

In an e-mail sent Wednesday, 4/9/2008, at 11:12 AM, Robert Kutz stated:

In proposed Section 10505(b), shouldn't the lien claimant(s) being served as well as parties, as defined in §10301(v) when the case in chief has not been closed or abandoned, be required to have agreed to "some other method of service" in order for proper service to be made on the lien claimant(s) other than by mail or personal service?

In an e-mail sent Wednesday, 4/9/2008, at 11:29 AM, Robert Kutz stated:

Should Section 10561(b) (4) be amended to provide with respect to Orders

“... or with an order or award of the Workers' Compensation Appeals Board, including an order of discovery, which is not pending determination on appeal or subject to timely appeal, unless that failure results from mistake, inadvertence, surprise, or excusable neglect.”

In an e-mail sent Wednesday, 4/9/2008, at 11:41 AM, Robert Kutz stated:

Regarding proposed Rule 10593:

Should Pro Tempore Workers' Compensation Judges acting under Rules of Practice and Procedure Sections 10351 or 10350 be expressly included among those designated as “judicial or quasi judicial officer of the Workers' Compensation Appeals Board or Division of Workers' Compensation in subsection 10593(c)?

In an e-mail sent Friday, 4/11/2008, at 11:57 AM, Clifford Levy stated:

Section 10301 (j): Change “District Office” to “Trial Court”. Litigants “go to trial”, they don't “go to office” for trial.

(z): Change “regular hearing” to “Trial”. If regular hearing means trial, call it a trial.

Replace “District Office” with “District Trial Court” throughout the proposed regulations.

Thanks. Cliff Levy, PJ, San Diego.

In an e-mail sent Tuesday, 4/15/2008, at 4:54 PM, Richard Newman stated:

I am concerned about the deletion of section 10301(p), the definition of “record of proceedings.” There is no definition of what constitutes a “record of proceedings” in the court administrator's proposed rules. My understanding of the current EAMS proposal is that all documents will go

into FileNet when scanned until they are placed in an “evidence” file by the judge at trial. The problem with this approach is that it fails to deal with the other elements of what we would traditionally think of as the “legal” portion of the file that was previously covered by section 10301(p). This includes minutes of hearing, judicial orders and decisions, applications and declarations of readiness, and all other pleadings.

Sections 10233 and 10256 of the proposed court administrator’s rules do not completely address this issue. Under §10233, the parties are required to submit relevant medical evidence or other documents, including any payroll or personnel records, and under §10256, the “parties are expected to submit for decision all matters properly in issue at a single trial and to produce all necessary evidence... considered essential in the proof of a party's claim or defense.” However, neither of these sections requires submission of documents that ensure a complete record of proceedings: i.e., all prior orders and decisions from a judge or the appeals board, minutes, and pleadings should be included in the record.

Although it can be argued that the record need only consist of those documents that relate directly to the issues to be tried, the legal file provides a complete chronology from application to trial, and portions of this legal record may become relevant to the issues upon review by the board or an appellate court. For example, determination of whether there has been due diligence by a party in obtaining evidence often requires an examination of all previous minutes and the content of all pleadings that pertain to this issue. Under the rules as drafted, it is apparently incumbent on one of the parties to provide whatever portions of these legal documents they believe are relevant; however, it would seem that the better solution would be to ensure that all legal filings (as we define them) are included in the record.

The problem of ensuring that we have a complete record of proceedings can be solved by first defining “record of proceedings” to include 2 components (for EAMS purposes, 2 files as subsets of the FileNet folder): (1) all minutes, orders, findings, awards, pleadings, correspondence to the judge or board; and (2) all evidence admitted at trial. The second component is covered in the rules above, the first is not.

For cases that arise after the EAMS go-live date, it would make sense to scan and index all those documents into a file designated as the “record of proceedings” or “legal” file with sub-files as described in (1) and (2) above.

For the legacy files, the issue of creating a complete record is more problematic. Under the proposed rules, only evidence admitted at trial will be scanned and included as part of the record. This means that the

judge will have to ensure that the legal record as described in (1) above is also scanned as part of the record. This could be very time consuming and cumbersome. Furthermore, the proposed system will require that the judge preside over the trial using a “hybrid record”: the evidence will be scanned, but the legal file will still be part of the paper file.

Furthermore, where there is a petition for reconsideration of a legacy file that has a hybrid record (where the evidence and decision are in electronic format, but the rest of the legal file as described in (1) above are still part of the paper file), the appeals board will likely have to have the paper file submitted as well as the electronic file, to ensure that the board has a complete record to review. If the Court of Appeal grants writ, a certified paper record will need to be prepared, underscoring the need for a complete record of proceedings that is easily producible in paper format.

Therefore, in a legacy file, it would make sense to maintain the paper file *through trial and any appeals*. After there has been a final decision by a judge, the board or an appellate court, the entire “record of proceedings” [(1) and (2) above] can be scanned, and the paper file can be destroyed. This would not be inconsistent with the proposed rules, except that we would require a more expansive interpretation of what comprises a complete record of proceedings until the rules are revised to include this definition. The paper file will presumably still be identified in the EAMS network, with an ADJ number, etc., and the judges and appeals board could input their decisions in the EAMS network, with printed copies included as part of the paper file. Furthermore, in accordance with §10216(b), the documents that the parties submit in evidence can be scanned into the network, again maintaining paper copies for the paper file. Only when the proceedings are concluded, and when there is available time, would the complete legal record be scanned into the network. Note that a delay in scanning the rest of this material from the paper file is consistent with § 10216 (c), which provides that “(a) paper case file or a *portion of a paper case file* may be converted to an electronic case file by the Division of Workers’ Compensation *at any time*. ... [emphasis added.]

--Richard Newman

[*MODERATOR’S NOTE*: The reason for the proposed deletion of the definition of “record of proceedings” from Rule 10301(p) is that the definition of “record of proceedings” already exists in current Rule 10750. Although there is a slight difference between current Rule 10301(p) and current Rule 10750, because the latter does not include a reference to the arbitrator's file, new proposed Rule 10750 will refer to the arbitrator's file, as well as making some other changes to the definition of “record of proceedings.”]

In an e-mail sent Tuesday, 4/22/2008, at 1:26 PM, Richard Berryhill stated:

This comment is in regard to Rule 10561(b)(9), which proposed change is too limited in one regard, and too all-inclusive in another regard:

The proposed language of section (9)(A) currently makes punishable by sanctions:

“Using any language or gesture at or in connection with any hearing, or using any language in any pleading or other document: (A) where the language or gesture (i) is directed to the Workers’ Compensation Appeals Board, to any of its officials or staff, or to any party or lien claimant (or the attorney or other representative for a party or lien claimant) and (ii) is patently insulting, offensive, insolent, intemperate, foul, vulgar, obscene, abusive, or disrespectful”

It is my opinion that the use of such language should also be sanctionable when issued verbally. One current claimant has left dozens of cussing, swearing, verbally abusive phone messages, first with the claims adjuster, now me. The proposed language change would apparently not include such verbal abuse, but it should.

The proposed language of section (9)(B) is over-broad and potentially violates the constitutional right of free speech, as it would make sanctionable any language:

“where the language or gesture impugns the integrity of the Workers’ Compensation Appeals Board.”

Such language and/or comments may certainly be offensive, especially if they appear to be directed towards a specific individual, and in that sense would probably be punishable as contempt. If not so punishable, then I have my doubts that they should be made sanctionable. Many a nut case has voiced similar criticisms of our state and federal courts and officers, but they have a constitutional right to do so, and all of us make our judgments of such individuals and the comments they make.

Furthermore, when one considers what the allowable extent of free speech encompasses - even when we do not like it - then extending the punishment of sanctions to language which might merely be seen as “fair political comment” might be going too far, which could potentially lead to constitutional challenges to these new rules and the loss of their protection in other areas.

Very truly yours,
MULLEN & FILIPPI, LLP
RICHARD J. BERRYHILL
Attorney at Law

In an e-mail sent Wednesday, 4/23/2008, at 3:17 PM, David Robin stated:

Ladies and Gentlemen,

In preparation for my comments on the proposed EAMS regulations posted on the DWC website (EAMS section) on 3/19/08, when I now go to the EAMS site there is no evidence of these proposed rule to comment upon. Have they been withdrawn or are they located elsewhere on the website?

Please respond immediately as comments are due 4/28/08 and I need to know whether or not these proposed rules are still being promulgated.

Very truly yours,
The 4600 Group
David D. Robin
[Phone number omitted by Moderator]

[MODERATOR'S NOTE: The Workers' Compensation Appeals Board (WCAB) and the Court Administrator of the Division of Workers' Compensation (DWC) have separate rule-making authority. (See Lab. Code, § 5307(a) & (c).) The Court Administrator's proposed regulations were posted for informal public comment on the DWC Web forum on March 19, but the informal comment period ended on March 25. (See DWC Newslines announcement at: http://www.dir.ca.gov/dwc/dwc_newslines/2008/Newsline_15-08.html.) However, the Court Administrator will be promulgating the proposed regulations through the formal notice and public comment rulemaking procedure of the Administrative Procedure Act.]

In an e-mail sent Thursday, 4/24/2008, at 1:45 PM, Maureen Gray stated:

The Division's forum has been closed for a while. However, the Workers' Compensation Appeals Board's forum is currently happening. Perhaps that is what you are looking for? Please click on the enclosed link.
Thanks!

<http://www.dir.ca.gov/WCAB/WCABForum/1.asp>

Maureen Gray
DWC Legal Unit
[Phone and fax numbers omitted by Moderator]



California Workers' Compensation Institute

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April 28, 2008

Workers' Compensation Appeals Board
P.O. Box 429459
San Francisco CA 94142-9459
ATTN: WCAB Forum

Subject: Forum Comments
WCAB -- Rules of Practice and Procedure – EAMS Implementation

These recommended modifications and comments on the proposed WCAB regulations are presented on behalf of the members of the California Workers' Compensation Institute. Recommended modifications are indicated by underline and ~~strikethrough~~.

Introduction

As we have stated to the DWC and the court administrator regarding the proposed regulations for EAMS implementation, the paramount rationale in the process of modernizing the information flow of the Appeals Board and the Division is the efficient and effective resolution of disputes in order to promptly deliver the appropriate benefits to injured workers. The most significant aspect of this process is, therefore, the evidentiary record of the Appeals Board. All documents necessary to fully and fairly adjudicate the entitlement to compensation benefits must be filed, served on the parties, become a part of the record of the Board's proceedings, and must be available for the judge's review in determining an award of benefits.

In order to avoid exalting form over substance, the procedural regulations creating the information flow for EAMS must ensure that the material essential to a timely adjudication of a claim are a part of the Board's evidentiary file – one way or another. The regulations must ensure that no processing, technical, or systems-related issue corrupts the evidentiary record or impedes the dispute resolution process at the Appeals Board.

In a number of proposed regulations, the DWC is establishing new procedures for filing documents, and the material successfully loaded into the new system will or may be destroyed. In each set of proposed regulations, the Appeals

Board and the Division included procedures for documents that are filed incorrectly, but the rules are not consistent. In some cases, the incomplete documents will be reviewed and discarded, sometimes with notice to the parties, sometimes with notice if the filer has included a SASE, and sometimes without notice to the parties. Without confirmation that a document has been successfully loaded into the system, the filing party will not know what documents have become a part of the evidentiary record. Rejection without notice to the filing party will only exacerbate the confusion and taint the Board's trial record leading to flawed findings and additional litigation.

The Institute recommends that:

- The system provide a confirmation of the records successfully filed, and
- The records rejected by the Division or the Board, for whatever reason, be returned to the filing party with an explanation of the failure.

But in no event should the Division or the Board, on purely procedural grounds, reject a document intended for inclusion in the evidentiary record and discard it without notice to the parties and an opportunity to correct the defect.

EAMS Implementation by the Workers' Compensation Community

When these 2 sets of complimentary regulations become effective, there will be no "old system" for processing an injured worker's claim through the WCAB. The new system and supporting regulations will not be optional. That means that at the "go live" date everyone in the workers' compensation community will have to learn to do things differently.

That comprehensive change alone will require a considerable period of adjustment in order to reprogram automated systems; revise the workflows for workers' compensation judges, law firms and claims administrators; manage the scope of the change; train judges, Board staff, claims adjusters and attorneys; and perfect the interface with the agency, whether that is an electronic interface or the filing of new OCR forms and tracking the scanning of documents. The parties will have to determine whether their representatives will require laptop computers at the Boards or whether the local EAMS interface will be sufficient for trial.

It has become clear in the past several months that EAMS will not be compatible with other litigation management systems and even though the Division has met with independent system vendors, we are not aware that any vendor has yet created an automated forms package for document filing in EAMS.

The members of the Institute have considerable experience with automated claims and litigation systems and they have no confidence that the necessary system revisions, training, and workflow modifications can be accomplished in less than several months from the effective date of the final regulations. Yet the Division and the Appeals Board are referencing a "go live" date of August 25.

This seems to leave little or no time to address the implementation issues that will arise for the injured workers, applicants' attorneys, defense attorneys, and claims administrators to manage this change.

The failure to allow for an adequate adjustment period for the community to learn the new system and develop automated tools to make EAMS effective invites confusion, disruption, and unacceptable delays. A chaotic implementation of new technology threatens the Board's primary function – the prompt and fair adjudication of disputed issues.

Privacy and File Security

Throughout both sets of proposed regulations, the Division and the WCAB have referred to the electronic transmission of medical data, personal health information, and other identifying factors that give rise to privacy concerns. Yet, the proposed regulations are essentially silent regarding the delivery of this confidential information by e-mail, fax, or electronic means. If these issues have been resolved by the Division and the Appeals Board, then the regulations should reflect that consideration and articulate to what extent the regulations create a "safe harbor" for the workers' compensation community. If these issues have not been fully vetted, then the regulations should be expanded to address the inherent privacy and file security issues.

Technical Comments

In discussions with Institute members, there seems to be no simple, quick solution to permit rapid compliance with EAMS. Current paper forms cannot be used. EAMS will not accept completed forms from other automated systems. The requirements of proposed regulation make documents subject to rejection for purely technical reasons. These new strictures apply to all levels of users from injured workers to highly automated law firms and claims administrators.

The simple, alarming truth is that if the OCR forms are not perfectly and promptly scanned, the Board's evidentiary record will be erroneous and/or incomplete. There appears to be no "back up" system available; no manual alternative if the system falters or the rate of human error is excessive; and no fail-safe system if the system fails and the HAL 9000 refuses to open the pod bay doors.

Section Comments

Section 10301

Discussion

This section does not include a definition of a "case opening document", a term used in several other sections. As the equivalent of an Application, a case opening document triggers several related procedures and should be defined in detail. This term is even relevant to invoking the WCAB's jurisdiction (Section 10403).

Section 10301(b) Adjudication File -- Consistency

Discussion

This is merely one example of the inconsistency found in the separate sets of proposed regulations. The DWC uses the term “case file,” while the WCAB uses “adjudication file” to mean the same thing and the terms appear throughout both sets of regulations. These definitions need to be synonymous and relate to both the Division’s and the Board’s files.

Other regulations address the same or similar topic but fail to mirror the language provided by related regulations. Both sets of regulations must be drafted to eliminate both significant and insignificant redundancies and inconsistencies.

Section 10301(g) Declaration of Readiness to Proceed

Recommendation

“Declaration of Readiness to Proceed” or “Declaration of Readiness” means a request for a proceeding before a trial court of the Workers’ Compensation Appeals Board at the district office with venue.”

Discussion

There are several references to requests for trial and it should be clear that this is a request for trial at the appropriate district office.

Section 10301(r) Lien Claimant

Recommendation

(r) “Lien claimant” means any person who or entity that has claimed payment under the provisions of Labor Code section 4903 or 4903.1 and has filed the documents necessary to establish the lien.

Discussion

The additional language would include medical billing agencies and others who might be filing on behalf of providers. It also imposes the statutory and regulatory requirements for securing a lien.

Section 10302 -- Workers’ Compensation Judges

Discussion

DWC regulation section 102210(gg) includes pro tempore judges appointed pursuant to California Code of Regulations, title 8, section 10350 within the definition of “Workers’ compensation administrative law judge”. For consistency, the WCAB definition should be no different.

Section 10608 Filing and Serving Medical Reports

Discussion

This proposed regulation is a significant expansion of the requirements for service, particularly with regard to lien claimants. This rule is overly expansive, in that lien claimants are only entitled to medical and medical legal records that are relevant to their liens. As written, the parties are required to serve all records on

all parties and lien claimants. Additionally, there is no express provision permitting electronic service by fax or e-mail. The service of medical records should be accomplished as efficiently as possible and the regulations should consider this.

If a lien claimant wants to review all subpoenaed records, the defendant should only be required to identify those records.

Section 10629 -- Filing and Listing of Exhibits

Discussion

The Board should include a provision for sanctions for potential technical failures that may result. For example, if documents are filed in violation of the dictates of subdivision (e), they should be returned to the filing party with the deficit noted. If the correction delays the process, then the Board can consider an appropriate sanction. In no event, should the Board discarded the exhibits or preclude documents from the record of the Board's proceedings.

Section 10785 – Electronically Filed Decisions, Findings, Awards, and Orders

Discussion

There is no current definition in the regulations for “electronically filed” in the context of EAMS, and given the technology available to the parties, the Board should be more specific.

Section 10845 -- General Requirements for Petitions

Discussion

This section sets the procedures for filing petitions and includes the 25-page filing limitation and a 10-page limit for supplemental petitions. Because these restrictions could become burdensome for both the parties and the WCAB, the Board should provide additional procedures to permit a judicial waiver of these limits. To protect the Board's evidentiary record, the regulation should provide some flexibility, based on a showing of good cause to allow the record to be augmented.

Section 10848 -- Supplemental Petitions

Recommendation

When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall ~~not be acknowledged or~~ returned to the filing party.

Discussion

As previously discussed, the paramount concern for the WCAB should always be the integrity and completeness of its evidentiary record. To avoid eliminating

relevant evidence on purely technical grounds, the Board should use sanctions, as appropriate, rather than eliminate potentially valuable evidence without notice to the parties.

Thank you for considering these comments. Please contact me for further clarification or if I can be of any other assistance.

Sincerely,

Michael McClain
General Counsel and Vice President

MMc/pm

cc: CWCI Medical Care Committee
CWCI Claims Committee
CWCI Legal Committee
CWCI Associate Members

In an e-mail sent Tuesday, 4/28/2008, at 2:40 PM, Stephen Suchil stated:

American Insurance Association

[Moderator: Address and Phone Number omitted]

April 28, 2008

Workers' Compensation Appeals Board
Post Office Box 429459
San Francisco, California 94142-9459
Attention: WCAB Forums

Subject: Forum Comment on the Workers' Compensation Appeals Board Rules of Practice and Procedure, Title 8 CCR Section 10301, et. seq.

Ladies and Gentlemen:

These comments for the Workers' Compensation Appeals Board (WCAB) Forum on the proposed WCAB Rules of Practice and Procedure are submitted on behalf of the members of the American Insurance Association (AIA).

AIA is a national trade association representing more than 435 property and casualty insurers that write insurance in every jurisdiction in the United States. AIA member companies offer all types of property and casualty insurance, including personal and commercial automobile insurance, commercial property and liability coverage, workers' compensation, homeowners' insurance, medical malpractice coverage and product liability insurance. AIA represents companies writing both personal and commercial lines of business in the State of California. AIA member companies account for 21 percent of the workers' compensation premiums in California.

I. Introduction

We appreciate the amendments in this proposal to reduce duplication and conflict with the Court Administrator's proposed rules for EAMS. We do, however, continue to be concerned about the shortness of the period of time between when these regulations could be finalized and the August 25, 2008 "go live" date. If the regulated community does not have a reasonable length of time to prepare for the changes we will see confusion with resulting delays in the work of the WCAB.

Additionally, the regulations should address the security of private health information that is transmitted electronically and to provide what back-up

measures are in place should the EAMS crash at any time.

II. Comments

Section 10400 (b)

This section addresses Case Opening documents, but a Case Opening document is not defined in Section 10301. We recommend addition of a definition as it might be helpful to differentiate from documents that are not Case Opening.

Section 10403

Section 10403 also speaks of Case Opening documents in terms of WCAB jurisdiction, but without describing how a Case Opening Compromise and Release, for example, is different than any other Compromise and Release. This should be clarified.

Section 10500 (a)

The WCAB will have the contact data and preferences of the parties, most of whom will likely prefer electronic service. If this is the case, a more efficient process would be for the WCAB itself "to make service of notices of the time and place of hearing, orders approving compromise and release, awards based upon stipulations with request for award and any interim or procedural orders."

Section 10608

This revision is a significant expansion for serving requirements for medical reports and medical-legal reports. We recommend adding a relevance standard for these requests for service and also an allowance for electronic service if the parties agree.

Section 10770.5 (a)

Subparagraphs (2) and (3) of Section 10770.5 (a) require a lien filer to attach a verification under penalty of perjury that the lien is being filed after the statutory period for payment has elapsed for the medical treatment or medical-legal services. Many liens are filed for portions of payment that are in dispute. We recommend that the verification also contain an attestation that the lien is confined to amounts payable under the Administrative Director's fee schedules or the contracted amount.

Sections 10840 (a) (3), 10843 (a) and 10865 (b)

These provisions are amended to state that if Petitions for Reconsideration and/or Removal are filed incorrectly, such as at the wrong location, the Petitions may be discarded. We strongly urge that, should the WCAB plan to discard documents, parties to the action be notified so that corrective actions may be taken.

Section 10845

We recommend adding Separator Sheets to the pages not included in the 25/10 page limit and authorizing a judicial waiver of the 25/10 page limit if deemed necessary.

III. Conclusion

We appreciate the opportunity to respond to these proposed revisions. Please contact me should there be any comments or questions as to the above comments.

Sincerely,

STEPHEN SUCHIL
Assistant Vice President