

The Workers' Compensation Appeals Board (WCAB) is posting the following proposed changes to its Rules of Practice and Procedure (Rules) on its web forum for informal public comment. The WCAB is largely proposing these changes in light of SB 863, although some proposed changes are not strictly related to SB 863. For the most part, the WCAB is deferring any rulemaking relating to AB 1429 (i.e., the re-numbering and possible amendment of the old Court Administrator Rules) as well as other rule changes the WCAB might be considering. A rationale for each proposed change is discussed immediately below the tentative draft rule. Proposed changes to the WCAB's Rules are reflected by underlining (indicating new language), by double-underlining (indicating new language that will be single-underlined for emphasis in the final text), and by ~~strike-throughs~~ (indicating deleted language).

The informal public comment period will begin on Friday, December 21, 2012 and will end at 5pm on Wednesday, January 9, 2013. After the closure of the informal public comment period, the WCAB will take the informal comments into consideration and make any modifications to the proposed regulations that it deems appropriate. Thereafter, the WCAB will submit its package of proposed regulations to the Office of Administrative Law (OAL) to commence the formal public comment period, culminating in a public hearing. The WCAB will announce the beginning of the formal public comment period and the date of the public hearing in various ways, including on DWC's Newswire.

The WCAB understands that some members of the workers' compensation community may disagree with certain provisions of SB 863. The WCAB, however, will not consider any comments to the extent they are based on disagreements with SB 863's statutory provisions. Any such complaints should be directed to the Legislature. The WCAB, of course, will consider comments suggesting that its proposed Rules are inconsistent with SB 863 and/or exceed the WCAB's rulemaking authority.

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**Tentative Proposed Changes to
California Code of Regulations, Title 8
Chapter 4.5. Division of Workers' Compensation
Subchapter 1.9. Rules of the Court Administrator
&
Subchapter 2. Workers' Compensation Appeals Board--Rules
of Practice and Procedure**

Subchapter 1.9. Rules of the Court Administrator

**Article 5. Declarations of Readiness to Proceed and Objections and Hearing
Calendars**

§ 10250. Declaration of Readiness to Proceed

(a) Except when a hearing is set on the Workers' Compensation Appeals Board's own motion, Applications or petitions no matter shall not be placed on calendar for mandatory settlement conferences, status conferences, priority conferences, expedited hearing or any other hearing unless one of the parties has filed and served a declaration of readiness to proceed in the form prescribed by the Appeals Board court administrator. The declaration of readiness shall be served on all other parties and lien claimants.

(b)(1) Except for a lien claimant listed in section 10205.10(c)(5), a declaration of readiness shall not be filed by any lien claimant unless it is a "party" as defined by section 10301(dd)(3).

(2) Where a lien claimant is required to pay a filing or activation fee, it shall not file a declaration of readiness unless it has: (A) paid the requisite fee; and (B) entered a valid confirmation number for that fee in the confirmation number field of the declaration of readiness form. If the lien claimant asserts it is exempted from payment of a fee, it shall indicate the basis for the claimed exemption in the designated field of the lien form.

(b)(c) All declarations of readiness to proceed shall state under penalty of perjury that the moving party has made a genuine, good faith effort to resolve the dispute before filing the declarations of readiness to proceed, and shall state with specificity the same on the declarations of readiness to proceed. Unless a status or priority conference is requested, the declarant shall also state under penalty of perjury that the moving party has completed discovery and is ready to proceed on the issues specified in the declaration of readiness.

(e)(d)(1) A false declaration or certification by any party, lien claimant, attorney or representative, including a false declaration or certification pertaining to payment of a lien filing or activation fee, may give rise to proceedings under Labor Code section 134 for contempt or Labor Code section 5813 for sanctions.

(2) Except for lien claimants listed in section 10205.10(c)(5), if a declaration of readiness is filed without complying with the provisions of this section, the Workers' Compensation Appeals Board may order the hearing off calendar and may impose sanctions and award attorney's fees and costs in accordance with Labor Code section 5813 and section 10561.

~~(d)~~(e) If a party or lien claimant is represented by an attorney or representative any declaration of readiness filed on behalf of the party shall be executed by the attorney or representative.

Note: Authority cited: Sections ~~127.5~~, 133, 5307(e), ~~and~~ 5502(a), 5708, Labor Code. Reference: Sections ~~134~~, 4903.05, 4903.06, 5500.3, 5502 and 5813, Labor Code.

RATIONALE:

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

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

Rule 10250 was adopted by the former Court Administrator under sections 5307, 5500.5, and 5502(a). Therefore, it is now “deemed to be” a regulation of the WCAB and it may be “amended” by the WCAB.

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

However, with certain exceptions,¹ SB 863 provides that: (1) “[a]ll liens filed on or after January 1, 2013, for expenses under subdivision (b) of Section 4903 or for claims of costs

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

shall be subject to a filing fee” (Lab. Code, § 4903.05(c));² and (2) “[a]ny lien filed pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1, 2013, shall be subject to a lien activation fee” (Lab. Code, § 4903.06(a)).

Further, Labor Code section 4903.06(a)(2) expressly provides: “The lien claimant shall include proof of payment of the filing fee or lien activation fee *with the declaration of readiness to proceed.*” (Stats. 2012, ch. 363, § 64 [italics added].)

Therefore, the WCAB is proposing to add Rule 10250(b)(2) so that it is consistent with section 4903.06(a)(2).

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

The WCAB is also proposing to add Rule 10250(b)(1), which would provide that no lien claimant, except for Rule 10205.10(c)(5) lien claimants,³ can file a DOR unless it is a “party” as defined by proposed Rule 10301(dd)(3) (currently, Rule 10301(x)(3)), regardless of whether it is subject to a lien filing or activation fee.⁴

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

² SB 863 amended Labor Code section 4903(b) to the effect that medical-legal costs are no longer allowable as lien claims. (Stats. 2012, ch. 363, § 62.) Nevertheless, under SB 863, medical-legal costs and other “claims of costs” may be filed in the *using a lien form* (Lab. Code, § 4903.05(b)) and, if so filed, such claims are subject to the lien filing and activation fees (Lab. Code, §§ 4903.05(c)(7), 4903.06(b)), unless they are exempt.

³ In essence, section 10205.10(c)(5) [formerly, section 10228(c)(5)] lien claimants are people who are self-represented (or represented by non-attorneys) who are seeking reimbursement for living expenses, burial expenses, or spousal/child support. These liens represent a relatively minuscule portion of those filed with the WCAB and, given the nature of these liens, the WCAB sees no reason why these lien claimants cannot file a DOR at any time.

⁴ Under proposed Rule 10301(dd)(3), a non-employee petitioner for costs would be treated as a lien claimant for purposes of determining whether it is a “party.”

The WCAB is also proposing to amend Rule 10250(c) (current Rule 10250(b)) to make it more consistent with the currently existing declaration of readiness forms (i.e., sections 10205.16 and 10205.17 [formerly, sections 10250.1 and 10252.1]),⁵ which provide: “Declarant states under penalty perjury that he or she is presently ready to proceed to hearing on the issues below” and that “unless a status or priority conferences requested, I have completed discovery on the issues listed above.”

Subchapter 2. Workers’ Compensation Appeals Board--Rules and Practice Procedure

Article 1. General

§ 10300. Adoption, Amendment or Rescission of Rules.

(a) Notices required by Labor Code Sections 5307 and 5307.4 shall be served by the Appeals Board by regular mail, fax, electronic mail or any similar technology, not less than thirty (30) days prior to the date of hearing on those who have on file with the Secretary of the Workers’ Compensation Appeals Board in San Francisco a written request for notification. Notice of action taken shall be served on the same persons by regular mail within thirty (30) days following the filing of any order pertaining to the rules with the Secretary of State.

(b) The provisions of these Rules are severable. If any provision of these Rules, or the application thereof to any person or circumstances, is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

NOTE: Authority cited: Sections 133, 5307, 5309, and 5708, Labor Code. Reference: Section 5307.4, Labor Code; Stats. 1984, ch. 252, § 7; Stats. 1993, ch. 117, § 2; Stats. 2004, ch. 34, § 48.

RATIONALE:

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

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

Stats. 2004, ch. 34, § 48) and consistent with the provision of Labor Code section 4610.6(n), as enacted by SB 863 (Stats. 2012, ch. 363, § 46.)

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

§ 10301. Definitions

As used in this subchapter:

(a) "Administrative Director" means the Administrative Director of the Division of Workers' Compensation or his or her designee.

(b) "Adjudication file" or "ADJ file" means a case file in which the jurisdiction of the Workers' Compensation Appeals Board has been invoked and which is maintained by the Division of Workers' Compensation in paper format, electronic format, or both, including a temporary paper case file.

(c) "Appeals Board" means the commissioners and deputy commissioners of the Workers' Compensation Appeals Board acting en banc, ~~or~~ in panels, or individually.

(d) "Applicant" or "injured employee" or "injured worker" means any person asserting a right to relief under the provisions of Labor Code Section 5300.

(e) "Application for Adjudication" or "application" means the initial pleading that asserts a right to relief under the provisions of Labor Code Section 5300.

(f) "Carve-out case" means a workers' compensation case that, in accordance with the criteria specified in Labor Code sections 3201.5 through 3201.9, is subject to an alternative dispute resolution (ADR) system that supplements or replaces all or part of the dispute resolution processes contained in Division 4 of the Labor Code.

(g) "Case opening document" means any document that creates an adjudication case and invokes the jurisdiction of the Workers' Compensation Appeals Board for the first time.

~~(h) "Court Administrator" means the administrator of the workers' compensation adjudicatory process at the trial level, or his or her designee.~~

(h) “Cost” means any expense that is not allowable as a lien under Labor Code section 4903. A “cost” includes, but is not limited to:

(1) medical-legal expenses under Labor Code section 4620 et seq.;

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

(3) costs under Labor Code section 5811;

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

(5) interpreter’s fees that are not otherwise covered by Labor Code sections 4600, 4620 et seq., and 5811.

“Cost” shall not include interpreter’s fees incident to medical treatment, which shall be filed only as a section 4903(b) lien.

(i) “Declaration of Readiness to Proceed” or “Declaration of Readiness” means a request for a ~~proceeding~~hearing at a district office.

(j) “Declaration of Readiness to Proceed to Expedited Hearing” means a request for a ~~proceeding~~hearing at a district office pursuant to Labor Code section 5502(b).

(k) “Defendant” means any person against whom a right to relief is claimed.

(l) “Director” means the Director of Industrial Relations or his or her designee.

~~(m)~~(m) “District office” means a location of a trial court of the Workers’ Compensation Appeals Board.

~~(n)~~(n) “Document” is a pleading, petition, medical report, record, declaration, exhibit, or another filing submitted by a party or lien claimant, including an electronically filed document or a scanned version of a document that was filed in paper form. Each medical report or other record having a different author and/or a different date is a separate “document.”

~~(o)~~(o) “Document cover sheet” means the form adopted by the Court Administrator under section ~~10232.4~~ 10205.13, which is placed on top of a document or set of documents being filed at one time in a specific case.

~~(o)~~(p) “Document separator sheet” means the form ~~adopted by the Court Administrator~~ under section ~~10232.2~~ 10205.14, which is placed on top of each individual document, when one or more documents are being filed at the same time in the same case, and which is placed on top of each individual attachment to each document being filed, when a document has one or more attachments.

~~(p)~~(q) “Electronic Adjudication Management System” or “EAMS” means the computerized case management system used by the Division of Workers’ Compensation to electronically store and maintain adjudication files and to perform other case management functions.

(r) “Electronic filing” or “e-filing” means the electronic transmission of a document into EAMS for purposes of filing it with the Workers’ Compensation Appeals Board, in accordance with the provisions of these rules and the rules of the Administrative Director.

~~(q)~~(s) “Fax” means a document that has been electronically served by a facsimile (fax) machine or other fax technology.

~~(r)~~(t) To “file” a document means: (1) to deliver a document or cause it to be delivered to the district office with venue or to the Appeals Board for the purpose of having it included in the adjudication file; or (2) to electronically transmit a document to EAMS for the purpose of having it included in the adjudication file.

~~(s)~~(u) “Hearing” means any trial, mandatory settlement conference, rating mandatory settlement conference, status conference, lien conference, or priority conference at a district office or before the Appeals Board.

(v) “Lien” and “lien claim” shall include any claim of costs filed utilizing a lien claim form, even though a claim of costs is not allowable as a lien against the injured employee’s compensation.

(w) “Lien activation fee” or “activation fee” is the fee payable under Labor Code section 4903.06(a)(1) for a medical treatment and/or medical-legal cost lien filed prior to January 1, 2013, unless the lien claimant: (1) is exempted from the fee by Labor Code section 4903.06(b); or (2) provides proof of having paid a filing fee as previously required by former Labor Code section 4903.05 as added by Chapter 639 of the Statutes of 2003.

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

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

(z) “Lien issue(s)” shall include any issue(s) relating to a claim of costs filed as a lien claim.

~~(u)~~(aa) “Lien conference” means a proceeding, including a proceeding following an order of consolidation, held in accordance with section 10770.1 for the purpose of assisting the parties in resolving disputed lien claims or claims of costs filed as liens pursuant to Labor Code section 4903 or 4903.1 or, if the dispute cannot be resolved, to frame the issues and stipulations and to list witnesses and exhibits in preparation for a lien trial.

~~(v)~~(bb) “Mandatory settlement conference” means a proceeding to assist the parties in resolving their dispute or, if the dispute cannot be resolved, to frame the issues and stipulations and to list witnesses and exhibits in preparation for a trial.

~~(w)~~(cc) “Optical character recognition form” or “OCR form” means a paper form designed to be scanned so that its information is automatically extracted and stored in EAMS.

~~(x)~~(dd) “Party” means: (1) a person claiming to be an injured employee or the dependent of a deceased employee; (2) a defendant; or (3) a lien claimant or a non-employee petitioner for costs where either (A) the underlying case of the injured employee or the dependent(s) of an injured a deceased employee has been resolved or (B) the injured employee or the dependent(s) of a deceased employee choose(s) not to proceed with his, her, or their case.

~~(y)~~(ee) “Petition” means any request for action by the Workers’ Compensation Appeals Board other than an Application for Adjudication, an Answer or a Declaration of Readiness to Proceed.

~~(z)~~(ff) “Priority conference” means a proceeding in which the applicant is represented by an attorney and the issues in dispute at the time of the proceeding include employment and/or injury arising out of and in the course of employment.

~~(aa)~~(gg) “Rating mandatory settlement conference” means a mandatory settlement conference conducted to facilitate determination of the existence and extent of permanent disability through the use of informal ratings issued by the Disability Evaluation Unit, where the only unresolved issues are permanent disability and the need for future medical treatment.

~~(bb)~~(hh) “Regular hearing” means a trial.

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

the injured employee and not subject to a lien against the employee's compensation, including but not limited to: (1) reasonable transportation, meal, or lodging expenses incident to the medical treatment that were paid by the employee; or (2) temporary disability indemnity for each day of lost wages.

~~(ee)~~(jj) To “serve” a document means to personally deliver a copy of the document, or to send it in a manner permitted by these rules or the rules of the ~~Court Administrator~~Administrative Director, to a party, lien claimant, or attorney who is entitled to a copy of the document.

~~(dd)~~(kk) “Status conference” means a proceeding set for the purpose of ascertaining if there are genuine disputes requiring resolution, of providing assistance to the parties in resolving disputes, of narrowing the issues, and of facilitating preparation for trial if a trial is necessary.

~~(ee)~~(ll) “Submission” means the closing of the record to the receipt of further evidence or argument.

~~(ff)~~(mm) “Trial” means a proceeding set for the purpose of receiving evidence.

~~(gg)~~(nn) “Venue” means the district office, as established by Labor Code section 5501.5 or 5501.6, at which any trial level proceedings will be conducted and from which any trial level orders, decisions, or awards will be issued.

~~(hh)~~(oo) “Workers’ Compensation Appeals Board” means the Appeals Board, commissioners, deputy commissioners, presiding workers’ compensation judges and workers’ compensation judges.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections ~~20, 54,~~ 110, 130, 131, 134, 3201.5 et seq., 4903 et seq., 5300, 5307, 5309, 5310, 5500, 5500.3, 5501, 5501.5, 5501.6, 5502, 5700, 5701 and 5808, Labor Code.

RATIONALE:

The WCAB is proposing to make various amendments to Rule 10301. Except for the proposed changes discussed below, the amendments are essentially self-explanatory, including deleting the references to “Court Administrator” because that position was eliminated by Assembly Bill No. 1426 (Stats. 2011, ch. 639 [AB 1426]).

The WCAB is proposing to add Rule 10301(h) to define “cost.” This definition is needed because of the proposed addition of Rule 10451 regarding petitions for costs and the proposed amendment of Rule 10770 regarding claim of costs liens. These proposed changes are needed in part because of SB 863’s amendment of Labor Code section 4903(b), which makes medical-legal costs non-lienable, and its addition of Labor Code section 4903.05(b), which nevertheless provides that “claims of costs” may be filed as a lien.

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

The WCAB is also proposing to add Rule 10301(r) to define “electronic filing” or “e-filing.” When the EAMS rules were initially adopted in November 2008, only very limited e-filing was allowed under the e-filing trial rule (section 10205.11 [formerly, section 10229]). The scope of e-filing has been expanded since then and will continue to be expanded in the future.

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

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

The WCAB is also proposing to amend Rule 10301(aa) (current Rule 10301(u)) to add language reflecting that a “lien conference” means a proceeding “held in accordance with section 10770.1.” The addition of this phrase is to emphasize that a “lien conference” is subject to the provisions of Rule 10770.1, filed with the Secretary of State on May 21, 2012, including but not limited to the preparation of a pre-trial conference statement and discovery closure. Further, the WCAB is proposing to amend Rule 10301(bb) to expressly provide that lien conferences may include the consolidation of multiple liens under Rule 10589.

The WCAB is also proposing to add Rule 10301(ii) to add a definition of “section 4903(b) lien,” which is a repeatedly used in the proposed Rules. It is defined to mean a lien for section 4600 et seq. medical treatment expenses filed in accordance with section 4903(b). A “section 4903(b) lien” shall include, but is not limited to, interpreter’s fees incurred in connection with medical treatment. A “section 4903(b) lien” does not include any amount payable directly to the injured employee and not subject to a lien against the employee’s compensation, including but not limited to reasonable transportation, meal, or lodging expenses incident to the medical treatment that were paid by the employee and temporary disability indemnity for each day of lost wages.

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Article 5. Pleadings

§ 10451. Petition for Costs.

(a) Any person or entity may file 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. The petition for costs shall append: (1) a copy of the written demand, together with a copy of its proof of service; and (2) a copy of the defendant's response, if any. A petition that fails to comply with these provisions shall be dismissed.

(c) If the petition for costs seeks payment for any medical treatment goods or services that are lienable under Labor Code section 4903(b) or that are subject to independent medical review and/or independent bill review, the entire petition shall be dismissed. In addition, the petition shall not preserve or extend the time for filing a lien claim under Labor Code section 4903.5, whether or not the petition was accepted for filing, and it shall not relieve the petitioning person or entity from the lien filing fee, lien activation fee, and other provisions of Labor Code sections 4903.05 and 4903.06 and their related regulations.

(d) A petition for costs for medical-legal expenses under Labor Code section 4620 et seq. shall not be filed: (1) more than 18 months after the date the services were provided, if the services were provided on or after July 1, 2013; and (2) more than three years from the date the services were provided, if the services were provided prior to July 1, 2013. An untimely petition for medical-legal costs shall be dismissed. Where a lien for medical-legal expenses is time-barred under former Labor Code section 4903.5, the claim for medical-legal expenses shall not be resurrected by filing a petition for costs.

(e) The petition shall be identified as a "Petition for Costs."

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

(g) The petition shall be filed as follows:

(1) if an application was previously filed, the petition, unless e-filed, shall be filed only with the district office having venue;

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

(h) If the petition for costs is filed by a person or entity who is not already a party or lien claimant of record, the petition shall be accompanied by a notice of representation, even if the petitioner is self-represented.

(i) Notwithstanding section 10280(c), a petition for costs may be submitted on a walk-through basis utilizing the procedures of section 10280, subject to any limitations on walk-through documents imposed by Policy and Procedure Manual 1.25, which is adopted and incorporated by reference.

(j)(1) A petition for costs shall be placed on calendar: (A) on the filing of a declaration of readiness; or (B) on the Workers' Compensation Appeals Board's own motion. A declaration of readiness may be filed at any time if the petitioner is an injured employee or a dependent of a deceased employee. In all other instances, a declaration of readiness shall not be filed unless the petitioner is a "party" as defined by section ~~10301(x)(3)~~10301(dd)(3).

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

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4600, 4903 et seq., 5710, and 5811, Labor Code.

RATIONALE:

Prior to SB 863, former Labor Code section 4903(b) provided that claims for medical-legal expenses were to be filed as liens against the applicant's compensation even though these expenses were ordinarily the direct liability of the defendant under sections 4621 and 4622. SB 863 amended section 4903(b) to exclude medical-legal expenses from the statutory list of items that are allowable as a lien against compensation. (Stats. 2012, ch. 363, § 62.)

Concurrently, the Legislature added Labor Code section 4903.05. (Stats. 2012, ch. 363, § 63.) In relevant part, section 4903.05(b) states: "Any lien claim for [medical treatment] expenses under subdivision (b) of Section 4903 *or for claims of costs* shall be filed with the appeals board electronically using the form approved by the appeals board." (Italics added.) This language suggests 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.⁶

Proposed Rule 10451(a) would expressly provide that claims for costs, including but not limited to medical-legal costs, also may be requested by the filing of a petition.

Proposed Rule 10451(b) would provide that no petition for costs shall be filed or served until at least 90 days after a written demand has been sent to the defendant. This will encourage the parties to informally resolve any costs issues before presented them to the WCAB for adjudication, which will increase efficiency in the workers' compensation system and reduce the burdens on limited judicial resources.

Proposed Rule 10451(c) would provide that a petition for medical-legal costs shall not be filed: (1) more than 18 months after the date the services were provided, if the services were provided on or after July 1, 2013; and (2) more than three years from the date the services were provided, if the services were provided prior to July 1, 2013.

The reasons for this proposed provision are as follows.

Under current (i.e., pre-SB 863) law, both medical treatment and medical-legal expenses are submitted as liens under Labor Code section 4903(b). Furthermore, current Labor Code section 4903.5(a) imposes a time limitation on *all* Labor Code section 4903(b) expenses. Therefore, currently, medical-legal expenses are subject to the Labor Code section 4903.5(a) statute of limitations.

Under SB 863, Labor Code section 4903.5(a) still imposes a statute of limitations for “[a] lien claim for expenses as provided in subdivision (b) of Section 4903.” However, SB 863 amended Labor Code section 4903(b) to exclude medical-legal expenses as a lienable item. Therefore, it appears there *might* no longer be a statute of limitations for medical-legal costs that are filed as “claims of costs” liens on or after January 1, 2013 (see Lab. Code, § 4903.05(b)), although such liens are subject to a filing fee (see Lab. Code, § 4903.05(c)).

Yet, while the Legislature might not have established a statute of limitations for medical-legal claims of costs filed as a lien, the Legislature definitely has not established any statutes of limitations for petitions for costs, which is a method of claiming medical-legal and other costs the WCAB is establishing by regulation. Therefore, the WCAB, under its rule-making authority (see Lab. Code, §§ 133, 5307, 5309, 5708), can establish time limits for the filing of a petition for costs.

⁶ Implicit in this language is a legislative recognition that billings by medical providers will often contain a mix of medical treatment charges, medical-legal charges, and other costs. However, section 4903.05(c) further provides that all claims of costs filed by a lien form “shall be subject to a filing fee.” Therefore, a person or entity seeking reimbursement for medical-legal or other claims of costs may prefer to file a petition for costs, rather than seeking reimbursement through the filing of a lien form.

Proposed Rule 10451(c) requires that a petition for medical-legal costs shall be filed within the same time frame as the section 4903.6 a medical treatment lien, i.e., within: (1) 18 months after the date the services were provided, if the services were provided on or after July 1, 2013; and (2) three years from the date the services were provided, if the services were provided prior to July 1, 2013.

The WCAB believes this timely filing requirement is appropriate because the problem with so-called “zombie liens”—i.e., the resurrection of ancient medical bills—exists both with medical treatment bills and medical-legal bills. That is, the anecdotal evidence suggests that there are a significant number of long-standing allegedly unpaid or partially unpaid bills from agreed medical evaluators (AMEs) and qualified medical evaluators (QMEs) and, more importantly, unpaid bills from secondary evaluators and/or diagnostic facilities to whom some AMEs and QMEs routinely refer injured employees.

Proposed Rule 10451(d) would specify that if a petition for costs includes a claim for reimbursement of any lienable medical treatment goods or services, the entire petition shall be dismissed and its lodging shall not preserve or extend the section 4903.5 statute of limitations and shall not relieve the petitioner from the lien filing fee, lien activation fee, and other provisions of sections 4903.05 and 4903.06. The purpose of this provision is to discourage the filing of petitions for costs that include reimbursement requests that should be filed as a lien claim and, in particular, to prevent a medical provider from attempting to circumvent the lien filing fee, lien activation fee, and other provisions of sections 4903.05 and 4903.06.

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

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

Proposed Rule 10451(i) would allow a petition for costs to be submitted using the walk-through procedure of Rule 10280, subject to any limitations on the filing of walk-through documents by the Policy and Procedure Manual.

Proposed Rule 10451(j) provides that a petition for costs shall not be placed on calendar unless a DOR is filed. It also provides that a DOR may be filed at any time by an injured employee or the dependent of a deceased employee, but otherwise one shall not be filed unless the petitioner is a “party” under proposed Rule 10301(dd)(3) (formerly, Rule 10301(x)(3)) (see also Rule 10250). However, proposed Rule 10451(j) would also establish a notice of intention procedure by which a petition for costs could be determined without setting a hearing.

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§ 10498. Special Requirements for Pleadings Filed or Served by Attorneys or by Non-Attorney Employees of an Attorney or Law Firm.

Where a party or lien claimant is represented by an attorney, all pleadings filed with the Workers' Compensation Appeals Board or served on any party, lien claimant, or other person shall include the name, State Bar number, law firm, if any, business address, and business telephone number of the attorney.

If a non-attorney employee of an attorney or law firm is executing the pleading being filed or served, the pleading shall include a heading containing the non-attorney's name and the name, State Bar number, law firm, if any, business address, and business telephone number of the attorney primarily responsible for supervising the non-attorney.

For purposes of this section, "pleading" shall include, but is not limited to, any petition, answer, application for adjudication, declaration of readiness, subpoena, or subpoena duces tecum, but shall not include any form pleading if there is no designated space on the form for the requisite information.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 5000, 5501, 5505, 5900 et seq., Labor Code; Sections 10232(a)(4), 10450, 10773, title 8, California Code of Regulations; Rules 2.111(1), 8.204(b)(10)(D), California Rules of Court.

RATIONALE:

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

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

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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.

(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.

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.

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

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

However, Code of Civil Procedure section 1985 does not allow a self-represented party to sign and issue a subpoena. 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. Nevertheless, the issuance of a subpoena is a ministerial act (see *People v. Blair* (1979) 25 Cal.3d 640, 651)⁷ 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.

For the reasons that follow, proposed Rule 10530 would not allow non-attorney representatives of non-party lien claimants to sign and serve subpoenas.⁸

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.

⁷ *Blair* states: “The issuance of a subpoena ... is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein until a judicial determination has been made that the person is legally entitled to receive them.”

⁸ Under proposed Rule 10301(dd)(3) (formerly, Rule 10301(x)(3)), a lien claimant does not become a “party” in WCAB proceedings unless the underlying claim of the injured employee has resolved or the injured employee has chosen not to proceed with his or her case.

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.

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.

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.

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.

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.

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Article 8. Hearings

§ 10582.5. Dismissal of Inactive Lien Claims for Lack of Prosecution

(a) A lien claim may be dismissed for lack of prosecution on a petition filed by a party or on the Workers' Compensation Appeals Board's own motion if the lien claimant fails to file a declaration of readiness to proceed by the earlier of:

(1) 180 days after the lien claimant becomes a "party" within the meaning of section ~~10301(x)(3)~~10301(dd)(3); or

(2) 180 days after a lien conference or lien trial at which the lien claim was at issue is ordered off calendar.

The 180-day period of subdivision (a)(1) is computed from the date that the original owner of the lien claim became a party or would have become a party if it still owned the lien claim.

(b) At least 30 days prior to filing a petition to dismiss a lien claim for lack of prosecution, the petitioner shall send a letter to the lien claimant *and*, if represented, to the lien claimant's attorney or representative of record, stating petitioner's intention to file such a petition.

(c) A petition to dismiss a lien claim for lack of prosecution shall be accompanied by all of the following:

(1) A copy of the 30-day letter referenced in subdivision (b).

(2) A declaration under penalty of perjury stating whether:

(A) the lien claimant has served the petitioner with a declaration of readiness and, if so, the date of such service.

(B) the petitioner has received any billing(s) from the lien claimant and, if so, stating either:

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

(ii) the reason(s) why no such payment or tender of payment was made.

(C) the petitioner has timely served all medical reports and medical-legal reports on the lien claimant, to the extent ~~required~~provided by section ~~10608(f)~~10608.

(d) In addition to the requirements of subdivision (c), a petition to dismiss a lien claim for lack of prosecution shall be accompanied by the following, as applicable:

(1) If the petition seeks dismissal under section 10582.5(a)(1) based on the lien claimant's failure to file a declaration of readiness to proceed within 180 days after the underlying case has resolved within the meaning of section ~~10301(x)(3)(A)~~10301(dd)(3)(A), the petition shall be accompanied by:

(A) a copy of an order approving a compromise and release agreement, a stipulated Findings and Award, an adjudicated Findings and Award, or any other decision or order resolving the underlying case; and

(B) if this decision or order was served by designated service under section 10500(a), proof that it was served on the lien claimant.

(2) If the petition seeks dismissal under section 10582.5(a)(1) based on the lien claimant's failure to file a declaration of readiness to proceed within 180 days after the injured employee or the dependent(s) of a deceased employee "choose(s) not to proceed with his, her, or their case" within the meaning of section ~~10301(x)(3)(B)~~10301(dd)(3)(B), the petition shall be accompanied by a declaration concisely stating facts to support the "choose(s) not to proceed" allegation. This declaration, at a minimum, shall specify based on the petitioner's knowledge and belief:

(A) the nature and date of the last activity by the injured employee or the dependent(s) of a deceased employee relating to the case; and

(B) the nature and date of the last payment of disability indemnity.

(3) If the petition seeks dismissal under section 10582.5(a)(2), the petition shall be accompanied by a copy of the order taking the lien conference or lien trial at which the lien claim was at issue off calendar.

(e) A copy of the petition to dismiss a lien claim for lack of prosecution shall be served on each of the following, together with a proof of service:

(1) the lien claimant *and*, if represented, the lien claimant's attorney or representative of record;

(2) any defendant(s) in any case(s) listed on the lien claim *or*, if represented, the attorney or representative of record of any such defendant(s); and

(3) the injured employee and, if represented, the injured employee's attorney or representative of record.

(f) A lien claim shall not be dismissed for lack of prosecution unless:

(1) the Workers' Compensation Appeals Board has issued a notice of intention to dismiss with or without prejudice, giving the lien claimant at least 30 days to file written objection showing good cause to the contrary; and

(2) the lien claimant fails to timely object or the written objection, on its face, fails to show good cause.

Any objection to the notice of intention shall be filed with the Workers' Compensation Appeals Board and served on the defendant(s).

(g) If a defendant is designated to serve the notice of intention to dismiss under section 10500(a), the defendant shall serve the notice of intention within 10 business days. If the defendant does not receive a timely objection (taking into consideration the time extension provisions of sections 10507 and 10508), the defendant shall file and serve a proposed order dismissing the lien and copies of the notice of intention and the notice's proof of service.

(h) An order dismissing a lien claim for lack of prosecution shall be served only by the Workers' Compensation Appeals Board and not by designated service.

(i) All pleadings and declarations filed under this section shall be verified under penalty of perjury in the manner required for verified pleadings in courts of record.

(j) This section shall become operative on August 1, 2012 and, except as provided in subdivision (k), shall apply to all lien claims, regardless of the date of filing of the lien claim, the injured employee's date(s) of injury, or the date(s) on which the lien claimant provided the service(s) that are the subject of the lien claim.

(k) This section shall not apply to the lien claim(s) of any of the following: (1) the Employment Development Department; (2) the California Victims of Crime Program; (3)

any lien claimant listed as being excepted under parts (A) through (C) of section ~~10228(c)(5)~~10205.10(c)(5); and (4) any governmental entity pursuing a lien claim for child support or spousal support; and (5) the Uninsured Employers Benefits Trust Fund.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4903, 4903.5, 4903.6, 5404.5, Labor Code.

RATIONALE:

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

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

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

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

Article 9. Evidence and Reports

§ 10606. Physicians' Physician and Vocational Expert Reports as Evidence

(a) The Workers' Compensation Appeals Board favors the production of medical and vocational expert evidence in the form of written reports. Direct examination of a medical or vocational expert witness will not be received at a trial except upon a showing of good cause. A continuance may be granted for rebuttal medical testimony subject to Labor Code Section 5502.5. A continuance may be granted for rebuttal testimony of a vocational expert report if a report that was not served sufficiently in advance of the close of discovery to permit rebuttal is admitted into evidence.

(b) Medical reports should include where applicable:

~~(a)~~(1) the date of the examination;

~~(b)~~(2) the history of the injury;

~~(c)~~(3) the patient's complaints;

~~(d)~~(4) a listing of all information received from the parties reviewed in preparation of the report or relied upon for the formulation of the physician's opinion;

~~(e)~~(5) the patient's medical history, including injuries and conditions, and residuals thereof, if any;

~~(f)~~(6) findings on examination;

~~(g)~~(7) a diagnosis;

~~(h)~~(8) opinion as to the nature, extent, and duration of disability and work limitations, if any;

~~(i)~~(9) cause of the disability;

~~(j)~~(10) treatment indicated, including past, continuing, and future medical care;

~~(k)~~(11) opinion as to whether or not permanent disability has resulted from the injury and whether or not it is stationary. If stationary, a description of the disability with a complete evaluation;

~~(l)~~(12) apportionment of disability, if any;

~~(m)~~(13) a determination of the percent of the total causation resulting from actual events of employment, if the injury is alleged to be a psychiatric injury;

~~(n)~~(14) the reasons for the opinion; and,

~~(o)~~(15) the signature of the physician.

~~Failure to comply with (a) through (o) will be considered in weighing the evidence.~~

In death cases, the reports of non-examining physicians may be admitted into evidence in lieu of oral testimony.

(c) All medical-legal reports shall comply with the provisions of Labor Code Section 4628. Except as otherwise provided by the Labor Code, including Labor Code Sections 4628 and 5703, and the rules of practice and procedure of the Appeals Board, failure to comply with the requirements of this section will not make the report inadmissible but will be considered in weighing the evidence.

(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;

(B) utilization review and independent medical review have been completed, a timely appeal has been filed, and a treating physician has incorporated the findings of the report under Labor Code section 4061.5;
or

(C) the injury occurred on or before December 31, 2012 and the utilization review decision is communicated to the requesting physician on or before June 30, 2013.

(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.

Note: Authority cited: Sections 133 and 5307, Labor Code. Reference: Sections 4061, 4603.2, 4603.2, 4603.3, 4603.6, 4610.5, 4610.6, 4616.3, 4616.4, 4628, 5703, 5708 and 5709, Labor Code.

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RATIONALE:

The WCAB is proposing to amend Rule 10606 for several reasons.

The WCAB is proposing to amend Rule 10606(a) to add provisions regarding vocational expert reports that are consistent with Labor Code section 5703(j), as adopted by SB 863. (Stats. 2012, ch. 363, § 81.)⁹

The WCAB is also proposing to add a subdivision (c)(1) which would provide that the report of an agreed medical evaluator (AME) or qualified medical evaluator (QME) shall not be admissible for the purpose of resolving an objection to a treating physician's determination concerning continuing medical care, unless: (A) a defendant's utilization review (UR) was untimely or otherwise invalid; (B) UR and independent medical review (IMR) have been completed, a timely IMR appeal has been filed, and a treating physician has incorporated the findings of the AME's or QME's report under Labor Code section 4061.5; or (C) the injury occurred on or before December 31, 2012 and the UR decision is communicated to the requesting physician on or before June 30, 2013.

Similarly, the WCAB is proposing to add a subdivision (c)(2) which would provide that the report of an AME or QME addressing the need for continuing medical care shall be admissible for the purposes of making a general report of future medical treatment, assessing the adequacy of a compromise and release, or determining disputed lien claims or claims of costs.

The WCAB's proposed adoption of subdivisions (c)(1) and (2) stems largely from certain amendments made to Labor Code section 4061 by SB 863. Specifically, in relevant part, section 4061 was amended to read:

This section shall not apply to the employee's dispute of a utilization review decision under Section 4610, nor to the employee's dispute of the medical provider network treating physician's diagnosis or treatment recommendations under Sections 4616.3 and 4616.4.

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

⁹ Labor Code section 5703(j) provides: "Reports of vocational experts. If vocational expert evidence is otherwise admissible, the evidence shall be produced in the form of written reports. Direct examination of a vocational witness shall not be received at trial except upon a showing of good cause. A continuance may be granted for rebuttal testimony if a report that was not served sufficiently in advance of the close of discovery to permit rebuttal is admitted into evidence."

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

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

The WCAB, however, does not believe the Legislature intended that AMEs and QMEs should never address specific medical treatment that the employee might need in the future, i.e., treatment that has not been recommended by a treating physician and that is not the subject of a current dispute. Having an AME or QME report specifically address future treatment issues will assist the parties in settling cases and assist the WCAB in assessing the adequacy of proposed compromise and release agreements (C&R), both of which would reduce litigation and/or the number of hearings before the WCAB. Also, if a dispute over a treating physician's recommended treatment arises in a non-C&R'd case subsequent to the issuance of an AME or QME report, then that treatment dispute would be subject to UR and IMR. Any prior specific treatment statements by the AME or QME would be considered only if adopted by the treating physician under Labor Code section 4061.5, which was not amended by SB 863.

The provision of proposed subdivision (c)(1)(C) is consistent with the provisions of Labor Code section 4610.5(a)(1) and (2) adopted by SB 863. Those provisions establish that the IMR procedure applies only to: (1) a dispute over a UR decision for an injury occurring on or after January 1, 2013; and (2) a dispute over a UR decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury.

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

(a) ~~All medical reports and medical legal reports filed with the Workers' Compensation Appeals Board shall be filed in accordance with the regulations of the Court Administrator, or as otherwise provided by these rules.~~ Service of all medical reports, and medical-legal reports, and other medical information on ~~other~~ parties and lien claimants

shall be made in accordance with the provisions of this section. For purposes of this section, the following definitions shall apply:

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

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

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

(4) “Party” shall mean: (A) an injured employee; (B) the dependent of a deceased injured employee; (C) a party defendant named in the application or other case opening document or subsequently joined; or (D) the attorney or non-attorney representative of any of the foregoing. For purposes of this section only, “party” shall not include any lien claimant, even if it would otherwise be deemed a “party” under section ~~10301(x)(3)~~10301(dd)(3), except as provided by subdivision 10608 (c)(8)(D)(ii)(II).

(5) “Physician lien claimant” shall mean a lien claimant defined as a “physician” by Labor Code section 3209.3, an entity described in Labor Code sections 4903.05(c)(7) and 4903.06(b), or the attorney or non-attorney representative for any such physician or entity. For purposes of this section, an attorney or non-attorney representative shall not include any person or entity to whom a physician lien claimant’s lien has been assigned, either as an assignment of all right, title, and interest in the accounts receivable or as an assignment for collection.

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

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

(1) After the filing of an ~~Application for Adjudication~~ application or other case opening document, if a party or lien claimant is requested by another

party or a physician lien claimant to serve copies of medical reports and medical-legal reports relating to the claim, the party or lien claimant receiving the request shall serve copies of the reports ~~that are~~ in its possession or under its control on the requesting party or physician lien claimant within six (6) calendar days of the request, if ~~the reports have~~ not been previously served. The party or lien claimant receiving the request shall serve a copy of any subsequently-received medical report and medical-legal report on the party or physician lien claimant within six (6) calendar days of receipt ~~of the report~~.

~~(e)~~(2) At the time of the filing of any Declaration of Readiness to Proceed or Declaration of Readiness to Proceed to Expedited Hearing, the filing declarant shall concurrently serve copies of all medical reports and medical-legal reports relating to the claim that have not been previously served and that are in the possession or under the control of the filing declarant on: ~~(1)~~(A) all other parties, whether or not they have previously requested service; and ~~(2)~~(B) all physician lien claimants that have previously requested service. The filing declarant also shall serve a copy of any subsequently-received medical report and medical-legal report relating to the claim on all other parties and each physician lien claimant within six (6) calendar days of receipt ~~of the report~~.

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

~~(e)~~(4) If, at any time after the periods specified in ~~subsections (b), (c) and~~ ~~(d)~~ subdivisions (b)(1), (b)(2) and (b)(3), a physician lien claimant initiates a request for service of medical reports and medical-legal reports, all parties and other lien claimants shall serve the requesting physician lien claimant with copies of all medical reports and medical-legal reports relating to the claim that are in their possession or under their control, and that have not been previously served, within six (6) calendar days of receipt of the request. The parties and other lien claimants also shall serve a copy of any subsequently-received medical report and medical-legal

report relating to the claim on the physician lien claimant within six (6) calendar days of receipt of the report.

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

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

The provisions of this subdivision shall apply to the service of medical reports, medical-legal reports, or other medical information on a non-physician lien claimant. Nothing in this subdivision shall preclude an injured employee from signing an authorization to release medical information.

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

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

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

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

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

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

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

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

(7) The petition shall be filed as follows:

(A) if an application was previously filed, the petition, unless e-filed, shall be filed only with the district office having venue;

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

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

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

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

(B) When issuing a notice of intention or setting a hearing, the Workers’ Compensation Appeals Board may order that the party or lien claimant alleged to be in possession of the medical

information shall send it to the personal and confidential attention of the assigned workers' compensation judge, in a sealed envelope lodged by mail or personal service only, for in camera review. Medical information so lodged shall not be deemed filed or admitted in evidence and shall not become part of the record.

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

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

(ii) If a notice of intention is not issued: (I) if the non-physician lien claimant is a "party" within the meaning of section 10301(dd)(3), a hearing shall not be set unless a declaration of readiness is filed; (II) if the non-physician lien claimant is not yet a "party" and is therefore precluded from filing a declaration of readiness by section 10250, the hearing date shall be within 60 days after the petition was filed.

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

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

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

RATIONALE:

The WCAB is proposing to amend Rule 10608 to make it consistent with Labor Code section 4903.6(d), as added by SB 863. (Stats. 2012, ch. 363, § 69.)

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Labor Code section 4903.6(d) states:

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

For reasons that will be discussed in greater detail below, the WCAB concludes that, in referring to “subdivision (g) of Section 50.05 of the Civil Code,” the Legislature actually intended to refer to “subdivision (g) of Section 56.05 of the Civil Code.” In substance, Civil Code section 56.05(g) defines “medical information” to be “any individually identifiable information ... regarding a patient’s medical history, mental or physical condition, or treatment.” Section 56.05(g) also defines “individually identifiable” to be medical information that “includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient’s name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual’s identity.”

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

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

One principle of statutory construction is that, where a statute contains a drafting error, the statute may be interpreted to “correct” the error, but only where both the error and the intent are clear.

For example, in *People v. Skinner* (1985) 39 Cal.3d 765, 775-776, the Supreme Court said:

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

Earlier, in *Southern Pac. Co. v. Riverside County* (1939) 35 Cal.App.2d 380, 388, the Court of Appeal concluded that, although the Storm Water District Act of 1909 purported to give the right to assess and tax the “property” in the district, the legislature only intended to confer the right to tax “real property.” In so concluding, the Court stated:

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

Similar statements have been made in other cases. (See, e.g., *In re Thierry S.* (1977) 19 Cal.3d 727, 741, fn. 13 [“obvious mistake” in statute’s cross-reference to “Section 625 of this act” was corrected to read “Section 2 of this act” so as to reflect the Legislature’s “clear intent” where the Act in question had only four sections and did not contain a Section 625]; *Bonner v. County of San Diego* (2006) 139 Cal.App.4th 1336, 1346, fn. 9 [courts should use the power to rewrite statutes “with great restraint,” only where “the error is clear and correction will best carry out the intent of the Legislature.”];¹⁰ *Szold v. Medical Bd. of California* (2005) 127 Cal.App.4th 591, 598 [“[w]e interpret statutes so as to avoid giving effect to drafting errors” and concluding that Legislature’s insertion of the word “of” for “or” was an inadvertent drafting error]; *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185, 1193-1194 (courts may “correct an obvious and minor drafting error where necessary to effectuate the intent of the Legislature”); *Carleson v. Unemployment Ins. Appeals Bd.* (1976) 64 Cal.App.3d 145, 151 [reference in statute to incorrect subdivision (c) was “the result of an inadvertent

¹⁰ Accord: *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 905.

error in drafting on the part of the Legislature” and the statute was read as referring to subdivision (d) “in accordance with the obvious intent of the Legislature”].)

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

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

“ ‘Medical information’ means any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient’s medical history, mental or physical condition, or treatment. ‘Individually identifiable’ means that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient’s name, address, electronic mail address, telephone number, or social security number, or other information that, alone or in combination with other publicly available information, reveals the individual’s identity.”

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

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

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

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One clear purpose of this provision is to protect the confidentiality of injured employees' "medical information," which is protected under the privacy clause of the California Constitution.¹¹

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

Moreover, apart from section 56.05(g) within the Confidentiality of Medical Information Act, there are only 46 sections of the Civil Code that refer to "medical information." Yet, none of these sections possesses the unique combination of: (1) "defin[ing]" the term "medical information" (as Labor Code section 4903.6(d) would demand); (2) having a subdivision (g) (as Labor Code section 4903.6(d) calls for); and (3) having such a

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¹¹ The right of privacy established by the California Constitution (Cal. Const., art. I, § 1) "extends to ... medical records" (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1198.

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

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

markedly kindred graphic appearance to section 50.05(g) that it could result in a scrivener's error.¹²

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

An insurer, third-party administrator retained by a self-insured employer pursuant to Section 3702.1 to administer the employer's workers' compensation claims, and those employees and agents specified by a self-insured employer to administer the employer's workers' compensation claims, are prohibited from disclosing or causing to be disclosed to an employer, *any medical information, as defined in subdivision (b) of Section 56.05 of the Civil Code*, about an employee who has filed a workers' compensation claim, except as follows" (Italics added.)¹³

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

Section 4903.6(d) imposes no new restrictions on what "medical information" may be served on a party applicant or defendant or a lien claimant who is a "physician" as

¹² Other than section 56.05(g), there are approximately 38 sections the Confidentiality of Medical Information Act that use the term "medical information," but none of these sections "defines" the term and only five of them even have a subdivision (g) (see Civ. Code, §§ 56.103, 56.11, 56.17, 56.21, 56.36)

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

¹³ It is not clear why section 3762(c) refers to "*subdivision (b)* of Section 56.05 of the Civil Code." As it read in 1984, Civil Code subdivision (b) did define the term "medical information." (See Stats. 1984, ch. 1391, § 3.) However, Civil Code section 56.05 was substantially rewritten in 1999, and the definition of "medical information" was placed in subdivision (g) (see Stats. 1999, ch. 526, § 1), where it is now. The phrase "subdivision (b) of" was inserted into section 3762(c) in 2002 (see Stats. 2002, ch. 6, § 48), which was *after* the definition of "medical information" was moved to subdivision (g) of Civil Code section 56.05. Therefore, the reference to "subdivision (b)" appears to have been another draftsmanship error.

defined in section 3209.3(a)¹⁴ when requested in accordance with current Rule 10608. Accordingly, no substantive changes are being proposed with respect to service of medical reports and medical-legal reports on applicants, defendants, or physician lien claimants (see proposed Rule 10608(b)), with the exception that, consistent with sections 4903.05 and 4903.06, no lien claimant (physician or non-physician) can invoke the provisions of Rule 10608 unless it has paid any requisite lien filing for activation fee (see proposed Rule 10608(a)(1)).

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

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

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

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

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¹⁴ Section 3209.3(a) states: “ ‘Physician’ includes physicians and surgeons holding an M.D. or D.O. degree, psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractic practitioners licensed by California state law and within the scope of their practice as defined by California state law.”

Among the compelled disclosure exceptions is:

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

(Civ. Code, § 56.10(b)(2).)

Among the permissive disclosure exceptions are the following:

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

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

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

(Civ. Code, § 56.10(c)(2) & (3).)

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

The WCAB recognizes that Civil Code section 56.10(b) and (c) allow for disclosure of medical information by “[a] provider of health care” or “a health care service plan” and

that Rule 10608(b) would apply to the service of medical information by all parties in lien claimants. However, Civil Code section 56.10(b)(2) allows “a board, commission, or administrative agency” to compel disclosure of medical information to any person or entity “for purposes of adjudication pursuant to its lawful authority,” and nothing in that section suggests that the disclosure cannot be required by rule, rather than by an order in a specific case.

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

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

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

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

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

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

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

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

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

§ 10608.5. Service by Parties and Lien Claimants of Reports and Records on Other Parties and Lien Claimants.

(a) In order to promote cost-effective and efficient discovery and information exchange, document service between parties and lien claimants may be effected by CD-ROM, DVD, or other electronic media including e-mail attachments. Production in PDF/A format shall be the preferred form of service. Indexing of documents and Bates-stamping of pages shall also be preferred.

(b) Nothing in this section shall preclude: (1) the Workers’ Compensation Appeals Board or the Administrative Director from adopting any regulation that would permit service or receipt of service to be effected by alternative technologies; or (2) the Workers’ Compensation Appeals Board from ordering or allowing an alternative form of service, including service in paper form, in any particular case.

(c) For purposes of this section, the terms: (1) “serve” and “service” shall include any requirement to produce, allow inspection of, or allow access to any report, record, or other document; and (2) “party” and “lien claimant” shall include any attorney, representative, or agent (including a copy service) of a party or lien claimant.

(d)(1) This section shall apply only to reports, records, and other documents: (A) served in response to a discovery request, subpoena duces tecum, or order; (B) served in accordance with the requirements of sections 10601, 10603, 10605, 10607, 10608, 10615, 10616, 10618, and 10626; or (C) served in accordance with other orders or rules relating to discovery and the exchange of information.

(2) This section shall not apply to the filing of any report, record, or other document with the Workers’ Compensation Appeals Board.

(e) This section shall not preclude the Workers’ Compensation Appeals Board, upon a showing of good cause, from ordering a party or lien claimant to either allow the on-site inspection of its records or to produce those records at hearing.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Art. XIV, § 4, Cal. Const.; Section 5307.9, Labor Code; Section 250, Evidence Code.

RATIONALE: Section 1(a) of SB 863 expressly recognizes that “Section 4 of Article XIV of the California Constitution authorizes the creation of a workers’ compensation system ... to accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character, all of which matters are expressly declared to be the social public policy of this state.” (Stats. 2012, ch. 363, § 46.)

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

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

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

Proposed Rule 10608.5 is also consistent with Labor Code section 5307.9, as enacted by SB 863 (Stats. 2012, ch. 363, § 77), which requires the Administrative Director to adopt “a schedule of reasonable maximum fees payable for copy and related services, including, but not limited to, records or documents that have been reproduced or recorded in paper, electronic, film, digital, or other format.” Providing that parties and lien claimants may elect to serve reports, records, and other documents in electronic format will reduce the costs associated with copy and related services.

§ 10622. Failure to Comply

Disclosure, service and filing of all medical reports in the possession and control of every party to a proceeding, except as otherwise expressly provided, is essential to and required in the expeditious determination of controversies.

The Workers’ Compensation Appeals Board may decline to receive in evidence, either at or subsequent to hearing, any report offered under the provisions of Labor Code Section 5703 by a party who has failed to comply with the provisions of Rules 10600, 10608, 10615, 10616 or 10618. A medical or vocational expert report shall not be refused admission into evidence at a hearing, solely upon the ground of a late filing, where examination was diligently sought and said report came into possession or control of the party offering it within the preceding seven (7) days.

Where a willful suppression of a medical report is shown to exist in violation of these rules, it shall be presumed that the findings, conclusions and opinions therein contained, would be adverse, if produced.

The remedies in this section are cumulative to all others authorized by law.

Note: Authority cited: Sections 133 and 5307, Labor Code. Reference: ~~Section~~Sections 5703, 5708, Labor Code.

RATIONALE:

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

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Article 13. Liens

§ 10770. Filing and Service of Lien Claims.

(a) Lien Claims that May Be Filed or Served:

(1) A lien claim may be filed or served only if permitted by Labor Code section 4900 et seq. An otherwise permissible lien claim shall not be filed or served if doing so would violate the premature filing restrictions of Labor Code section 4903.6(a).

(2) Except as provided in subdivision (a)(3), any lien claim that is not statutorily allowable, in whole or in part, or is filed before the lapse of the premature filing restrictions of Labor Code section 4903.6(a) shall be deemed invalid, whether or not accepted for filing, and shall be deemed dismissed by operation of law.

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

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

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

~~(a)~~(b) Format of Lien Claims:

(1) Electronically-filed lien claims:

(A) All section 4903(b) liens and/or claims of costs liens shall be filed electronically.

(B) All other lien claims may be filed electronically.

(C) Any electronically submitted lien claim shall be deemed filed only if it utilizes an e-form approved by the Appeals Board and it is submitted in accordance with the requirements of:

(i) the electronic filing or JET-filing procedures established by the Administrative Director under sections 10205.11 and 10206 et seq., including the Business Rules and Technical Specifications they incorporate by reference; or

(ii) any other administrative procedures or standards for electronic filing established by statute, regulation, en banc decision of the Appeals Board, published appellate opinion, or policy of the Administrative Director, applying to documents to be filed with the Workers' Compensation Appeals Board.

(1)(2) Non-electronically-filed lien claims:

(A) All other lien claims~~Unless the lien claimant is excepted by parts (A) through (C) of section 10228(e)(5), a lien claimant under Labor Code sections 4903 or 4903.1 shall be filed~~ file its lien claim: (A)utilizing an optical character recognition (OCR) lien claim form approved by the Appeals Board and completed in compliance with section 10228(e)10205.10(c), unless the lien claimant is excepted by parts (A) through (C) of section 10205.10(c)(5); or (B) electronically utilizing an e-form approved by the Appeals Board.

(2)(B) Lien claimants set forth in parts (A) through (C) of section 10228(e)(5)10205.10(c)(5) may file a lien claim utilizing an approved optical character recognitionOCR form or a non-OCR paper lien form completed in compliance with section 10228(e)10205.10(e).

(3) The claims of two or more providers of goods or services shall not be merged into a single lien. However, an individual provider may claim more than one type of lien on a single lien form.

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

(1) Only original (i.e., initial or opening) lien claims~~accompanied by a proof of service shall be filed accepted for filing.~~ Except as provided in subdivisions (g) or (h) of section 10233 or as ordered by the Workers' Compensation Appeals Board, no amended liens lien claims and no documentation statement or itemized voucher in support of any lien claims (original or amended) shall be filed will be accepted. If an original lien

claim is filed with supporting documentation, the original lien claim shall be filed but not the supporting documentation.

(2) The following documents shall be concurrently filed with each lien claim:

(A) a proof of service;

(B) the verification under penalty of perjury required by section 10770.5;

(C) a true and correct copy of any assignment of the lien, as required by Labor Code section 4903.8(a) and (b);

(D) the declaration under penalty of perjury required by Labor Code section 4903.8(d); and

(E) any other declaration or form required by law to be concurrently filed with a lien claim.

(3) Unless the lien claimant is concurrently filing an initial (case opening) application in accordance with section 10770.5, a lien claim ~~of shall~~ bear ~~an the~~ adjudication case number(s) previously assigned by the Workers' Compensation Appeals Board for the injury or injuries ~~will not be~~ accepted.

(4) Any person or entity filing a section 4903(b) lien and/or a claim of costs lien shall not file any such lien unless it has: (A) paid the requisite lien filing fee; and (B) entered a valid confirmation number for that fee in the confirmation number field of the lien form.

If the lien claimant asserts it is exempted from payment of the filing fee because it is an entity specified in Labor Code section 4903.06(b), it shall indicate this in the designated field of the lien form.

Any lien claim filed in violation of this provision shall be deemed dismissed by operation of law.

(5)(A) For medical treatment provided on or after July 1, 2013, a section 4903(b) lien shall not be filed if the *only* remaining dispute(s) must be resolved by the independent medical review procedures established by Labor Code sections 4610.5, 4610.6, 4616.3, and 4616.4 and/or by the independent bill review procedures established by Labor Code sections 4603.2, 4603.3, and 4603.6.

(B) Nothing in this subdivision shall preclude a medical treatment lien claimant from filing a lien claim if there are other outstanding disputes, including but not limited to injury, employment, jurisdiction, or the statute of limitations.

~~(6)~~ Any lien claim or supporting documentation submitted in violation of ~~this~~ subdivisions (c)(1) through (c)(5) shall not be deemed filed for any purpose, shall not be acknowledged or returned to the filer~~lien claimant~~, and may be destroyed at any time without notice.

~~(2)~~(7) Any amended lien or supporting documentation ~~supporting~~for any lien claim (original or amended) that was previously filed or lodged for filing may be destroyed without notice.

~~(3)~~(8) The service of a lien claim on a defendant, or the service of notice of any claim that would be allowable as a lien, shall not constitute the filing of a lien claim with the Workers' Compensation Appeals Board within the meaning of its rules of practice and procedure or within the meaning of Labor Code section 4903.1 et seq., including but not limited to section 4903.5.

~~(4)~~(9) Where a lien has been served on ~~any~~ a party ~~under Labor Code section 4903.1(b)~~, that ~~no~~ party shall have ~~an~~ no obligation to file that lien with the Workers' Compensation Appeals Board. If:

~~(A) the lien has been paid in full; or~~

~~(B) a good faith partial payment has been made and:~~

~~(i) the lien claimant has been concurrently provided with a clear written explanation that both justifies the amount paid and specifies all additional information the lien claimant must submit as a prerequisite to additional or full payment, in conformity with the following, as applicable: (I) Lab. Code, § 4603.2(b)(1) and Cal. Code Regs., tit. 8, § 9792.5(c) for medical treatment liens; (II) Lab. Code, § 4622 and Cal. Code Regs., tit. 8, § 9794(b) & (c) for medical legal liens; and (III) Cal. Code Regs., tit. 8, § 9795.4(a) for interpreter liens; and~~

~~(ii) no additional written demand for payment is made by the lien claimant within 90 calendar days after the partial payment.~~

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~~(e)~~(d) Service of Lien Claims and Supporting Documentation on the Parties

(1) All original and amended lien claims, ~~together with a full statement or itemized voucher supporting the lien and a proof of service~~ and all related documents, including supporting documentation and any document listed in subdivision (c)(2), shall be served on:

(A) the injured worker (or, if deceased, the worker's dependent(s)), unless:

(i) the worker or dependent is represented by an attorney or other agent of record, in which event service may be made solely upon the attorney or agent of record; or

(ii) the underlying case of the worker or dependent(s) has been resolved. For purposes of this subdivision, the underlying case will be deemed to have been resolved if:

(I) in a stipulated findings and award or in a compromise and release agreement, a defendant has agreed to hold the worker or dependent(s) harmless from the specific lien claim being filed and has agreed to pay, adjust, or litigate that lien claim;

(II) a defendant had written notice of the lien claim before the lien claim was filed and, in a stipulated findings and award or in a compromise and release agreement, that defendant has agreed to pay, adjust, or litigate all lien claims;

(III) the application for adjudication of claim filed by the worker or the dependent(s) has been dismissed, and the lien claimant is filing or has filed a new application; or

(IV) the worker or the dependent(s) chooses ~~choose(s)~~ not to proceed with his, her, or their case.

(B) any employer(s) or insurance carrier(s) that are parties to the case *and*, if represented, their attorney(s) or other agent(s) of record.

(2) The full statement or itemized voucher supporting the lien claim or amended lien claim shall include: (A) any amount(s) previously paid by any source for each itemized service; (B) a statement that clearly and specifically sets forth the basis for the claim for additional payment; (C)

proof that the lien claimant is the service provider or owner of the alleged debt; and (D) a declaration under penalty of perjury under the laws of the State of California that all of the foregoing information provided is true and correct.

~~The requirement of proof that the lien claimant is the owner of the alleged debt may be satisfied if, as part of the declaration under penalty of perjury, the declarant states that the lien claimant possesses documents either establishing original ownership of the lien claim or establishing that the right to payment for the claimed services was transferred to the lien claimant by the original owner and any intermediate owners. The lien claimant shall furnish a copy of such documentation to any party or to the Workers' Compensation Appeals Board upon demand and shall have a copy available for immediate production at any lien conference or lien trial.~~

(3) When serving an amended lien claim, the lien claimant shall indicate in the box set forth on the lien form that it is an "amended" lien claim.

~~(d)~~(e) The lien claimant shall provide the name, mailing address, and telephone number of a person with authority to resolve the lien claim on behalf of the lien claimant.

~~(e)~~(f) For purposes of this subdivision, an "amended" lien claim includes: (1) a lien claim that is for or includes additional services or charges for the same injured employee for the same date or dates of injury; (2) a lien claim that reflects a change in the amount of the lien claim based on payments made by the defendant; and/or (3) a lien claim that has been corrected for clerical or mathematical error. A subsequent lien claim that adds an additional adjudication case number or numbers is an "amended" lien claim with respect to the adjudication case number(s) originally listed.

~~(f)~~(g) Within five business days after a lien claim has been resolved or withdrawn, the lien claimant shall provide written notification to:

- (1) the Workers' Compensation Appeals Board;
- (2) the party defendant(s) or, if represented, their attorney(s); and
- (3) the worker or dependent(s) or, if represented, the attorney(s) for the worker or dependent(s), except that no such notification is required if the underlying case has been resolved as provided in subdivision ~~(e)~~(d) (1)(A)(ii)(I) through (IV).

(h)(1) If a lien claimant notifies the Workers' Compensation Appeals Board in writing that its lien has been resolved or withdrawn, the lien claim shall be deemed dismissed without prejudice by operation of law.

(2) If a lien claim has been resolved or withdrawn, but the lien claimant fails to file the required written notification with the Workers' Compensation Appeals Board, the lien claim shall remain subject to all pertinent provisions of the Labor Code and the WCAB's Rules of Practice and Procedure, including but not limited to the lien filing fee, the lien activation fee, and the other provisions of Labor Code sections 4903.05 and 4903.06, if the lien is subject to those sections.

~~(g)~~(i) The Workers' Compensation Appeals Board shall either serve or, under sections 10500(a) and 10544, cause to be served notice on all lien claimants of each hearing scheduled, whether or not the hearing directly involves that lien claimant's lien claim.

~~(h)~~(j) Inclusion of the injured employee's Social Security number on a lien claim form is voluntary, not mandatory. A failure to provide a Social Security number will not have any adverse consequences. Nevertheless, although a lien claimant is not required by law to include the employee's Social Security number, lien claimants are encouraged to do so because this will facilitate the processing and filing of the lien claim. Social Security numbers are used solely for identification and verification purposes in order to administer the workers' compensation system. A Social Security number will not be disclosed, made available, or otherwise used for purposes other than those specified, except with the consent of the applicant, or as permitted or required by statute, regulation, or judicial order.

~~(i)~~(k) Any violation of the provisions of this section may give rise to monetary sanctions, attorney's fees, and costs under Labor Code section 5813 and Rule 10561.

~~(j)~~(l) The provisions of subdivisions ~~(b)(3), (b)(4), and (c)(2)(c)(8), (c)(9), and (d)(2)~~ shall not apply to any notice of claim or lien claim of: (1) the Employment Development Department; (2) the California Victims of Crime Program; (3) any lien claimant listed as being excepted under parts (A) through (C) of section ~~10228(e)(5)~~10205.10(c)(5); ~~and~~ (4) any governmental entity pursuing a lien claim for child support or spousal support; and (5) the Uninsured Employers Benefits Trust Fund.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4903, 4903.05, 4903.06, 4903.8, 4903.1, 4903.4, 4903.5, 4903.6, 4904, 4603.2, 4603.3, 4603.6, 4610.5, 4610.6, 4616.3, 4616.4, 4622, and 5813, Labor Code; Sections 9792.5, 9794, 9795.4, and 10561, title 8, California Code of Regulations.

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

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

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

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

Concurrently, the Legislature also added Labor Code section 4903.05(b). (Stats. 2012, ch. 363, § 63.) In relevant part, section 4903.05(b) states: “Any lien claim for [medical treatment] expenses under subdivision (b) of Section 4903 *or for claims of costs* shall be filed with the appeals board electronically using the form approved by the appeals board.” (Italics added.)¹⁵

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

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

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

claim, the medical provider will be subject to the statutorily required lien filing and lien activation fees.

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

Consistent with section 4903(b), proposed Rule 10770(a)(3) would specify that medical-legal and other claims of costs are not allowable as a lien against the employee's compensation. Yet, consistent with sections 4903.05 and 4903.06 (Stats. 2012, ch. 363, §§ 63, 64), proposed Rule 10770(a)(3) would further provide that claims of costs may be filed as a lien claim, but the filer must then timely pay the applicable lien filing or lien activation fees or the *entire* lien claim will be deemed dismissed by operation of law.

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

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

Consistent with Labor Code section 4903.05(b), as adopted by SB 863, Rule 10770(b)(1) requires that any section 4903(b) lien and/or any claims of costs lien *must* be filed electronically.

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

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

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

Proposed Rule 10770(b)(3) would further expressly provide, however, that an individual provider may seek payment for more than one type of lien on a single lien form. The WCAB is proposing to add this amendment because, currently, the lien form on the Division of Workers' Compensation website currently allows only one type of lien claim

to be checked on each lien form.¹⁶ There is nothing in SB 863, or in the Labor Code as it currently exists, which suggests that a provider must file separate lien claim forms for each different type of lien claim. To the contrary, the statutory language tends to refer to liens in the singular, not the plural. (See, e.g., Lab. Code, § 4903.05(a).) Moreover, SB 863 allows physicians, interpreters, and others to file a lien for medical treatment-related goods and services, and it also allows them to file a claim for medical-legal and other costs in the form of a lien. In doing this, the Legislature was giving implicit recognition to the fact that the billings of many physicians, interpreters, and others include a mix of medical treatment and medical-legal charges. However, if two separate lien forms were required under these circumstances, the providers might be subject to two sets of lien filing and/or lien activation fees. This does not appear to be the intent of SB 863. Indeed, a requirement to file two separate liens would require the providers to go through their billings to separate out which charges are medical and which are medical-legal (not always easy to determine) so that the total amount of each could be entered on each separate lien. This would defeat the purpose of allowing them to file a lien for medical-legal costs because, if the different charges have to be segregated, the provider would simply file a petition for costs for those services that are allowable as costs.

Proposed Rule 10770(c)(1), in substance, reiterates the requirements of current Rule 10770(b)(1) that only original (i.e., initial or opening) lien claims shall be filed with the WCAB (and not amended liens) and no supporting documentation (i.e., the “statement or itemized voucher” referred to by statute) shall be filed, except as provided in section 10233(g) and (h) or as ordered by the WCAB.

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

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

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

¹⁶ See <http://www.dir.ca.gov/dwc/FORMS/EAMS%20Forms/ADJ/DWCF6.pdf>

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

Based on various new or existing statutory and regulatory requirements, Rule 10770(c)(2) would specify what documents must be concurrently filed with each lien claim or lien for making a claim of costs. Specifically, Rule 10770(c)(2) would require:

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

Proposed Rule 10770(c)(4) would provide that a section 4903(b) lien claimant or a person or entity having a claim of costs in the form of a lien that is required to pay a lien activation fee shall not file a lien claim or lien form unless it has: (A) paid the requisite lien activation fee; and (B) entered a valid confirmation number for that fee in the confirmation number field of the lien form. It also provides that any lien claimant claiming an exemption from the filing fee must so indicate on the lien form.

Proposed Rule 10770(c)(4) would further provide that a section 4903(b) lien or a claim of costs lien filed in violation of the above provision shall be deemed dismissed by operation of law. This provision is consistent with Labor Code section 4903.05(c). Specifically: (1) section 4903.05(c) provides that “All liens filed on or after January 1, 2013, for expenses under subdivision (b) of Section 4903 or for claims of costs *shall be*

subject to a filing fee as provided by this subdivision”; (2) section 4903.05(c)(1) provides for a \$150 filing fee; and (3) section 4903.05(c)(2) provides that “On or after January 1, 2013, a lien submitted for filing that does not comply with paragraph (1) *shall be invalid.*” If a lien submitted without the requisite filing fee is invalid ab initio, then it is appropriate to provide that any such lien is dismissed by operation of law.

Proposed Rule 10770(c)(5)(A) would provide that a section 4903(b) lien for services rendered on or after July 1, 2013 shall not be filed if the *only* remaining disputes are subject to independent medical review and/or independent bill review. This is consistent with Labor Code section 4903(b) (Stats. 2012, ch. 363, § 62), which provides: “The liens that may be allowed ... are as follows: ... (b) The reasonable expense incurred by or in behalf of the injured employee, as provided by Article 2 (commencing with Section 4600 [i.e., the medical treatment sections]), *except those disputes subject to independent medical review or independent bill review.*” (Italics added.) It is also consistent with Labor Code section 4604 (Stats. 2012, ch. 363, § 40), which provides: “Controversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5* [i.e., the IMR process].” (Italics added.) It is further consistent with the IMR statutory scheme (Lab. Code, §§ 4616.3, 4616.4; see also §§ 4610.5, 4610.6) and the IBR statutory scheme (Lab. Code, §§ 4603.2, 4603.3, 4603.6) that, in substance, provides a special procedure for medical necessity and medical billing disputes separate from and exclusive of the lien claim procedure.

Proposed Rule 10770(c)(5)(B), however, would expressly provide that medical treatment lien claims *may* be filed if there are unresolved disputes other than pure medical necessity and medical billing issues. These would include, but not necessarily be limited to, disputes regarding injury, employment, jurisdiction, or the statute of limitations.

Proposed Rule 10770(c)(9) would amend current Rule 10770(b)(4), which had addressed the circumstances under which a party served with an unfiled lien must file that lien with the WCAB. These provisions of current Rule 10770(b)(4) were deemed necessary because of language in former Labor Code section 4903.1(b), which had provided that [w]hen a compromise of claim or award is submitted to the appeals board ... the parties shall file... any liens served on the parties.” However, this language was stricken from section 4903.1 by SB 863 (see Stats. 2012, ch. 363, § 66.5)¹⁷ and the language was not re-adopted elsewhere, so these provisions of current Rule 10770(b)(4) have become unnecessary.

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

Proposed Rule 10770(d)(2) would delete the requirement of current Rule 10770(c)(2) regarding the requirement of proof that the lien claimant is the owner of the alleged debt. This language no longer appears to be necessary in light of the provisions of Labor Code section 4903.8 regarding the filing and service of any assignment of the lien.

Proposed Rule 10770(h)(1) provides that if a lien claimant notifies the WCAB that its lien has been resolved or withdrawn, then the lien claim will be deemed dismissed without prejudice by operation of law. This will allow the WCAB to automatically “end date” these resolved or withdrawn liens. This would have the beneficial effect of, among other things, relieving the WCAB of the duty to serve lien claimants whose liens have been resolved or withdrawn with notices of hearing, minutes of hearing, orders, etc. It would also minimize confusion at lien conferences (see Cal. Code Regs., tit. 8, § 10770.1) that might arise when the lien claimant failed to appear.

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

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

§ 10770.1. Lien Conferences and Lien Trials

(a)(1) A lien conference shall be set: ~~(1)(A)~~ when any party, including a lien claimant who is a “party” as defined by section ~~10301(x)(3)~~10301(dd)(3), files a declaration of readiness in accordance with section 10250 on any issue(s) directly relating to any lien claim(s); or ~~(2)(B)~~ by the Workers’ Compensation Appeals Board on its own motion at any time.

(2) Based upon resources available and such other considerations as the Workers’ Compensation Appeals Board in its discretion may deem appropriate, a lien conference may be set at any district office without the necessity of an order changing venue.

(3) Unless otherwise expressly stated in the notice of hearing, all unresolved lien claims and lien issues shall be heard at the lien conference, whether or not listed in any declaration of readiness. An agreement to “pay, adjust or litigate” a lien claim or its equivalent, or an award leaving a lien claim to be adjusted, is not a resolution of the lien claim or lien issue.

(4) To the extent feasible, the date of the lien conference shall be no sooner than 60 days after the date the notice of hearing for it is served.

(b) Nothing in this section shall preclude the Workers' Compensation Appeals Board, in its discretion, from: (1) setting a type of hearing other than that requested in the declaration of readiness, in accordance with section 10420; (2) issuing a ten-day notice of intention to order payment of the lien claim, in full or in part, in accordance with section 10888; or (3) issuing a ten-day notice of intention to disallow the lien claim, in accordance with section 10888.

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

Proof of prior timely payment shall be in the form provided by the Rules of the Administrative Director. An offer of proof or a stipulation that payment was made shall not be adequate. A lien claimant shall not avoid dismissal by attempting to pay the fee at or after the hearing.

(1) If the proof of prior timely payment of the activation fee is not submitted, the lien claim shall be dismissed with prejudice.

(2) If the proof of prior timely payment of the filing fee is not submitted, the lien claim shall be deemed dismissed by operation of law as of the time of its filing, except that if the lien claimant filed a declaration of readiness its lien shall be dismissed with prejudice.

(3) If a lien claimant asserts it already paid a filing fee as required by former Labor Code section 4903.05 as added by Chapter 639 of the Statutes of 2003, its lien claim shall be dismissed unless it submits proof of such payment at the lien conference or lien trial.

(4) If a lien claimant asserts it is an entity listed in Labor Code sections 4903.05(c)(7) or 4903.06(b), it shall be prepared to file proof or submit a stipulation to that effect at the lien conference or lien trial.

The provisions of subdivision (c)(1) shall apply even if, but for the lien conference or trial, the activation fee would not have been due until December 31, 2013.

~~(e)~~(d) When a party, including a lien claimant who is a "party" as defined by section 10301~~(x)~~~~(3)~~10301(dd)(3), files a declaration of readiness on an issue directly relating to a lien claim, including any preliminary or intermediate procedural or evidentiary issue, the party shall designate on the declaration of readiness form that it is requesting a "lien conference" and shall not designate any other kind of conference or hearing. If a status conference or any other type of hearing is requested or is set on the calendar, that status conference or other type of hearing shall be deemed a "lien conference" and shall be governed by any and all rules applying to a "lien conference."

~~(d)~~(e) Notwithstanding section 10240, all defendants and lien claimants shall appear at all lien conferences and lien trials, either in person or by attorney or representative. Each defendant, lien claimant, attorney, and hearing representative appearing at any lien conference or lien trial: (1) shall have sufficient knowledge of the lien dispute(s) to inform the Workers' Compensation Appeals Board as to all relevant factual and/or legal issues in dispute; (2) shall have authority to enter into binding factual stipulations; and (3) shall either have full settlement authority or have full settlement authority immediately available by telephone.

~~(e)~~(f) For any lien claim(s) or lien issue(s) not fully resolved at the lien conference by an order signed by a workers' compensation judge, the defendant(s) and lien claimant(s) shall prepare, sign, and file with the workers' compensation judge a pretrial conference statement, which shall include: (1) all stipulations; (2) the specific issues in dispute; (3) all documentary evidence that might be offered at the lien trial; and (4) all witnesses who might testify at the lien trial. The right to present any issue, documentary evidence, or witness not listed in the pretrial conference statement shall be deemed waived, absent a showing of good cause. This subdivision shall apply regardless of which action the Workers' Compensation Appeals Board takes under subdivision ~~(f)~~(g).

~~(f)~~(g) If any lien claim(s) or lien issue(s) cannot be fully resolved at the lien conference, the Workers' Compensation Appeals Board shall take one of the following actions:

(1) set a lien trial;

(2) upon a showing of good cause, allow a one-time continuance of the lien conference to another lien conference, after which a lien trial shall be set; or

(3) upon a showing of good cause, order the lien conference off calendar.

Good cause shall not include the delayed or late appointment of an attorney or other representative by a defendant or lien claimant or the delayed receipt of the defendant's or lien claimant's file by that attorney or other representative.

The action taken shall apply to all unresolved lien claim(s) or lien issue(s).

~~(g)~~(h) Discovery shall close on the date of the lien conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the lien conference.

~~(h)~~(i) If a lien claimant fails to appear at a lien conference or lien trial, the Workers' Compensation Appeals Board may issue a notice of intention to dismiss the lien claim with or without prejudice in accordance with section 10562(d)(1) and/or section 10241(b)(2).

If a defendant is designated to serve the notice of intention to dismiss under section 10500(a), the defendant shall serve the notice of intention within 10 business days. If the defendant does not receive a timely objection (taking into consideration the time extension provisions of sections 10507 and 10508), the defendant shall file and serve a proposed order dismissing the lien and copies of the notice of intention and the notice's proof of service.

An order dismissing a lien claim for failure to appear shall be served only by the Workers' Compensation Appeals Board and not by designated service.

~~(i)~~(j) The Workers' Compensation Appeals Board may order that any unresolved lien claim(s) or lien issue(s) be submitted for decision solely on the exhibits listed in the pretrial conference statement if: (1) no witnesses are listed in the pretrial conference statement; or (2) witnesses are listed but no good cause is shown for any witness to testify at trial. Good cause may be established by offers of proof made at the lien conference.

If the disputed lien claim(s) or lien issue(s) are submitted for decision at the lien conference, the workers' compensation judge shall prepare minutes of hearing and a summary of evidence listing: (1) all exhibits offered in evidence; (2) the identity of the party or lien claimant offering each exhibit; and (3) whether or not each exhibit is admitted in evidence. This descriptive listing shall be filed and served no later than the date of the decision on the submitted issues.

~~(j)~~(k) After a lien conference or lien trial has been ordered off calendar, no party or lien claimant shall file a new declaration of readiness for at least 90 days. The declaration of readiness shall designate that a "lien conference" is requested and shall state under penalty of perjury that there has been no hearing on the lien claim(s) or lien issue(s) within the preceding 90 calendar days.

Nothing in this subdivision shall preclude the Workers' Compensation Appeals Board from (1) restoring the lien claim(s) or lien issue(s) to the lien conference or lien trial calendar on its own motion or (2) restoring the lien claim(s) or lien issue(s) to the lien conference or lien trial calendar less than 90 calendar days after the most recent hearing.

~~(k)~~(l) If a defendant was designated to serve a lien claimant with notice of a lien conference or lien trial under sections 10500(a) and 10544, the defendant shall bring a copy of its proof of service to the lien conference or lien trial and, if the lien claimant fails to appear, the defendant shall file that proof of service with the Workers' Compensation Appeals Board.

~~(l)~~(m) Any violation of the provisions of this section may give rise to monetary sanctions, attorney's fees, and costs under Labor Code section 5813 and Rule 10561.

~~(m)~~(n) The provisions of subdivisions ~~(e)~~, ~~(g)~~, and ~~(h)~~(f), (h), and (i)(2) shall not apply to the lien claim(s) of any of the following: (1) the Employment Development Department; (2) the California Victims of Crime Program; (3) any lien claimant listed as being

excepted under section ~~10228(e)(5)~~10205.10(c)(5); ~~and~~ (4) any governmental entity pursuing a lien claim for child support or spousal support; and (5) lien claims of the Uninsured Employers Benefits Trust Fund.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4903, 4903.05, 4903.06, 4903.1, 4903.4, 4903.5, 4903.6, 4904, 5502 and 5502.5, Labor Code; Sections 351 and 352, Evidence Code; and Sections 10250, ~~10250.1~~10205.16, 10301(u) and (z), 10364(a), 10561, 10629 and 10770-10772, title 8, California Code of Regulations.

RATIONALE:

The proposed addition of Rule 10770.1(a)(4) would codify and confirm the WCAB's already existing authority to set a lien conference at a district office other than the one having venue through the issuance of the notice of hearing and without the issuance of an order changing venue.¹⁸

Proposed Rule 10770.1(a)(4) is also consistent with SB 863's amendment of Labor Code section 4903.4. As amended, section 4903.4(b) now provides: "If [a] dispute [concerning a lien for medical treatment expenses] is heard at a separate proceeding it shall be calendared for hearing or hearings as determined by the appeals board based upon the

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

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

resources available to the appeals board and other considerations as the appeals board deems appropriate and shall not be subject to Section 5501.” The reference to Labor Code section 5501 (regarding who may file an application and how the application should be served) appears to be clerical or inadvertent error. The WCAB believes the Legislature intended to refer to section 5501.5, relating to venue.

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

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

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

The first element of the fourth provision is derived from: (1) section 4903.05(c), which provides that, with certain exceptions specified in subdivision (c)(7), “All liens filed on or after January 1, 2013, for expenses under subdivision (b) of Section 4903 or for claims of costs *shall be subject to a filing fee ...*”; (2) section 4903.05(c)(1), which sets a \$150 filing fee; and (3) section 4903.05(c)(2), which provides that “On or after January 1, 2013, a lien submitted for filing that does not comply with paragraph (1) *shall be invalid.*” If a lien submitted without the requisite filing fee is “invalid” ab initio, then it is appropriate to provide that any such lien is dismissed by operation of law *as of the time of its filing.*

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

who files a DOR without proof of the requisite filing fee. The provision that the lien will be dismissed *with prejudice* accomplishes this purpose.

The third provision is derived by section 4903.06(a)(4), which states: “All lien claimants that did not file the declaration of readiness to proceed and that remain a lien claimant of record at the time of a lien conference shall submit proof of payment of the activation fee at the lien conference. If the fee has not been paid or no proof of payment is available, the lien shall be dismissed with prejudice.”

The WCAB recognizes that section 4903.06(a)(4) only expressly refers to “the time of the lien conference.” Accordingly, an argument could be made that no activation fee is required if a lien conference was conducted in 2012 (or earlier) and the lien trial is conducted in 2013. However, apart from the limited exceptions established by section 4903.06(a) and (b), section 4903.06 makes it expressly clear that “[a]ny lien filed pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1, 2013, *shall be subject to a lien activation fee.*” Thus, it is the “activation” of a lien that is key, and a lien claim that is not resolved at a 2012 lien conference is still being “active” or “activated” if it moves forward to a lien trial in 2013. Indeed, it appears that the Legislature contemplated only that the lien conference would be the gateway to the lien trial and, therefore, did not intend for a lien claimant to be able to participate in a lien trial if it failed to pay an activation fee. The WCAB finds further support for this interpretation in the language of section 4903.06(a)(5), which provides that if a lien activation fee has not been paid by January 1, 2014, the lien is dismissed by operation of law. This, of course, would include liens that were the subject of a lien conference that occurred on or before December 31, 2012.

The second provision — i.e., that a lien claimant that has not paid a requisite filing or activation fee shall not participate in any lien conference or lien trial, including obtaining an order allowing its lien in whole or in part, without submitting written proof at the lien conference of prior timely payment of the fee — flows from the statutory language relating to the other provisions just discussed. That is, the Legislature requires all lien claimants, apart from those expressly excepted, to pay lien filing and activation fees and to provide proof of such payment. The statutory provisions would have no force and effect if a lien claimant could participate in a lien conference or lien trial, and obtain an order allowing its lien in whole or in part, without ever having paid the requisite filing or activation fee.

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

the lien shall be dismissed with prejudice.” Therefore, this language specifically indicates that if a lien conference occurs, *regardless of its date*, a lien claimant must submit proof of having paid the requisite fee or its lien will be dismissed with prejudice. For the reasons discussed above, the WCAB concludes that this is also true when a lien trial occurs.

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

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

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

§ 10770.5. Verification to Filing of Lien Claim or Application by Lien Claimant.

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

(1) Sixty days have elapsed ~~since~~after the date of acceptance or rejection of liability for the claim, or the time provided for investigation of liability pursuant to Labor Code section 5402(b) has elapsed, whichever is earlier;
and

(2) either of the following:

(A) The time provided for payment of medical treatment bills pursuant to Labor Code section 4603.2 ~~has elapsed~~has expired and, if the employer objected to the amount of the bill, the reasonable fee has been determined pursuant to Labor Code section 4603.6, and, if authorization for the medical treatment has been disputed pursuant to Labor Code section 4610, the medical necessity of the medical treatment has been determined pursuant to Labor Code sections 4610.5 and 4610.6; or

~~(3)~~(B) The time provided for payment of medical-legal expenses pursuant to Labor Code section 4622 ~~has elapsed~~has expired and,

if the employer objected to the amount of the bill, the reasonable fee has been determined pursuant to Labor Code section 4603.6.

(b) The verification under penalty of perjury shall also contain a statement declaring that the lien or petition is not being filed solely because of a dispute subject to the independent medical review and/or the independent bill review process.

~~(b)~~(c) In addition, if an application for adjudication is also being filed, the verification under penalty of perjury ~~also~~ shall contain:

(1) A statement specifying in detail the facts establishing that venue in the district office being designated is proper pursuant to Labor Code section 5501.5(a)(1) or Labor Code section 5501.5(a)(2); and

(2) A statement specifying in detail the facts establishing that the filing lien claimant has made a diligent search and has determined that no adjudication case number exists for the same injured worker and same date of injury at any district office. A diligent search shall include contacting the injured worker, contacting the employer or carrier, or inquiring at the district office with appropriate venue pursuant to Labor Code section 5501.5(a)(1) or Labor Code section 5501.5(a)(2).

~~(c)~~(d) The verification shall be in the following form:

I declare under penalty of perjury under the laws of the State of California:

(1) that ~~one~~ of the time periods set forth in Rule 10770.5(a) ~~has~~ have elapsed;

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

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(3) that, if an application for adjudication is being filed, that venue is proper as set forth in Rule 10770.5(b) and that I have made a diligent search and have determined that no adjudication case number exists for the same injured worker and the same date of injury. In determining that no adjudication case number exists for the same injured worker and the same date of injury, I have made a diligent search consisting of the following efforts (specify):

s/s _____ on _____

Failure to attach the verification or an incorrect verification may be a basis for sanctions.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4903 and 4903.6, Labor Code.

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RATIONALE:

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

The WCAB is proposing to add Rule 10770.5(b) and (d)(2) in recognition not only of SB 863’s amendments to Labor Code section 4903.6(a), but also its amendment to Labor Code section 4903(b), which in relevant part provides that a lien can be allowed for reasonable medical treatment expense “except those disputes subject to independent medical review or independent bill review.”²⁰ Therefore, if the only remaining medical treatment cost disputes relate to independent medical review (IMR) or independent bill

¹⁹ Section 4903.6(a) was amended as follows:

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

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

(2) *Either of the following:*

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

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

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

review (IBR), then a medical treatment lien claim should not be filed, “[e]xcept as necessary to meet the requirements of Section 4903.5.” (Lab. Code, § 4903.6(a).)

§ 10770.6. Verification to Filing of Declaration of Readiness By or on Behalf of Lien Claimant.

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

(a) stating either that:

(1) the declaration of readiness is not being filed because of a dispute solely subject to the independent medical review and/or independent bill review process; or

(2) a timely petition appealing the Administrative Director’s determination regarding independent medical review and/or independent bill review has been filed; and

(b) stating either ~~(1)~~ that:

(1) the underlying case has been resolved; ~~or~~ or

(2) ~~that~~ at least six months have elapsed from the date of injury and the injured worker has chosen not to proceed with his or her case.

The declarant shall make a diligent search to determine that the injured worker has chosen not to proceed with his or her case and the verification shall specify the efforts made in conducting the diligent search. A diligent search shall include contacting the injured worker, contacting the employer or carrier, or inquiring at the district office with appropriate venue pursuant to Labor Code section 5501.5(a)(1) or Labor Code section 5501.5(a)(2).

The verification shall be in the following form:

I declare under penalty of perjury under the laws of the State of California that:

[] the declaration of readiness is not being filed because of a dispute subject to the independent medical review and/or independent bill review process; or [] a timely petition appealing the Administrative Director’s determination regarding independent medical review and/or independent bill review has been filed (Check one box); and

that the underlying case has been resolved; or that at least six months have elapsed from the date of injury and the injured worker has chosen not to proceed with his or her case (Check one box). In determining that the injured worker has chosen not to proceed with his or her case, I have made a diligent search consisting of the following efforts (specify):

s/s _____ on _____

Failure to attach the verification or an incorrect verification may be a basis for sanctions.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4903 and 4903.6, Labor Code.

RATIONALE:

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

Article 14. Attorneys and Representatives.

§ 10774.5 Notices of Representation, Change of Representation, and Non-Representation for Lien Claimants.

(a) Whenever any lien claimant obtains representation by an attorney or a non-attorney, changes such representation, or such representation ceases, the lien claimant shall provide written notice to: (1) the Workers' Compensation Appeals Board; (2) the injured employee and the dependent(s) of a deceased employee or, if represented, to the attorney or non-attorney representative of the employee or dependent(s); and (3) each defendant and each defendant's attorney or non-attorney representative, if any. The written notice shall be accompanied by a proof of service made under penalty of perjury.

(b) The notice shall:

(1) caption the case title (i.e., the name of the injured employee and the name of the defendant or primary defendant(s)) and the adjudication case number(s) to which the notice relates;

(2) set forth the full legal name, mailing address, and telephone number of the lien claimant; and

(3) set forth the full legal name, mailing address, and telephone number of the initial or new attorney or non-attorney representative or, where a lien claimant becomes self-represented, the name of the former attorney or non-attorney representative.

(c) The notice shall be filed and served within five working days of obtaining, changing, or ceasing representation by an attorney or non-attorney representative.

(d) The notice shall be verified by a declaration under penalty of perjury stating: “I declare under penalty of perjury that the statements and information contained in this notice are true and correct.”

(e) Notices of Representation and Notices of Change of Representation:

(1) Where a lien claimant first becomes represented by an attorney or non-attorney, a “Notice of Representation” shall be filed. Where a lien claimant that was previously represented by an attorney or non-attorney obtains representation with a new attorney or non-attorney, a “Notice of Change of Representation” shall be filed.

(2) If a lien claimant obtains initial or new representation less than five working days before a scheduled hearing or if, for any reason, a copy of the notice of representation or change of representation does not appear in the Workers’ Compensation Appeals Board’s record by the time of hearing, a copy of the fully executed notice shall be lodged with the workers’ compensation judge presiding over the hearing and shall be concurrently personally served on each party or lien claimant appearing at the hearing or, if represented, their appearing attorney or non-attorney representative.

(3) The notice of representation or change of representation is required even if the initial or new attorney or non-attorney representative has signed or is signing a pleading on behalf of the lien claimant.

(4) The lien claimant and the attorney or non-attorney representative who is assuming representation must each sign and date the notice of representation or change of representation before the relationship shall become effective.

If the lien claimant, the attorney, or the non-attorney representative is a partnership, corporation, or other organization, the notice of representation or change of representation may be signed by a corporate officer, partner,

or fiduciary under a statement certifying that the person signing has the authority to sign.

(5) If no fully executed notice of representation or change of representation has been filed at or before the time of any hearing:

(A) the lien claimant shall be deemed not to be represented even if the attorney or non-attorney representative who purportedly has assumed representation appears; and

(B) if the lien claimant does not otherwise appear at the hearing, it shall be subject to all of the consequences of a failure to appear.

(6) A notice of representation or change of representation shall not be filed for the sole purpose of allowing a third party agent, such as a copy service, to sign and issue a subpoena or subpoena duces tecum under section 10530.

(7) The notice of representation or change of representation shall contain each of the following, verified under penalty of perjury:

(A) a declaration executed by both the lien claimant *and* by the attorney or non-attorney assuming representation stating: “I declare that the named initial or new attorney or non-attorney representative has consented to represent the interests of the named lien claimant and that the named lien claimant has consented to this representation.”;

(B) a declaration executed by both the lien claimant *and* by the attorney or non-attorney assuming representation stating one of the following, as appropriate:

(i) “This representation began on _____, _____, 20____. I am not aware of any other attorney or non-attorney who was previously representing the lien claimant.”; or

(ii) “This representation began on: _____, _____, 20____. I _____ am _____ aware _____ that

_____ [specify person or entity] was previously representing the lien claimant. This Notice of Change of Representation supersedes a previous Notice of Representation dated _____, 20____. I hereby certify that I have notified the previous attorney or non-attorney representative in writing of the change of representation.

(C) a declaration executed by the attorney or non-attorney stating: “By signing below, I affirm that I am a licensed attorney or a non-attorney who is not disqualified from appearing by WCAB Rule 10779 (Cal. Code Regs., tit. 8, § 10779) or by any other Rule, order, or decision of the Workers’ Compensation Appeals Board, the State Bar of California, or court.”

(f) Notice of Non-Representation:

(1) If a lien claimant’s representation by an attorney or non-attorney representative terminates for any reason (including but not limited to the attorney or non-attorney’s discharge or death, or the suspension or removal of the attorney’s or non-attorney’s right to appear) and the lien claimant does not concurrently execute a notice of change of representation, the lien claimant shall be deemed self-represented and shall file and serve a “Notice of Non-Representation.”

(2) The notice of non-representation shall comply with the provisions of subsections (a) through (d), above.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4903(a), 4903.6(b), 4906, 5501, and 5700; Sections 284, 285, and 286, Code of Civil Procedure; Sections 10774 and 10779, title 8, California Code of Regulations.

RATIONALE:

Current Rule 10774 (entitled “Substitution or Dismissal of Attorneys”) provides: “Substitution or dismissal of attorneys must be made in the manner provided by Code of Civil Procedure Sections 284, 285 and 286. Dismissal of agents may be made by serving and filing a statement of dismissal.”²¹ However, there is no current Rule requiring the filing of a notice of representation when lien claimant first obtains an attorney or non-attorney representative.²²

SB 863 enacted Labor Code section 4903.6(b), which specifically provides: “(b) All lien claimants under Section 4903 shall notify the employer and the employer’s

²¹ Consistent with current Rule 10774, there is a “Substitution of Attorneys” form (<http://www.dir.ca.gov/dwc/FORMS/SubOfAttorney.pdf>) and a “Notice of Dismissal of Attorney” form (<http://www.dir.ca.gov/dwc/Dismissalofattorney.pdf>).

²² Both attorneys and certain non-attorneys may appear before the Workers’ Compensation Appeals Board (see Lab. Code, §§ 5501, 5700; *Eagle Indemnity Co. v. Industrial Acc. Com. (Hernandez)* (1933) 217 Cal. 244, 248 [19 I.A.C. 150]; *99 Cents Only Stores v. Workers’ Comp. Appeals Bd. (Arriaga)* (2000) 80 Cal.App.4th 644, 648 [65 Cal.Comp.Cases 456]; *Longval v. Workers’ Comp. Appeals Bd.* (1996) 51 Cal.App.4th 792, 798 [61 Cal.Comp.Cases 1396]); but see WCAB Rule 10779; *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61 [“defrocked” attorneys cannot appear].

representative, if any, and the employee and his or her representative, if any, and the appeals board within five working days of obtaining, changing, or discharging representation by an attorney or nonattorney representative. The notice shall set forth the legal name, address, and telephone number of the attorney or nonattorney representative.” (Stats., ch. 363, § 69.)

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

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

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

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

Similarly, proposed Rule 10774(e)(5) would provide that, if no fully executed notice of representation or change of representation has been filed at or before the time of any hearing, then: (A) the lien claimant shall be deemed not to be represented even if the attorney or non-attorney representative who purportedly has assumed representation appears; and (B) if the lien claimant does not appear at the hearing, it shall be subject to all of the consequences of a failure to appear. These provisions will help ensure that lien claimants actually and timely comply with the notice of representation requirements.

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

representative who is employed or intended to be employed on a continuing or extended basis.

Article 20. Review of Administrative Orders

§ 10956. Petition Appealing Determination of Director of Industrial Relations Regarding Return to Work Fund Benefits

(a) An injured employee may file a petition appealing a determination by the Director of Industrial Relations, made pursuant to Labor Code section 139.48 and its related regulations, regarding the employee's eligibility for, or the amount of, supplemental payments under the Return to Work Fund (RTWF) administered by the Director.

(b) The petition shall be filed with the Workers' Compensation Appeals Board no later than 20 days after the Director served the RTWF determination. The time for filing shall be extended in accordance with sections 10507 and 10508.

(c) The petition shall be filed as follows:

(1) if an application was previously filed, the petition, unless e-filed, shall be filed only with the district office having venue;

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

(d) The petition shall be identified as "Petition Appealing Return to Work Fund Determination of Director of Industrial Relations."

(e) The caption of the petition shall include: (1) the injured employee's first and last names; (2) the name(s) of the defendant(s) in the underlying workers' compensation case(s); (3) the case number assigned by the Director to the RTWF determination; and (4) the adjudication case number(s), if any, assigned by the Workers' Compensation Appeals Board to any related application for adjudication of claim(s) previously filed.

(f) A document cover sheet and a document separator sheet shall be filed with the petition and "Appeal of Determination of DIR Director-RTWF" shall be entered into the document title field of the document separator sheet.

(g) The petition shall include a copy of the RTWF determination and of the proof of service to that determination.

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(h) The petition shall comply with each of the following provisions:

- (1) The petition may appeal the RTWF determination upon one or more of the following grounds and no other: (A) the determination was without or in excess of the Director's powers; (B) the Director's determination was procured by fraud; (C) the evidence does not justify the Director's determination; (D) the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and presented to the Director at the time of the request for RTWF benefits; (E) the Director's findings of fact do not support the determination.
 - (2) The petition shall set forth specifically and in full detail the factual and/or legal grounds upon which the petitioner considers the RTWF determination of the Director to be unjust or unlawful, and every issue to be considered by the Workers' Compensation Appeals Board. The petitioner shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the RTWF determination other than those set forth in the petition.
 - (3) The petition shall be verified upon oath in the manner required for verified pleadings in courts of record.
 - (4) The petition shall comply with the requirements of sections 10842(a) & (c), 10846, and 10852. It shall also comply with the provisions of section 10845, including but not limited to the 25-page restriction.
 - (5) Any failure to comply with the provisions of this subdivision shall constitute valid ground for summarily dismissing or denying the petition.
- (i) A copy of the petition shall be concurrently served on the Return to Work Fund Unit (RTWF Unit) of the Department of Industrial Relations. A failure to file a proof of service concurrently with the petition shall subject it to summary dismissal.
- (j) The Director may file an answer to the petition within 10 days of the date of its service. A document cover sheet and a document separator sheet shall be filed with the answer and "RTWF Answer to Appeal" shall be entered into the document title field of the document separator sheet.
- (k) The petition shall not be placed on calendar unless a declaration of readiness is filed. The declaration of readiness may be filed with or subsequent to the petition. Any declaration of readiness shall be concurrently served on the Department of Industrial Relations, RTWF Unit, or on its legal representative, if the legal representative has appeared through the filing of an answer or otherwise.

(l) The petition shall be adjudicated by a workers' compensation judge at the trial level of the Workers' Compensation Appeals Board utilizing the same procedures applicable to claims for ordinary benefits, including but not limited to the setting of a mandatory settlement conference.

(m) Any party aggrieved by a final decision, order, or award of the workers' compensation judge may file a petition for reconsideration with the Appeals Board within the same time and in the same manner specified for petitions for reconsideration. The workers' compensation judge shall prepare a report on the petition for reconsideration in accordance with section 10860, unless the judge timely acts on a timely filed petition for reconsideration in accordance with section 10859.

(n) This section shall not become operative until the effective date of the regulations adopted by the Director to implement Labor Code section 139.48.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 139.48, 5500, 5501, 5502, 5700 et seq., 5800 et seq., 5900 et seq., Labor Code; Sections 10409, 10507, 10508, 10842, 10845, 10846, 10852, 10856, 10859, 10860, California Code of Regulations, title 8.

RATIONALE:

The WCAB is proposing to add Rule 10956 in light of SB 863's addition of Labor Code section 139.48. (Stats. 2012, ch. 363, § 6.5.) Section 139.48 establishes a fund by which the Director of Industrial Relations may award supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. Section 139.48 further provides that "[d]eterminations of the director shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration."

Proposed Rule 10956(b) would provide that a petition appealing the Director's determination shall be filed with the WCAB no later than 20 days after the determination. This is consistent with Labor Code sections 5900(a) and 5903 relating to petitions for reconsideration. It would further provide, however, that the time for filing would be extended under Rule 10507 where the determination is not personally served and under Rule 10508 where the time for filing falls on a weekend or holiday.

Proposed Rule 10956(c) would essentially provide that, except for e-filed petitions appealing (which are filed in cyberspace), the petition must be filed with the district office of the WCAB having venue if an application was previously filed. If no application was previously filed, an application shall be filed together with the petition and the petition shall be filed only with the district office where venue is being asserted.

Proposed Rule 10956(d) would provide that the petition shall be captioned "Petition Appealing Return to Work Fund Determination of Director of Industrial Relations." The phrase "Return to Work Fund" is what the Director has determined payments under

Labor Code section 139.48 will be called. Also, to avoid confusion with petitions for reconsideration filed under Labor Code section 5900 et seq., the petition will be titled a “Petition Appealing”

Proposed Rule 10956(e) would require that a document cover sheet and document separator sheet be filed with the petition and would also specify that “Appeal of Determination of DIR Director-RTWF” must be entered in the document title field of the document separator sheet. “RTWF” is the acronym for “Return to Work Fund.”

Proposed Rule 10956(h)(1) would limit the grounds for the petition, in accordance with Labor Code section 139.48, which expressly provides that the petition “shall be subject to review at the trial level of the appeals board *upon the same grounds* as prescribed for petitions for reconsideration.” This language of proposed Rule 10956(h)(1) tracks the “grounds” for reconsideration listed in Labor Code section 5903.

Proposed Rule 10956(h)(2) would require the petition to set forth specifically and in full detail its factual and/or legal grounds. Again, Labor Code section 139.48, which expressly provides that the petition appealing “shall be subject to review ... *upon the same grounds* as prescribed for petitions for reconsideration.” Therefore, the language of proposed Rule 10956(h)(2) tracks the first sentence of Labor Code section 5902, except that it adds “factual and/or legal.” It also provides that all objections, irregularities, and illegalities not raised in the petition are deemed waived, which tracks the language of Labor Code section 5904.

Proposed Rule 10956(h)(3) provides that the petition must be verified, which tracks the language of the first part of the first sentence of Labor Code section 5902.

Proposed Rule 10956(h)(4) and (5) provide, respectively, that the petition shall comply with various WCAB Rules relating to petitions for reconsideration and that a failure to comply with the provisions of subdivision (h) is a ground for summarily dismissing or denying the petition.

Proposed Rule 10956(i) provides that a copy of the petition must be served on the Return to Work Fund Unit of the Department of Industrial Relations. This provision is necessary because, with respect to the supplemental payments under Labor Code section 139.48, there will be no employer or insurance carrier to defend against the appeal since any payments allowed will come from a special fund administered by the Director. Therefore, the Director should have notice of any petition, since it is the only possible interested adverse entity. Further, the Labor Code section 139.48 fund is currently limited to \$120,000,000. Therefore, the Director needs to be promptly aware of any petition appealing because that petition may have an effect on the fund’s reserves.

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

Proposed Rule 10956(k) addresses how a petition gets on the WCAB's calendar.

Proposed Rule 10956(l) provides that the petition shall be adjudicated by a WCJ at the trial level of the WCAB, utilizing the same procedures applicable to claims for ordinary benefits.

Proposed Rule 10956(m) provides for a petition for reconsideration to the Appeals Board.

Proposed Rule 10956(n) provides that this section shall not become operative until the effective date of the regulations adopted by the Director to implement Labor Code section 139.48. This provision is intended to prevent appeals on the basis that the Director has not yet adopted regulations and, therefore, has not issued any determinations.

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

(a) An aggrieved party may file a petition appealing an independent bill review (IBR) determination of the Administrative Director. For purposes of this section, a "determination" includes a decision regarding the amount payable to the provider, if any, and a decision that a dispute is not subject to independent bill review.

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

(c) The petition shall be filed as follows:

(1) if an application was previously filed, the petition, unless e-filed, shall be filed only with the district office having venue;

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

(d) The petition shall be identified as a "Petition Appealing Administrative Director's Independent Bill Review Determination."

(e) The caption of the petition shall include: (1) the injured employee's first and last names; (2) the name(s) of the defendant(s) involved in the IBR dispute; (3) the case number assigned by the Administrative Director to the IBR determination; and (4) the adjudication case number, if any, assigned by the Workers' Compensation Appeals Board to any related application for adjudication of claim(s) previously filed.

(f) A document cover sheet and a document separator sheet shall be filed with the petition and “Appeal of Determination of AD-IBR” shall be entered into the document title field of the document separator sheet.

(g) The petition shall include a copy of the IBR determination and proof of service to that determination.

(h) The petition shall comply with each of the following provisions:

(1) The petition shall be limited to raising one or more of the five grounds specified in Labor Code section 4603.6(f).

(2) The petition shall set forth specifically and in full detail the factual and/or legal grounds upon which the petitioner considers the IBR determination to be unjust or unlawful, and every issue to be considered by the Workers’ Compensation Appeals Board. The petitioner shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the IBR determination other than those set forth in the petition appealing.

(3) The petition shall be verified upon oath in the manner required for verified pleadings in courts of record.

(4) The petition shall comply with the requirements of sections 10842(a) & (c), 10846, and 10852. It shall also comply with the provisions of section 10845, including but not limited to the 25-page restriction.

(5) Any failure to comply with the provisions of this subdivision shall constitute valid ground for summarily dismissing or denying the petition.

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

(j) The adverse party(ies) or provider(s) and the Administrative Director may file an answer to the petition within 10 days of its date of service. A document cover sheet and a document separator sheet shall be filed with the answer and “IBR Answer to Appeal” shall be entered into the document title field of the document separator sheet.

(k) The petition shall not be placed on calendar unless a declaration of readiness is filed. The declaration of readiness may be either concurrently filed with the petition or

subsequently filed. Any declaration of readiness shall be concurrently served on the adverse party(ies) or provider(s) and on the IBR Unit.

(l) The petition shall be adjudicated by a workers' compensation judge at the trial level of the Workers' Compensation Appeals Board utilizing the same procedures applicable to claims for ordinary benefits, including but not limited to the setting of a mandatory settlement conference, except that the IBR determination shall be presumed correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the Labor Code section 4603.6(f) statutory grounds for appeal.

(m) Any party aggrieved by a final decision, order, or award of the workers' compensation judge may file a petition for reconsideration with the Appeals Board within the same time and in the same manner specified for petitions for reconsideration. The workers' compensation judge shall prepare a report on the petition for reconsideration in accordance with section 10860, unless the judge acts on a timely filed petition for reconsideration in accordance with section 10859.

(n) If the IBR determination is reversed by the workers' compensation judge or the Appeals Board, the dispute shall be remanded to the Administrative Director in accordance with Labor Code section 4603.6(g).

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4603.6, 5500, 5501, 5502, 5700 et seq., 5800 et seq., 5900 et seq., Labor Code; Sections 10250, 10409, 10507, 10508, 10842, 10845, 10846, 10852, 10856, 10859, 10860, California Code of Regulations, title 8.

RATIONALE:

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

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

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

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

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

Proposed Rule 10957(h)(1) would provide that the petition shall be limited to raising one or more of the five grounds specified in Labor Code section 4603.6(f).²³ The WCAB sees no need for its proposed Rule to expressly set forth each of the five grounds specified in section 4603.6(f) because these statutory provisions are self-implementing.

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

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

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

Proposed Rule 10957(i) provides that a copy of the petition shall be concurrently served on: (1) the adverse party(ies) or provider(s) or, if represented, their attorney or non-attorney representatives; (2) the injured employee or, if represented, the employee’s attorney; and (3) the Division of Workers’ Compensation, Independent Bill Review Unit .

²³ The five grounds of appeal specified in section 4603.6(f) are:

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

A failure to file a proof of service concurrently with the petition appealing shall constitute valid ground for summarily dismissing the petition.

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

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

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

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

Proposed Rule 10957(n) provides that the AD's IBR determination is reversed by a WCJ or the Appeals Board, the dispute shall be remanded to the AD in accordance with Labor Code section 4603.6(g).²⁴ Again, the WCAB sees no need for its proposed Rule to expressly include the language of section 4603.6(g) because its provisions are self-implementing.

§ 10958. Petition Appealing Independent Medical Review Determination of Administrative Director

(a) This section shall apply only to petitions appealing an independent medical review (IMR) determination of the Administrative Director regarding treatment for: (1) an injury occurring on or after January 1, 2013; and (2) an injury occurring on or before December 31, 2012, if the decision is communicated to the requesting physician on or after July 1, 2013. This section shall not apply where the injured employee asserts that a defendant's utilization review is untimely or otherwise invalid unless, as an alternative challenge, the employee is also appealing the IMR determination.

(b) An aggrieved party may file a petition appealing the Administrative Director's independent medical review (IMR) determination. For purposes of this section, a "determination" includes a decision regarding medical necessity and a decision that a dispute is not subject to independent medical review.

²⁴ Section 4603.6(g) provides: "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent bill review by a different independent review organization. In the event that a different independent bill review organization is not available after remand, the administrative director shall submit the dispute to the original bill review organization for review by a different reviewer within the organization."

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

(d) The petition shall be filed as follows:

(1) if an application was previously filed, the petition, unless e-filed, shall be filed only with the district office having venue;

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

(e) The petition shall be identified as a "Petition Appealing Administrative Director's Independent Medical Review Determination."

(f) The caption of the petition shall include: (1) the injured employee's first and last names; (2) the name(s) of the defendant(s) involved in the IMR dispute; (3) the case number assigned by the Administrative Director to the IMR determination; and (4) the adjudication case number, if any, assigned by the Workers' Compensation Appeals Board to any related application for adjudication of claim(s) previously filed.

(g) A document cover sheet and a document separator sheet shall be filed with the petition and "Appeal of Determination of AD-IMR" shall be entered into the document title field of the document separator sheet.

(h) The petition shall include a copy of the IMR determination and proof of service to that determination.

(i) The petition shall comply with each of the following provisions:

(1) The petition shall be limited to raising one or more of the five grounds specified in Labor Code section 4610.6(h).

(2) The petition shall set forth specifically and in full detail the factual and/or legal grounds upon which the petitioner considers the IMR determination to be unjust or unlawful, and every issue to be considered by the Workers' Compensation Appeals Board. The petitioner shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the IMR determination other than those set forth in the petition.

(3) The petition shall be verified upon oath in the manner required for verified pleadings in courts of record.

(4) The petition shall comply with the requirements of sections 10842(a) & (c), 10846, and 10852. It shall also comply with the provisions of section 10845, including but not limited to the 25-page restriction.

(5) Any failure to comply with the provisions of this subdivision shall constitute valid ground for summarily dismissing or denying the petition.

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

(k) The adverse party(ies) or provider(s) and the Administrative Director may file an answer to the petition within 10 days of the date of its service. A document cover sheet and a document separator sheet shall be filed with the answer and "IMR Answer to Appeal" shall be entered into the document title field of the document separator sheet.

(l)(1) The petition shall not be placed on calendar unless a declaration of readiness is filed. The declaration of readiness may be either concurrently filed with the petition or subsequently filed. Any declaration of readiness shall be concurrently served on the adverse party(ies) or provider(s) and on the IMR Unit.

(2) The declaration of readiness may request an expedited hearing under Labor Code section 5502(b).

(3) Notwithstanding the filing of a declaration of readiness, a petition appealing an IMR determination shall be deferred if at the time of the determination the defendant is also disputing liability for the treatment for any reason besides medical necessity.

(m) The petition shall be adjudicated by a workers' compensation judge at the trial level of the Workers' Compensation Appeals Board utilizing the same procedures applicable to claims for ordinary benefits, including but not limited to the setting of a mandatory settlement conference unless an expedited hearing is being conducted in accordance with Labor Code section 5502(b). However, the IMR determination shall be presumed correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the Labor Code section 4610.6(h) statutory grounds for appeal.

(n) Any party aggrieved by a final decision, order, or award of the workers' compensation judge may file a petition for reconsideration with the Appeals Board within the same time and in the same manner specified for petitions for reconsideration. The workers' compensation judge shall prepare a report on the petition for reconsideration in

accordance with section 10860, unless the judge acts on a timely filed petition for reconsideration in accordance with section 10859.

(o) If the IMR determination is reversed by the workers' compensation judge or the Appeals Board, the dispute shall be remanded to the Administrative Director in accordance with Labor Code section 4603.6(g).

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4610.6, 5500, 5501, 5502, 5700 et seq., 5800 et seq., 5900 et seq., Labor Code; Sections 10250, 10409, 10507, 10508, 10842, 10845, 10846, 10852, 10856, 10859, 10860, California Code of Regulations, title 8.

RATIONALE:

The WCAB is proposing to add Rule 10958 in light of SB 863's addition of Labor Code section 4610.6(h). (Stats. 2012, ch. 363, § 39.) Section 4610.6(h) provides that independent medical review (IMR) determinations of the Administrative Director are subject to appeal to the WCAB, although it imposes significant restrictions on such appeals.

Proposed Rule 10958(a) would provide that this section applies only to petitions appealing IMR determinations regarding treatment for: (1) an injury occurring on or after January 1, 2013; and (2) an injury occurring on or before December 31, 2012, if the decision is communicated to the requesting physician on or after July 1, 2013. This provision is being included for the following reasons.

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

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

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

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

Proposed Rule 10958(c) would provide that a petition appealing an IMR determination of the AD shall be filed with the WCAB no later than 20 days after the determination. This is consistent with Labor Code sections 5900(a) and 5903 relating to petitions for

reconsideration. It would further provide, however, that the time for filing would be extended under Rule 10507 where the determination is not personally served and under Rule 10508 where the time for filing falls on a weekend or holiday.

Proposed Rule 10958(d) would essentially provide that, except for e-filed petitions appealing (which are filed in cyberspace), the petition must be filed with the district office of the WCAB having venue if an application was previously filed. If no application was previously filed, an application shall be filed together with the petition and the petition shall be filed only with the district office where venue is being asserted.

Proposed Rule 10958(e) would provide that the petition shall be captioned “Petition Appealing Administrative Director’s Independent Medical Review Determination.”

Proposed Rule 10958(g) would require that a document cover sheet and document separator sheet be filed with the petition and would also specify that “Appeal of Determination of AD-IMR” must be entered in the document title field of the document separator sheet.

Proposed Rule 10958(i)(1) would provide that the petition appealing shall be limited to raising one or more of the five grounds specified in Labor Code section 4610.6(h).²⁵ The WCAB sees no need for its proposed Rule to expressly set forth each of the five grounds specified in section 4610.6(h) because these statutory provisions are self-implementing.

Proposed Rule 10958(i)(2) would require the petition appealing to set forth specifically and in full detail its factual and/or legal grounds and would also provide that all objections, irregularities, and illegalities not raised in the petition are deemed waived. This is consistent with the language of Labor Code section 5902 and 5904.

Proposed Rule 10958(i)(3) provides that the petition appealing must be verified, which is consistent with the language of Labor Code section 5902.

²⁵ The five grounds of appeal specified in section 4610.6(h) are:

- (1) The administrative director acted without or in excess of the administrative director’s powers.
- (2) The determination of the administrative director was procured by fraud.
- (3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.
- (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.
- (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion.

Proposed Rule 10958(i)(4) and (5) provide, respectively, that the petition appealing shall comply with various WCAB Rules relating to petitions for reconsideration and that a failure to comply with the provisions of subdivision (i) is a ground for summarily dismissing or denying the petition.

Proposed Rule 10958(j) provides that a copy of the petition appealing the Administrative Director's determination shall be concurrently served on: (1) the adverse party(ies) or provider(s) or, if represented, their attorney or non-attorney representatives; (2) the injured employee or, if represented, the employee's attorney; and (3) the Division of Workers' Compensation, Independent Medical Review Unit . A failure to file a proof of service concurrently with the petition appealing shall constitute valid ground for summarily dismissing the petition.

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

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

Proposed Rule 10958(m) provides that the petition appealing shall be adjudicated by a WCJ at the trial level of the WCAB, utilizing the same procedures applicable to claims for ordinary benefits. However, consistent with Labor Code section 4610.6(h), proposed Rule 10958(m) further provides that the Administrative Director's determination shall be presumed correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the Labor Code section 4610.6(h) statutory grounds for appeal.

Proposed Rule 10958(n) provides for a petition for reconsideration to the Appeals Board.

Proposed Rule 10958(o) provides that the AD's IMR determination is reversed by a WCJ or the Appeals Board, the dispute shall be remanded to the AD in accordance with Labor Code section 4610.6(h).²⁶ Again, the WCAB sees no need for its proposed Rule to expressly include the language of section 4603.6(g) because its provisions are self-implementing.

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²⁶ Section 4610.6(h) provides: "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization."

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

(a) Any aggrieved person or entity may file a petition appealing a determination of the Administrative Director to: (1) deny a medical provider network (MPN) application; (2) revoke or suspend an MPN plan; (3) place an MPN plan on probation; (4) deny a petition to revoke or suspend an MPN plan; or (5) impose administrative penalties against an MPN or against an insurer, employer, or other entity providing MPN services.

For purposes of this section, an “aggrieved person or entity” shall include, but is not necessarily limited to, an MPN, an MPN applicant, an insurer, an employer, or any other entity that provides or seeks to provide MPN services. It shall also include, but is not necessarily limited to, an injured employee or a group of injured employees complaining that the Administrative Director should have suspended or revoked a previously approved MPN plan.

(b) The petition shall be filed only as follows:

(1) The petition shall be filed no later than 20 days after the date of service of the Administrative Director’s determination, except the time for filing shall be extended in accordance with sections 10507 and 10508. An untimely petition may be summarily dismissed.

(2) Notwithstanding any other provision of these rules or of Administrative Director Rules 9767.13(f) and 9767.14(f), the petition shall be filed solely in paper (hard copy) form directly with the Office of the Commissioners of the Appeals Board at either its P.O. Box or street address. Up-to-date P.O. Box and street address information may be obtained at the website of the Department of Industrial Relations, Workers’ Compensation Appeals Board (currently, at <http://www.dir.ca.gov/wcab/WCAB.PetitionforReconsideration.htm>) or by telephoning the Office of the Commissioners (currently, (415) 703-4550).

(3) The petition shall not be submitted to any district office of the Workers’ Compensation Appeals Board, including the San Francisco district office, and it shall not be submitted electronically.

(4) A petition submitted in violation of this subdivision shall neither be accepted for filing nor deemed filed and shall not be acknowledged or returned to the submitting party.

(c) The petition shall be identified as a “Petition Appealing Administrative Director’s Medical Provider Network Determination.”

(d) The caption of the petition appealing shall include: (1) the name of the MPN or MPN applicant; (2) the identity of the petitioner; and (3) the case number assigned by the Administrative Director to the MPN determination.

(e) The petition shall include a copy of the Administrative Director's determination and proof of service to that determination.

(f) The petition shall comply with each of the following provisions:

(1) The petition may appeal the Administrative Director's determination upon one or more of the following grounds and no other: (A) the determination was without or in excess of the Administrative Director's powers; (B) the determination was procured by fraud; (C) the evidence does not justify the determination; (D) the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and presented to the Administrative Director prior to the determination; (E) the Administrative Director's findings of fact do not support the determination.

(2) The petition shall set forth specifically and in full detail the factual and/or legal grounds upon which the petitioner considers the determination of the Director to be unjust or unlawful, and every issue to be considered by the Workers' Compensation Appeals Board. The petitioner shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the Administrative Director's determination other than those set forth in the petition appealing.

(3) The petition shall be verified upon oath in the manner required for verified pleadings in courts of record.

(4) The petition shall comply with the requirements of sections 10842(a) & (c), 10846, and 10852. It shall also comply with the provisions of section 10845, including but not limited to the 25-page restriction.

(5) Any failure to comply with the provisions of this subdivision shall constitute valid ground for summarily dismissing or denying the petition.

(g) A copy of the petition shall be concurrently served on the Division of Workers' Compensation, Medical Provider Network Unit (MPN Unit). A failure to file a proof of service concurrently with the petition appealing shall subject the petition to summary dismissal.

(h) The Administrative Director may file an answer to the petition appealing the Administrative Director's determination within 10 days of the date of service of that petition, except the time for filing shall be extended in accordance with sections 10507 and 10508.

(i) The petition shall be assigned to a panel of the Appeals Board in accordance with Labor Code section 115.

(j) Within 30 days after the filing of an answer or the lapse of the time allowed for filing one, the Appeals Board shall issue a notice for an evidentiary hearing regarding the petition. The evidentiary hearing shall be set for the purposes of specifying the issue(s) in dispute and any stipulations, taking testimony, and listing and identifying any documentary evidence offered. The proceedings shall be transcribed by a court reporter, which the Appeals Board in its discretion may order the petitioner to provide. The Appeals Board also may order the petitioner to pay the costs of the transcript(s) of the evidentiary hearing.

(k) In its discretion, the Appeals Board may provide that the evidentiary hearing shall be conducted by:

(1) one or more Commissioners of the Appeals Board; or

(2) a workers' compensation judge appointed under Labor Code sections 5309(b) for the sole purpose of holding hearings and ascertaining facts necessary to enable the Appeals Board to render a decision on the petition appealing; a judge appointed for this purpose shall not render any factual determinations, but may make a recommendation regarding the credibility of any witness(es) presented.

The time, date, length, and place of the evidentiary hearing shall be determined by the Appeals Board in its discretion.

(l) The assigned panel of the Appeals Board shall determine when the petition is submitted for decision. Within 60 days after submission, the panel shall render a decision on the petition appealing unless, within that time, the panel orders that the time be extended so that it may further study the facts and relevant law.

Note: Authority cited: Sections 133, 5307, 5309 and 5708, Labor Code. Reference: Sections 4616 et seq., 5300(f), 5900 et seq., Labor Code.

RATIONALE:

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

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

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

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

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

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

Proposed Rule 10959(b)(2) and (b)(3) would provide that, notwithstanding any other provision of the WCAB Rules or of AD Rules 9767.13(f) and 9767.14(f), a petition appealing an MPN determination shall be filed solely with the Office of the

Commissioners of the Appeals Board in San Francisco. This is consistent with section 4616(b)(5), which provides: “A[n] [MPN] determination of the [AD] may be reviewed only by an appeal of the determination ... filed as an original proceeding before the reconsideration unit of the workers’ compensation appeals board” AD Rules 9767.13(f) and 9767.14(f), which each provide that an MPN applicant may appeal an AD decision “by filing ... a petition at the district office of the Workers’ Compensation Appeals Board closest to the MPN applicant’s principal place of business, together with a Declaration of Readiness to Proceed,” are inconsistent with section 4616(b)(5).

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

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

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

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

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

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

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

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