guides caused by the injury.
- Discover and determine the nature and extent of all pre-existing disabilities for apportionment issues.
- Discover treatment facts, conditions, procedures, drugs administered etc. to ensure compliance with ACOEM and the AMA Guides to resolve treatment disputes.
- Discover MPN facts and authority to properly obtain medical treatment for the work related injury.
- Discover wage and earning facts to properly set permanent disability values.

- Discover timely and accurate payments made by the employer to the injured worker to ensure and enforce compliance with the law.

Medical records are used extensively to determine the extent of disability. For example, a surgical procedure would indicate a greater disability than if there was no surgery. Also, a total meniscectomy is a greater disability than a partial meniscectomy, and a medial and lateral meniscectomy is a greater disability than only a medial or lateral. These things can only be determined from records.

The workers compensation system should encourage the discovery of accurate evidence to provide integrity and respectability to the system.

Authority for Subpoenas and discovery

Workers compensation provides the following authority to parties and Judges in order to compel witnesses and documents to any proceeding. However, an important distinction here is the difference between the following concepts:

- a) Compelling witnesses and records to APPEAR at trial/depositions in order to resolve a known disputed fact or issue (CCP 1985 and 1987.5)
- b) Obtaining more generalized DISCOVERY by compelling production of documents only (no appearance by the witness) in order to understand and be made aware of the facts, issues and disputes in the case in the first place. (CCP 2020.410 and 2025.010)

Labor Code Section 130 provides authority for the Appeals Board to issue Subpoenas for the attendance of witnesses and production of papers, books, accounts, documents and testimony in any inquiry, investigation hearing or proceeding in any part of the state.

Discovery – Labor Code 5710: Labor Code 5710 provides authority for the Appeals Board, Judge or any PARTY to cause the deposition of witnesses to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of the state under Title 4 (commencing with section 2016.010) of part 4 of the Code of Civil Procedure.

California Code of Regulations Section 10530: As currently written (and newly proposed), Regulation 10530 only provides for the Subpoena of witnesses TO APPEAR under CCP 1985 and 1987.5.

CCP 1985 is specific to using the Subpoena or Subpoena Duces Tecum directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. CCP 1985(a) It may also require a witness to bring books and documents and things. However, the important issue here is CCP 1985 is specific to the process of requiring a witnesses to appear.

A CCP 1985 Subpoena or SDT is not usually used in discovery, which is the gathering of facts BEFORE a deposition or trial proceeding is held. Discovery is necessary to understand and discover the facts surrounding the situation so that the issues and disputes can be identified in the first place. A party or Judge would use a Subpoena or Subpoena Duces Tecum under CCP 1985 to compel a witness to appear (and possibly bring documents and things) in order to prove or disprove an already-identified (or suspected) fact or DISPUTE. It is for this reason

that an AFFIDAVIT OF GOOD CAUSE is required of a CCP 1985 Subpoena or SDT, and why the documents and things must be described EXACTLY which are to be brought to the proceeding. Compelling a witness to take their valuable time to APPEAR at a proceeding should only be done when truly necessary, and that is why good cause should be shown. Further, if the witness is to bring some document or item to prove or disprove a fact, that item should be described EXACTLY so as not to waste the time of the Judge, Appeals Board or parties causing the proceeding.

CCP 1987.5, which is also specifically referenced in the current and proposed version of Regulation 10530, is appropriate when compelling a witness to personally appear and attend a proceeding under a CCP 1985 Subpoena or SDT. This section defines the affidavit of good cause for the process. However, when performing discovery, a party has a limited knowledge of the facts, issues and disputes because they are still in the discovery phase of the case. Therefore, a requirement to show good cause would be unreasonable, which is why the **Deposition Subpoena** (not a Subpoena or SDT under 1985) and process is used in civil matters under CCP 2016 et. seq. This is also why CCP 2016 and related sections (Civil Discovery Act of 2005) are SPECIFICALLY REFERENCED in Labor Code 5710 (Depositions).

CCP 2017.010 allows parties to obtain discovery regarding “any matter, not privileged that is relevant to the subject matter involved in the pending action.” The act of discovery need only “appear reasonably calculated to lead to discovery of admissible evidence.” This is a far cry from having to provide an “affidavit of good cause” and describing documents and things “exactly” as required under CCP 1985, CCP 1987.5, and currently required for all Subpoenas under Regulation 10530.

CCP 2020.010 defines the process by which discovery shall be performed. Non-parties, such as the previous treatment providers who hold medical records regarding the injured worker, are to be compelled to produce documents only (no appearance necessary) using the “**Deposition Subpoena**” commencing with section 2020.410 and 2020.510. See CCP 2020.010(a)(3). However, parties currently have no regulation or form that provides for the Deposition Subpoena. This is an omission that should be corrected as soon as possible.

Deposition of PARTIES is to be performed under section 2025.010 et. seq., the oral deposition. This section is commonly used to take the deposition of the injured worker. It should also be used to compel production of discovery documents from the defendant/employer. A party need only give notice in writing to another party to take their deposition. CCP 2025.220(a). The documents requested to be produced need only be described with “reasonable particularity” and/or by “category”, and not described EXACTLY. CCP 2025(a)(4)

The point is, neither an Affidavit of Good Cause, nor an EXACT description of documents to be produced is required for discovery of a non-party witness under CCP 2020.410 or a Party witness under CCP 2025.010. This is a critical point when it comes to avoiding unnecessary DISPUTE in workers compensation proceedings, such as frivolous and unnecessary motions to quash. While the cost of discovery and copy services in general is currently at issue with the Administration, it should be kept in mind that the cost of the DISPUTE of the discovery process by aggressive defense attorneys looking to increase billable hours greatly adds to the cost employers must pay for workers compensation premiums. Amending regulations that increases complexity and requirements in an otherwise simple and straightforward

procedure should be avoided. The system should remain as simple and unencumbered as possible, resulting in fewer possibilities for dispute – thus lower cost to employers.

Suggested Changes to Regulation 10530

1. California Workers Compensation desperately needs a **Deposition Subpoena** under CCP 2020.410, and a clear method of obtaining “records only” discovery from the defendant/employer by the injured worker under CCP 2025.
2. The detailed requirements of an “original pen signature” on the discovery forms are unnecessarily burdensome in the digital age. This inefficient requirement also opens the door for costly DISPUTE by both sides of the discovery process (unnecessary motions to quash and objections based on form and not content). Digital signatures should be allowed by parties in the same manner and form as the Judges and the Appeals Board.
 - a. To effectively use an “original pen signature” for discovery causes unnecessary paper and waste. Consider that a form must be filled out in a computer (typewriters are obsolete), printed, signed, and then scanned so copies can be made and stored in the digital document management systems (such as EAMS) commonly used within the system. Then, the original paper document must be kept in filing systems that have become obsolete and replaced with digital document management systems (such as EAMS), and may no longer exist in law offices around the state. Requiring parties to stockpile useless copies of Subpoenas (the original) is a waste of space, money and valuable resources. Digital signatures and efficient (unencumbered) processes should be supported by the Administration.
 - b. There are other ways to discourage “copy service abuse” than forcing ALL PARTIES (including the defendant) into an antiquated and inefficient paper system so they can perform necessary discovery.
3. The change in requirement of a pen signature and original forms is major, and time should be allowed for parties within the system to adjust to these major changes. The regulation should not be adopted without a reasonable timeframe for the parties to find new ways of operating to comply with these procedures.
4. Making significant changes to the discovery process and forms used in workers compensation is major and couldn’t come at a worse time. Considering all the changes the system participants are faced with under SB863, the Administration should consider such vast changes as Regulation 10530 at a different time or year.

Stephen Schneider
CEO, Med-Legal, LLC
Legislative Chair, California Workers Compensation Service Association (CWCSA)

Date: 1/3/2013

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

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Sincerely,

Attorney: Glen L. Moss
Law Office of Moss & Murphy
1297 B St. #A
Hayward, CA 94541


Date: 1-3-13
(Signature)

RECEIVED BY

JAN 04 2012

**WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS**

Date: 1/3/2013

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

Attention Ms. Christine Baker, Director DIR

First let me say that to put this forum out for public comment over the Christmas and New Year's holidays does a disservice to all attorneys who would like to respond to this forum and are away for the holidays. We ask you to extend the response period from January 9, 2013 to at least January 31, 2013 to allow all attorneys who would like to respond a chance to do so.

This proposed requirement would greatly raise cost of doing business to the applicant's attorney and employers alike. It would be prohibitive and punitive to the attorney as the attorney does not have the staff or time to issue subpoena's, give notice to opposing parties and mail the notices. It would raise the cost to employers as there will be unnecessary motions to quash on form and procedure due to the added complication of these new regulations. We want to simplify the process of implementing SB863, not complicate it with all these new requirements for instance to implement subpoenas requiring original signatures when other state court systems do not require them.

My response to your suggested regulations is as follows:

(1) Section 10530 – Subpoenas and Subpoenas Duces Tecum

We object and disagree with the proposed requirement to prohibit copy services from issuing subpoena Duces Tecum for the purpose of acquiring records or commanding the appearance of someone required to appear to a deposition. I recommend that the previous policy of having the copy service issue the subpoena be continued.

We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(2) Rule 10608.5

Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(3) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files only and not medical records. We want our applicant copy services to be able to get medical records for our injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

Sincerely,

Attorney: Ann Murphy
Law Office of Moss & Murphy
1297 B St. #A
Hayward, CA 94541


(Signature) Date: 1-3-13

RECEIVED BY

JAN 04 2012

**WORKERS' COMPENSATION
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- Discover timely and accurate payments made by the employer to the injured worker to ensure and enforce compliance with the law.

Medical records are used extensively to determine the extent of disability. For example, a surgical procedure would indicate a greater disability than if there was no surgery. Also, a total meniscectomy is a greater disability than a partial meniscectomy, and a medial and lateral meniscectomy is a greater disability than only a medial or lateral. These things can only be determined from records.

The workers compensation system should encourage the discovery of accurate evidence to provide integrity and respectability to the system.

Authority for Subpoenas and discovery

Workers compensation provides the following authority to parties and Judges in order to compel witnesses and documents to any proceeding. However, an important distinction here is the difference between the following concepts:

- a) Compelling witnesses and records to APPEAR at trial/depositions in order to resolve a known disputed fact or issue (CCP 1985 and 1987.5)
- b) Obtaining more generalized DISCOVERY by compelling production of documents only (no appearance by the witness) in order to understand and be made aware of the facts, issues and disputes in the case in the first place. (CCP 2020.410 and 2025.010)

Labor Code Section 130 provides authority for the Appeals Board to issue Subpoenas for the attendance of witnesses and production of papers, books, accounts, documents and testimony in any inquiry, investigation hearing or proceeding in any part of the state.

Discovery - Labor Code 5710: Labor Code 5710 provides authority for the Appeals Board, Judge or any PARTY to cause the deposition of witnesses to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of the state under Title 4 (commencing with section 2016.010) of part 4 of the Code of Civil Procedure.

California Code of Regulations Section 10530: As currently written (and newly proposed), Regulation 10530 only provides for the Subpoena of witnesses TO APPEAR under CCP 1985 and 1987.5.

CCP 1985 is specific to using the Subpoena or Subpoena Duces Tecum directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. CCP 1985(a) It may also require a witness to bring books and documents and things. However, the important issue here is CCP 1985 is specific to the process of requiring a witnesses to appear.

A CCP 1985 Subpoena or SDT is not usually used in discovery, which is the gathering of facts BEFORE a deposition or trial proceeding is held. Discovery is necessary to understand and discover the facts surrounding the situation so that the issues and disputes can be identified in the first place. A party or Judge would use a Subpoena or Subpoena Duces Tecum under CCP 1985 to compel a witness to appear (and possibly bring documents and things) in order to prove or disprove an already-identified (or suspected) fact or DISPUTE. It is for this reason

that an AFFIDAVIT OF GOOD CAUSE is required of a CCP 1985 Subpoena or SDT, and why the documents and things must be described EXACTLY which are to be brought to the proceeding. Compelling a witness to take their valuable time to APPEAR at a proceeding should only be done when truly necessary, and that is why good cause should be shown. Further, if the witness is to bring some document or item to prove or disprove a fact, that item should be described EXACTLY so as not to waste the time of the Judge, Appeals Board or parties causing the proceeding.

CCP 1987.5, which is also specifically referenced in the current and proposed version of Regulation 10530, is appropriate when compelling a witness to personally appear and attend a proceeding under a CCP 1985 Subpoena or SDT. This section defines the affidavit of good cause for the process. However, when performing discovery, a party has a limited knowledge of the facts, issues and disputes because they are still in the discovery phase of the case. Therefore, a requirement to show good cause would be unreasonable, which is why the **Deposition Subpoena** (not a Subpoena or SDT under 1985) and process is used in civil matters under CCP 2016 et. seq. This is also why CCP 2016 and related sections (Civil Discovery Act of 2005) are SPECIFICALLY REFERENCED in Labor Code 5710 (Depositions).

CCP 2017.010 allows parties to obtain discovery regarding “any matter, not privileged that is relevant to the subject matter involved in the pending action.” The act of discovery need only “appear reasonably calculated to lead to discovery of admissible evidence.” This is a far cry from having to provide an “affidavit of good cause” and describing documents and things “exactly” as required under CCP 1985, CCP 1987.5, and currently required for all Subpoenas under Regulation 10530.

CCP 2020.010 defines the process by which discovery shall be performed. Non-parties, such as the previous treatment providers who hold medical records regarding the injured worker, are to be compelled to produce documents only (no appearance necessary) using the “**Deposition Subpoena**” commencing with section 2020.410 and 2020.510. See CCP 2020.010(a)(3). However, parties currently have no regulation or form that provides for the Deposition Subpoena. This is an omission that should be corrected as soon as possible.

Deposition of PARTIES is to be performed under section 2025.010 et. seq., the oral deposition. This section is commonly used to take the deposition of the injured worker. It should also be used to compel production of discovery documents from the defendant/employer. A party need only give notice in writing to another party to take their deposition. CCP 2025.220(a). The documents requested to be produced need only be described with “reasonable particularity” and/or by “category”, and not described EXACTLY. CCP 2025(a)(4)

The point is, neither an Affidavit of Good Cause, nor an EXACT description of documents to be produced is required for discovery of a non-party witness under CCP 2020.410 or a Party witness under CCP 2025.010. This is a critical point when it comes to avoiding **unnecessary DISPUTE** in workers compensation proceedings, such as frivolous and unnecessary motions to quash. While the cost of discovery and copy services in general is currently at issue with the Administration, it should be kept in mind that the cost of the DISPUTE of the discovery process by aggressive defense attorneys looking to increase billable hours greatly adds to the cost employers must pay for workers compensation premiums. Amending regulations that increases complexity and requirements in an otherwise simple and straightforward

procedure should be avoided. The system should remain as simple and unencumbered as possible, resulting in fewer possibilities for dispute – thus lower cost to employers.

Suggested Changes to Regulation 10530

1. California Workers Compensation desperately needs a **Deposition Subpoena** under CCP 2020.410, and a clear method of obtaining “records only” discovery from the defendant/employer by the injured worker under CCP 2025.
2. The detailed requirements of an “original pen signature” on the discovery forms are unnecessarily burdensome in the digital age. This inefficient requirement also opens the door for costly DISPUTE by both sides of the discovery process (unnecessary motions to quash and objections based on form and not content). Digital signatures should be allowed by parties in the same manner and form as the Judges and the Appeals Board.
 - a. To effectively use an “original pen signature” for discovery causes unnecessary paper and waste. Consider that a form must be filled out in a computer (typewriters are obsolete), printed, signed, and then scanned so copies can be made and stored in the digital document management systems (such as EAMS) commonly used within the system. Then, the original paper document must be kept in filing systems that have become obsolete and replaced with digital document management systems (such as EAMS), and may no longer exist in law offices around the state. Requiring parties to stockpile useless copies of Subpoenas (the original) is a waste of space, money and valuable resources. Digital signatures and efficient (unencumbered) processes should be supported by the Administration.
 - b. There are other ways to discourage “copy service abuse” than forcing ALL PARTIES (including the defendant) into an antiquated and inefficient paper system so they can perform necessary discovery.
3. The change in requirement of a pen signature and original forms is major, and time should be allowed for parties within the system to adjust to these major changes. The regulation should not be adopted without a reasonable timeframe for the parties to find new ways of operating to comply with these procedures.
4. Making significant changes to the discovery process and forms used in workers compensation is major and couldn’t come at a worse time. Considering all the changes the system participants are faced with under SB863, the Administration should consider such vast changes as Regulation 10530 at a different time or year.

Stephen Schneider
CEO, Med-Legal, LLC
Legislative Chair, California Workers Compensation Service Association (CWCSA)

Oscar Rodriguez DC, QME
January 3, 2013

To Whom It may Concern;

As a practicing doctor of chiropractic I want to comment on the Proposed / New regulations relating to limiting the participation of Chiropractors in the treatment of injured workers and the new and extensively unnecessary, complex and time consuming regulations on getting treatment authorized and getting reimbursed for treating injured workers.

SB 863 includes language that limits Chiropractors to continue to treat as "FREE CHOICE" of treating physician after the injured worker has received the maximum number of visits (24) allowed. However, there is no rational basis given or provided as to why this was recommended and implemented. This has created and will further lead to additional backlash in Insurance carriers limiting the participation of Doctors of Chiropractic in their Medical Provider Networks(MPN). To give an example of this; on I have received correspondence from Employers Insurance dated December 27, 2012 notifying me that they had elected to "discontinue" my participation in their MPN effective December 28, 2012. Again no rational or explanation is given. I expect this to be the first of many letters to come in this regards. SB 863 has basically given unilateral control to the Insurance Companies in deciding who treat injured workers. Subsequently the role of chiropractors will be further limited by exclusion from MPN and capitation in the number of "visits" as patient is allow to have with a Chiropractor.

Furthermore, there is a distinction in what is considered chiropractic treatment vs. a chiropractic visit. A chiropractic treatment consists application of therapeutic procedure or modality and a spinal or joint manipulation. There is no support or guidance to expand the definition of a "visit" to include ANY office visit in which treatment is not provided. This a prejudicial interpretation to further limit the role of chiropractors in the workers compensation system. In AB 228 the 24 chiropractic visits were made to limit treatment, NOT medical management or evaluation visits.

It seems to me that all that is really being accomplished here is to so obfuscate and make almost impossibly complex the appeal processes so as to heavily discourage a treater's, QME's or IW's ability to seek redress from insurance carrier frequent arbitrary and biased (self-interested) decisions. And the insurance carrier, which is merely one party to the case, is by virtue of this proposed system being given what amounts to almost unilateral decision making authority on such contested issues because the complexity of the appeal process will in many if not most cases probably leave the insurance carrier virtually unchallenged and not held accountable. I also don't believe that monitoring and enforcement by the DWC will be any different now than was the case prior to SB863 and the carriers will ultimately get their way and the IW will be denied access to medically necessary care to "cure and or relief" the effects of their industrial injuries.

Jeffrey Dittich, Esq.
January 3, 2013

Please delete any requirement that a "wet signature" will be required to obtain subpoenaed documents. This is not a requirement in Superior Court. It would be burdensome, it would add extra delay to the procedure and accomplish nothing. Keep in mind that new rules will add delay to an injured worker getting accurate and complete records since we will first have to request those records from the defendant and allow time for the

Comment from

Stephen Schneider, CEO, Med-Legal, LLC
Legislative Chair, California Workers' Compensation Service Association (CWCSA)

On January 3, 2013

Begins on the following page

defendant to comply before sending out our own subpoenas. This can only serve to profit the employers at the expense of injured workers.

Michael C. Grimes
LAW OFFICES OF MICHAEL C. GRIMES
January 2, 2013

I object to the copy service rule changes in that they generate significantly more work for applicant's counsel that is not necessary for the stated purpose of the proposed rules and discriminatorily departs from practice in every other area of law.

Jon C. Brissman
January 2, 2013

Proposed Reg. 10770(d)(2) includes a requirement that liens shall be served with "proof that the lien claimant is the service provider or owner of the alleged debt." If Dr. XYZ performs services, issues an invoice using his tax identification number, and files a lien in his name using his medical office address, what proof can he submit to show that he was the service provider and/or owns the debt? I suggest that the provision in the proposed regulation be amended to read, "proof of ownership of the debt if the lien claimant is not the original service provider."

Jon C. Brissman
January 1, 2013

Labor Code Section 4903.07 specifies the process by which a lien claimant can recover the lien filing or activation fee from defendant. However, it is inadequate insofar as it does not address recovery for a lien claimant other than the one who filed a Declaration of Readiness to Proceed. If there are ten lien claimants on a case, for example, the nine who did not file the DOR must pay the activation fee prior to the lien conference set by the one DOR filer but there is no mechanism for those other nine lien claimants to recover their fees. The proposed regulations concentrate on the WCAB's authority to obtain the fees but are silent on the consequences thereafter for defendants and lien claimants. Please draft a proposed regulation specifying how any lien claimant may recover its fee and how liability for the fee may be affixed on defendant.

Jon C. Brissman
January 1, 2013

Independent Bill Review is referenced several times in the proposed regulations. The regulations should specify that IBR applies only to services provided to injured workers with dates of injury on or after 01/01/2013. First, L.C. Sect. 139.5(a)(2) specifies that the independent review processes (IMR and IBR) are intended to apply to dates of injury on and after 01/01/2013. Second, Reg. 9792.5.5 specifies that a provider must object to an Explanation of Review within 90 days, and Reg. 9792.5.7 requires a provider to request IBR within 30 days of a final determination by a claims adjuster -- these deadlines have elapsed on virtually all

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Sincerely,

Attorney: Venita Metzinger
Metzinger and Associates
3838 Watt Ave #D-400
Sacramento, CA 95821

(Signature)

Date: 1-2-13

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Sincerely,

Attorney: Daniel E. Abramson
Abramson & Burns
2020 Hurley Way #345
Sacramento, CA 95825



(Signature)

Date: 01/02/2013

Date: 1/2/2013

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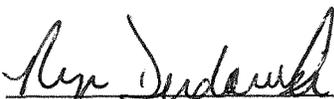
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Sincerely,

Attorney: Ryan E. Derdowski
Law Office of Ryan Derdowski
1851 Heritage Lane, 1st Fl
Sacramento, CA 95815


(Signature)

Date:

1/3/2013

legacy liens. Indeed, if IBR was required on currently-existing liens, many legacy liens would have been uncollectable on 08/31/2012 when SB863 was passed (and before it was signed into law). Note that application of IBR to dates of service on or after 01/01/2013 on prior dates of injury won't work because many of those accounts include pre-2013 charges on which the IBR implementation deadlines have already passed. To prevent a taking without due process of law, implement IBR only for dates of injury on or after 01/01/2013.

James T. Platto, MPH DC QME
December 29, 2012

As both a QME and treater I have read the text of SB863 & the proposed rule changes from that perspective; and in that regard I am anticipating a significant number of potential problems & conflicts that I believe should be considered more in depth before finalization and implementation. Below I have outlined and commented on just a few.

1. While SB863 specifies (appropriately) that IMRs cannot be QMEs, no one has ever addressed the very real conflict since SB899 involving QMEs or AMEs that happen to be in the same MPN that the injured worker they are evaluating is being treated in. As a long time QME myself and as an educational provider for the DWC-Medical Unit, I have received e-mails and calls from QMEs in the last several years who are concerned about being 'too applicant friendly' (even if justified by the facts of the case) because the injured worker is being treated in the same MPN the QME happens to also be a member of. I do not understand why this situation has never been addressed and considered as a direct 139.3 conflict. There is an obvious and very real potential financial conflict in such situations.

2. Regarding IMRs and the process involved, there would appear to be a number of potential problems and conflicts. For example, despite the proposed time-lines involved for the IMR process, I do not recall any language in SB863 that eliminates or modifies the 5-14 day rule already in place for ins. carrier decision making with regard to authorization requests for diagnostics, consults or treatment. How will this conflict be resolved, as IMR involvement will obviously conflict with such statutory time-lines? While theoretically unburdening the WCAB's calendar with regard to treatment disputes, will the current proposed IMR system not substantially protract the provision of reasonable and necessary treatment to cure and/or relieve the effects of an industrial injury? As a result, will this not impact many related outcomes affecting claims, not the least of which involve the injured worker's status and ultimately the financial impact to the insurance carrier? And what will occur if a QME, under Section 32 of the QME Regulations, orders referrals for what the QME opines and explains are medically reasonable and necessary diagnostics and consultations that an IMR determines are not necessary? Who will prevail and who will make determination in such conflicted situations? Will the conflict/dispute end up right back in front of a WCAB administrative hearing judge, thus further creating time delays, driving up costs, etc.?

3. Also, if an IMR's *final & binding* decision to uphold denial for diagnostics, consults or treatment conflicts with a QME's opinion that an injured worker is not *permanent & stationary* for lack of same, (and given that an IMR is not a QME and has no authority to make a decision with regard to permanent & stationary status), whose opinion in this regard will prevail? Will an IMR's denial decision create a *de facto* permanent & stationary situation that compels the QME to render a final impairment rating even if the QME disagrees? And will the IMR (who has never consulted with or examined the injured worker) have all of the relevant medical records to render such a decision within a time frame that is considerably abbreviated compared to the QME's time-line for issuing a medical-legal report? Just consider the not infrequent scenario of the QME who receives & must review large volumes of medical records requiring substantial hours for review. Will the IMR be provided with

identical records, let alone be willing to adequately review same at the payment levels being proposed for the IMR process? And if there is disagreement with the IMR decision, (especially relative to the opinion of the QME), the IMR's decision supposedly can only be appealed if the IMR's decision is *unjust or illegal*. What is the actual definition of 'unjust'? And how is it anticipated that a party to the case will be able to substantiate that a decision is 'unjust' without ultimately pitting the QME's opinion against the IMR's decision? And won't this ultimately end up right back in a '4062 treatment dispute' hearing situation before a WCAB judge? What will have been accomplished except for further expense and delays? And will IMRs have at least the same level of familiarity that QMEs do with statutory law, case-law and regulations that control and effect such decision-making? If the IMR's decisions are *final & binding*, (no different in effect than a judge), will their legal knowledge of the work. comp. system be assured? Even a WCAB judge's determination can be appealed based upon his/her interpretation of law; yet the IMR's decision can only be appealed based upon being 'illegal' or the undefined concept of being 'unjust'. And, ultimately, if the IMR's decision conflicts with the QME's decision and a *de facto* permanent & stationary situation results, won't the QME be compelled to rate the injured worker at a higher level of impairment which will ultimately increase the cost of compensation and future care...not to mention necessitating more restrictive *work preclusions* that will haunt the injured worker for the rest of their work-life?

4. This situation is not much different from the proposed IBR process. For example, as you know, many non-payment/denied payment situations are inextricably linked to treatment denials. Will the IBRs & IMRs be communicating with one another or have access to one another's medical record information and/or decisions? Will there be a cross-referencing or cross-indexing system available to them? And, as with the IMRs, will the IBRs be well versed and intimately familiar with statutory law, case-law & regulations that ultimately define & control payment protocols with regard to both treatment non-payment scenarios and med-legal non-payment situations? And I have already heard numerous, (although I believe unfounded), comments from treaters that denied payment for treaters during a 90-day delay period when a claim has initially been denied with self-procured treatment being obtained that the IBR process can be bypassed and a lien directly submitted. Unless I've missed it, I see no such exception clearly delineated in the text of SB863 or the proposed rule changes in such situations. I have also heard this assumption from some med-legal evaluators who seem to believe that denial of payment for their evaluations & reports can go directly to the lien process without first going through the IBR process. Again, I have either missed such definition or such assumptions are incorrect.

Unfortunately the list of questions and potential problems goes on. This has been only a very short list of concerns, as there has been very little time or substantial effort, (that I can recall), put into getting comments and functional considerations from the actual players in the field, (i.e. treaters, med-legal evaluators, injured workers and their attorneys, etc.), before this legislation was cobbled together and passed with barely a mention of its existence in the newspapers or on T.V. Frankly, rather than create this yet more complex and cumbersome administrative process, it would seem more rational to invest the same or less money by the same fee generation process being proposed to establish a larger WCAB judicial base where some administrative hearing judges would be devoted only to hearing treatment disputes, some just to payment disputes, some just to causation/apportionment disputes, etc. Rather than have one judge locked-up with every aspect of a single case, the various disputes could be parceled out by type and the admin. hearing judges would already be well versed in statutory law, case-law and regulations, (which is going to be a huge learning curve for IMRs & IBRs who typically have little to no legal background). This approach I am suggesting would significantly streamline the WCAB system and relieve its current burden and back-logged calendars.

Frankly, while it may no doubt be too late at this point in time, (especially with regard to the legislation itself), I would very strongly advise and recommend that the DWC Admin. Director organize a methodical and well represented committee system to review existing SB863 language and re-draft more definitive definitions and

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(1) Section 10530 – Subpoenas and Subpoenas Duces Tecum

We object and disagree with the proposed requirement to prohibit copy services from issuing subpoena Duces Tecum for the purpose of acquiring records or commanding the appearance of someone required to appear to a deposition. I recommend that the previous policy of having the copy service issue the subpoena be continued.

We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(2) Rule 10608.5

Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(3) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files only and not medical records. We want our applicant copy services to be able to get medical records for our injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

Sincerely,

Attorney: William O. Soria
Law Office of William Soria
140 Central Ave #1
Salinas, CA 93901


(Signature) Date: 1/4/13

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

Attention Ms. Christine Baker, Director DIR

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My response to your suggested regulations is as follows:

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(2) Rule 10608.5

Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(3) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files only and not medical records. We want our applicant copy services to be able to get medical records for our injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

Sincerely,

Attorney: Michael H. Young
The Law Firm of Amos Dittrich & Ushana
1184 Monroe St #6
Salinas, CA 93906

 Date: 1/3/13
(Signature)

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

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My response to your suggested regulations is as follows:

(16) Section 10530 – Subpoenas and Subpoenas Duces Tecum

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We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(17) Rule 10608.5

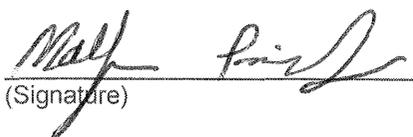
Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(18) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files only and not medical records. We want our applicant copy services to be able to get medical records for our injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

Sincerely,

Attorney: MAYRA Y. PINEDA
Law Offices of Marc Terbeek
2648 International Blvd., Ste. 115
Oakland, CA 94601


(Signature) Date: 1-7/2013

RECEIVED BY
JAN 09 2013
**WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS**

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

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(2) Rule 10608.5

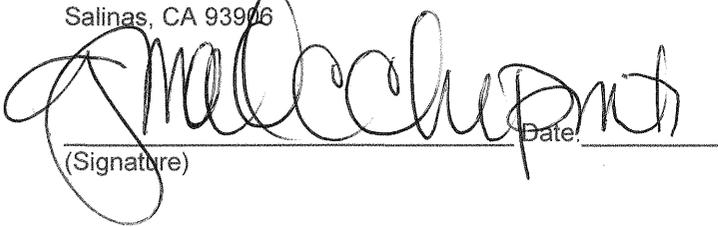
Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(3) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files only and not medical records. We want our applicant copy services to be able to get medical records for our injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

Sincerely,

Attorney: Gina A. Occhipinti
The Law Firm of Amos Dittrich & Ushana
1184 Monroe St #6
Salinas, CA 93906



(Signature)

Date: _____

RECEIVED BY

JAN 09 2013

**WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS**

1/4/2013

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

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(2) Rule 10608.5

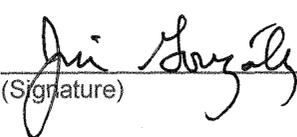
Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(3) Labor Code 5307.9

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Sincerely,

Attorney: Jim González
Law Offices of Jim González
28 E Romie Ln
Salinas, CA 93901


(Signature)

Date: 1/3/13

RECEIVED BY
JAN 09 2013
**WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS**

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

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My response to your suggested regulations is as follows:

(10) Section 10530 – Subpoenas and Subpoenas Duces Tecum

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We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(11) Rule 10608.5

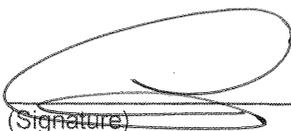
Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(12) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files only and not medical records. We want our applicant copy services to be able to get medical records for our injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

Sincerely,


Attorney: LEONARDO J. FLORES, J.D.
Law Offices of Marc Terbeek
2648 International Blvd., Ste. 115
Oakland, CA 94601


(Signature)

Date: 01/07/2013

RECEIVED BY
JAN 09 2013
WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS

Date: 12/27/2012

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Attn: WCAB forums
P.O. Box 429459
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My response to your suggested regulations is as follows:

(142) Section 10530 – Subpoenas and Subpoenas Duces Tecum

We object and disagree with the proposed requirement to prohibit copy services from issuing subpoena Duces Tecum for the purpose of acquiring records or commanding the appearance of someone required to appear to a deposition. I recommend that the previous policy of having the copy service issue the subpoena be continued.

We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(143) Rule 10608.5

Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(144) Labor Code 5307.9

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Sincerely,

Attorney: BYRON T. SMITH
Law Offices of Smith Baltaxe
1390 Market Street, Ste. 303
San Francisco, CA 94102



(Signature)

Date:

01/09/2013

RECEIVED BY
JAN 09 2013
WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

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(19) Section 10530 – Subpoenas and Subpoenas Duces Tecum

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We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(20) Rule 10608.5

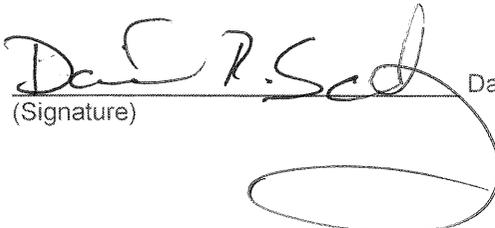
Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(21) Labor Code 5307.9

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Sincerely,

Attorney: DANIEL R. SCHWARZ
Law Offices of Marc Terbeek
2648 International Blvd., Ste. 115
Oakland, CA 94601


(Signature) Date: 01/07/13

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JAN 09 2013
WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS

Date: 12/27/2012

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P.O. Box 429459
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My response to your suggested regulations is as follows:

(13) Section 10530 – Subpoenas and Subpoenas Duces Tecum

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We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(14) Rule 10608.5

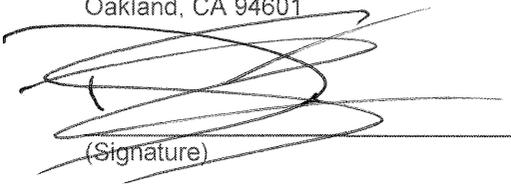
Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(15) Labor Code 5307.9

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Sincerely,

Attorney: DREW SANCHEZ
Law Offices of Marc Terbeek
2648 International Blvd., Ste. 115
Oakland, CA 94601


(Signature)

Date: 01/07/13

RECEIVED BY
JAN 09 2013
WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS

Date: 12/27/2012

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P.O. Box 429459
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My response to your suggested regulations is as follows:

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We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(8) Rule 10608.5

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(9) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files only and not medical records. We want our applicant copy services to be able to get medical records for our injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

Sincerely,

Attorney: MARC TERBEEK
Law Offices of Marc Terbeek
2648 International Blvd., Ste. 115
Oakland, CA 94601



(Signature) Date: 1/7/13

RECEIVED BY
JAN 09 2013
WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS

Date: 12/27/2012

RECEIVED BY

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

JAN 04 2012

**WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS**

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

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My response to your suggested regulations is as follows:

(46) Section 10530 – Subpoenas and Subpoenas Duces Tecum

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We further object and disagree with the proposal to have an original signature on the face page of the subpoena instead of the previous practice of using a judge's signature copy.

(47) Rule 10608.5

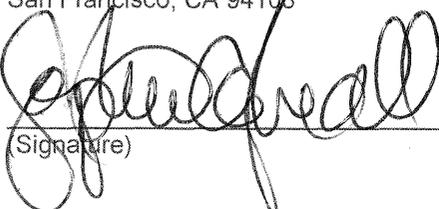
Copy services are in favor of reducing the cost of providing paper records and agree with providing electronic records if approved by the requesting attorney and reviewing doctor.

(48) Labor Code 5307.9

We specifically ask that Section 5307.9 be modified to set a 30 day period to allow the defense to provide claim's files and employment files only and not medical records. We want our applicant copy services to be able to get medical records for our injured workers just as soon as the case has been filed with the WCAB and there is a valid case number and the copy service has a copy of the letter of representative to indicate that the defense has been notified and served.

Sincerely,

Attorney: SOPHIE A. BREALL
Breall & Breall, LLP
1550 Bryant Street, Ste. 575
San Francisco, CA 94108


(Signature)

Date: 1/3/13

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

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(2) Rule 10608.5

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(3) Labor Code 5307.9

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Sincerely,

Attorney: NADEEM MAKADA
Law Offices of Nadeem Makada
1308 Bayshore Hwy, Ste. 240
Burlingame, CA 94010



(Signature)

Date: 1/4/2013

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

Subject: Response to Tentative Proposed Rules of Practice and Procedure Filed 12/21/2012 for Comment

Attention Ms. Christine Baker, Director DIR

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(5) Rule 10608.5

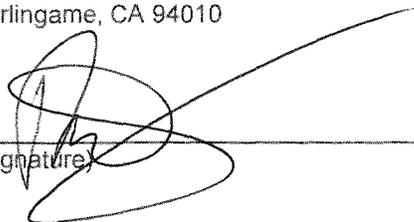
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Sincerely,

Attorney: PETER GIMBEL
Law Offices of Nadeem Makada
1308 Bayshore Hwy, Ste. 240
Burlingame, CA 94010


(Signature)

Date: 1/4/12

protocols for the development of rules to implement it. And such committee representation should not be heavily weighted with agency staff or special interest group representatives, but should include at least in part unaffiliated treaters, med-legal evaluators, attorneys, injured workers, and others who must deal with the workers' compensation system on a functional day-to-day basis. While legislative perfection and flawless implementation can probably never be realistically achieved, many of the potential conflicts that probably lie ahead for the implementation of SB863 can be moderated and attenuated with such input and reconsideration of proposed rule changes.

And, finally, whatever the final outcome of the proposed rule changes for the implementation of SB863 may be, it would behoove the DWC to make special effort to coordinate communication of rule change outcomes to treaters, med-legal evaluators and others in order to insure that all involved are provided with final, definitive and clear instructions, protocols, forms, etc. that will be required of them in dealing with treatment and med-legal evaluations from 01/01/13 forward. In the past, (following multiple legislative changes, such as in 1994, 2000, and 2004), most of these players in the workers' compensation system have been made aware of the many changes that have occurred by happenstance through costly and time consuming trial and error or through second-hand information picked up from colleagues or through periodic continuing education classes which may or may not adequately or correctly cover such information.

I hope these observations, while selective and not addressing the entire scope of SB863 or the full extent of the proposed rule changes, will help to provide further insight regarding potential, (and no doubt inevitable), problems that will likely develop in the months ahead.

Jon C. Brissman
December 27, 2012

Proposed Reg. 10774.5 paints attorneys and non-attorney representatives who represent lien claimants with the same broad brush. There are significant reasons to treat them differently.

I recognize that several non-attorney representatives for lien claimants have engaged in mischief in the past, wreaking havoc on the WCAB, lien claimants, defendants and their counsel. Thus, there is ample justification for the requirements placed on non-attorney representatives.

However, I am not aware of a single case where an attorney has falsified his or her representation of a lien claimant, and none of the several judges to whom I have spoken has ever heard of attorney misrepresentation. Thus, subsections (e)(4), (e)(5), and (e)(7) placing requirements on attorneys for lien claimants seems to fashion a remedy for a problem that does not exist and imposes a purposeless burden.

There is no reason that a simple letter of representation from an attorney, without declarations from the lien claimant, should not suffice. After all, defense attorneys (who likewise do not engage in representation mischief) are not required to have their letters of representation co-signed with a declaration by a corporate officer, partner, or fiduciary of the carrier, TPA, self-insured or uninsured employer that retained him or her. Further, in the unlikely event that an attorney engages in lien representation malfeasance, both the WCAB and the State Bar already have disciplinary apparatus in place to deal with the miscreant.

I suggest that 10774.5 be rewritten to specify that a letter of representation from a current member of the State Bar of California who has not been disqualified from appearing before the WCAB be accepted as sufficient, and the additional requirements remain as proposed for non-attorney representatives of lien claimants.

Dennis Camene
December 27, 2012

I have worked for both the defense and applicants. If the insurance company is allowed to control who can subpoena records and how much they may charge, it will put the injured worker at risk of winning or losing his case. So often, I have received certificates of no record because the individual did not speak to the individual in charge of records, or the copies did not include all the documents requested. I have used several companies and many have untrained staff and the records are fraught with problems.

I believe if the WCAB adopts this new rule it will only create more discovery filings with a court system already overwhelmed.

WCAB forum - Workers' Compensation Appeals Board (WCAB) - Tentative Proposed Rules of Practice and Procedure

Public discussion began 12/21/2012 and go thru 01/09/2012

For this forum, comments must be sent by email to WCABRules@dir.ca.gov. All other forum rules apply to submitting comments.

You may also mail in-depth comments to:

Workers' Compensation Appeals Board (WCAB)

Attn: WCAB forums

P.O. Box 429459

San Francisco, CA 94142- 9459

QUESTIONS TO ADDRESS:

WHY IT IS BAD FOR THE INJURED WORKER TO HAVE TO WAIT FOR RECORDS FROM DEFENDANT?

Copy service liens have already been shown by the DWC to be among the smallest \$dollar-amount of all lien claims.

Currently, the defendants suffer no ramifications (Pen/Int/etc) for non-payment of these charges.

Furthermore, since SB863 "passed" in August and in anticipation of "taking over" the ability to subpoena and/or provide records, defendants have stopped making reasonable and timely payments to applicants copy services.

Therefore, It will not be long before applicant attorney's will have to be filing petitions and motions for documentation AND the applicant's treatment and adjudication of his claim will be delayed significantly.

The rationale of allowing the defendant to control applicants access to records will not decrease the costs to defendant; nor will it decrease the amount of litigation. It is morally wrong to limit access to records and give legal access to defendants at the same time the DWC's rationale states that defendant is currently failing to pay for AME's and QME liens. Its like putting the cat in charge of a fish in a half-inch of water.

Defendants have had statutory requirement to serve all docs on applicant attorney on informal request within 6 days- that 11 days with mailing; and the duty for on-going service of all items throughout the claim. This has eluded defendant. Subpoenas are the most formal request requiring defendant to act within 15 days (with payment and affidavit) and defendants have failed on this level as well. Many defendants would never voluntarily serve the documents which copy services obtain by subpoena. Additionally, service of medical reports is different than service of subpoenaed records. Medical records subpoenas result in production of copious notes, other doctors medicals contained within a medical file and other valuable evidence.

The loss of ability by defendant to subpoena records without original signatures etc (and all the other burdensome changes being proposed and promulgated on all subpoenas) will result in defendant obtaining records by Authorization and in defendant failing to provide timely and complete records for applicants continuity of care and delay applicant ability to prepare to litigate cases with the records provided by defendant.

If a copy service has a bill for \$124.00 AND must file a lien or prepare a petition and wait 90 days (on each case) It will not be long before applicants attorney is spending time to file motions while the amount of litigation

increases and the time it takes to effectively prepare to adjudicate applicants claim will increase- with no increase in benefit...Just additional parties, additional waiting time for walk-thrus on any given day and additional Work for the DWC- in processing NOR's and petitions for payment for self-represented copy services.

Please use this small but understandable insight into what IS going to be one of applicants biggest delays in Workers Comp history and please further use Your Experience and Insight To Answer the following additional issues on this subject.

WHY IT IS BAD FOR THE INJURED WORKER?

WHY IT IS BAD FOR THE SYSTEM? (APPLICANT ATTORNEY NEEDS RECORDS EARLY ON IN THE CASE; CAN'T RELY ON DEFENSE)

IS IT MORALLY WRONG? WHY?

HOW CAN THE APPLICANT ATTORNEY DO HIS JOB IF HE CANT ACCOMPLISH THESE TASKS; OR GET THESE SERVICES ANYMORE?

HOW IS IT GOING TO AFFECT THE WC SYSTEM?

HOW IT WILL SLOW DOWN APPLICANTS ABILITY TO ADJUDICATE HIS CASE?

HOW WILL IT AFFECT APPLICANTS TREATMENT?

Proposed Regs:

http://www.dir.ca.gov/WCAB/ForumDocs/WCAB_ForumDec2012.htm

Further Comments:

Letting attorneys sign SDTs and the rest of subsection (a) should be no problem for anybody. This is a good thing.

We have a problem with subsection (b). Specifically, (b)(2) and (b)(3) should be be worded equally with (b)(1) and allow all parties to use electronic signatures. In 2012-2013, the technology in PDFs with third party verified signatures is orders of magnitude more secure than a pen signature (which is almost impossible to verify). Beside the fact that electronic signatures are stronger, they are huge orders of magnitude more efficient to to use, and less disruptive on the system in as a whole. Forcing pen signatures on every subpoena used in workers comp today is going to increase costs on everybody, most importantly the employers. There is no driving need in SB863 to cause this new burden and expense on the employers of the state, and the rest of the parties. Furthermore, forcing such a drastic change unnecessarily (not part of SB863) when the entire industry is having to already make massive adjustments to form and procedure BECAUSE of SB863 is overly burdensome. If the Administration truly believes that pen signatures are better than e-signatures, at least put this change in during a quieter time so it can be better managed.

We see no problem with (c).

We see no problem with (d) other than how "original" is defined.

We see no problem with (e) and (f) - our current SDTs in inventory should be fine as this is worded.

We don't see a problem with (g), (h), (i), (j).

We have a big problem with (k), which brings out the problem I have in general with 10530. The proposed changes have continued to leave out the most important piece of the whole discovery issue - the Deposition Subpoena under CCP 2020 et. seq. THAT's the code sections we actually use every day, and it is this very omission that causes all the motions to quash. In discovery, we don't have to specify the documents we want exactly, because we don't know what documents the witness has. By only allowing SDTs under CCP 1985 et. seq. and the SDT form and Subpoena form, the Administration is leaving out DISCOVERY from workers compensation, and forcing applicant attorneys to use an SDT to do discovery is what allows defense attorneys to objection and cause so many motions to quash.

We have no problem with (j) if they will fix (k) and give us the Deposition Subpoena and process under CCP 2020 et. seq.

Daniel Lopez, President
LOPEZ & ASSOCIATES, INC.

Date: 12/27/2012

Workers' Compensation Appeals Board (WCAB)
Attn: WCAB forums
P.O. Box 429459
San Francisco, CA 94142- 9459

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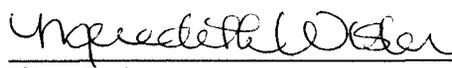
Sincerely,

Attorney: Meredith Wisler
Law Office of Wilson and Wisler
30 E San Joaquin St #201
Salinas, CA 93901

RECEIVED
State of California
Chairman's Office

DEC 31 2012

Worker's Compensation Appeals Board
SAN FRANCISCO

 Date: 12/27/2012
(Signature)

Date: 12/27/2012

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Sincerely,

Attorney: Bonnie Binder Wilson
Law Office of Wilson and Wisler
30 E San Joaquin St #201
Salinas, CA 93901


(Signature) Date: 12-28-12

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Sincerely,

David Han - *Hearing Rep.*
Law Offices of Andrew B. Shin
2131 The Alameda #A
San Jose, CA 95126



(Signature)

Date: 12/27/12

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State of California
Chairman's Office

DEC 31 2012

Worker's Compensation Appeals Board
SAN FRANCISCO

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Sincerely,

Attorney: John W. Amos II
The Law Firm of Amos Dittrich & Ushana
1184 Monroe St #6
Salinas, CA 93906

(Signature)

Date: 27 DEC 2012

RECEIVED
State of California
Chairman's Office
DEC 31 2012

Worker's Compensation Appeals Board
SAN FRANCISCO

Date: 12/27/2012

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Sincerely,

Attorney: Andrew Shaffer
Law Offices of Borah & Shaffer
20111 Stevens Creek Blvd #230
Cupertino, CA 95014


(Signature)

Date: 12-27-12

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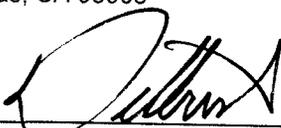
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Sincerely,

Attorney: Jeffrey C. Dittrich
The Law Firm of Amos Dittrich & Ushana
1184 Monroe St #6
Salinas, CA 93906

(Signature)



Date:

12.28.12

RECEIVED
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Sincerely,

Attorney: Josua P. Powers
The Law Firm of Amos Dittrich & Ushana
1184 Monroe St #6
Salinas, CA 93906


(Signature)

Date: 12/25/2012

RECEIVED
State of California
Chairman's Office

DEC 31 2012

Worker's Compensation Appeals Board
SAN FRANCISCO