

**California Coalition on Workers' Compensation**  
**California Chamber of Commerce**  
**California Manufacturers & Technology**  
**Association**  
**California Association of Joint Powers Authorities**  
**CSAC Excess Insurance Authority**  
**California State Association of Counties**  
**League of California Cities**  
**National Federation of Independent Business**  
**California Grocers Association**  
**California Trucking Association**  
**California Restaurant Association**  
**California Self-Insurers Association**  
**California Professional Association of Specialty**  
**Contractors**  
**Employers Group**  
**Schools Insurance Authority**  
**Sedgwick Claims Management Services**

**Comp Partners**  
**Safeway**  
**Metro Risk Management**  
**Small Business California**  
**TRITSAR Risk Management**  
**State Compensation Insurance Fund**  
**Fireman's Fund Insurance Company**  
**Shaw Jacobsmeyer**  
**GSG Associates**  
**Grimmway Farms**  
**KBA Engineering**  
**Athens Administrators**  
**Marriott International, Inc.**  
**Matian Law Group**  
**Seyfarth Shaw, LLC.**  
**University of California**  
**Nordstrom**

August 9, 2013

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

**RE: WCAB Rules of Practice and Procedure**

Dear Mr. Sullivan –

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

While there have been several estimates of the savings associated with SB 863 (De Leon, 2012), it is clear that the ultimate impact on employers (large and small, insured and self-insured) will depend largely on the regulatory framework that is constructed over the next several months. Our organizations believe that the WCAB Rules of Practice and Procedure are particularly important to an effective implementation. Many of the changes contained in SB 863 were intended to reduce friction-causing litigation in the workers' compensation system and speed the healing of injured workers and the resolution of their insurance claims.

## **Legislative Intent**

Regulators are often left to implement complex legislation with little more than the statute to guide them. However, the legislature chose not to let the statutory changes contained in SB 863 speak for themselves. Instead, they very carefully included findings and declarations that provides needed insight into the legislature's intent.

On the subject of permanent disability the legislature found that:

*“That the current system of determining permanent disability has become excessively litigious, time consuming, procedurally burdensome and unpredictable, and that the provisions of this act will produce the necessary uniformity, consistency, and objectivity of outcomes...”*

Similarly, when discussing medical treatment the legislature found that:

*“That the current system of resolving disputes over the medical necessity of requested treatment is costly, time consuming, and does not uniformly result in the provision of treatment that adheres to the highest standards of evidence-based medicine, adversely affecting the health and safety of workers injured in the course of employment.”*

The message from the legislature cannot be mistaken – a system overrun with litigation is adversely impacting injured workers and SB 863 was intended to eliminate the procedural logjams and unnecessary litigation so that injured workers could fare better. Our coalition strongly urges the WCAB to keep the legislature's words in mind as it proceeds with the revision of the WCAB Rules of Practice and Procedure. We respectfully ask that the WCAB avoid providing procedural pathways around the reforms enacted by the legislature through SB 863.

## **Technical Deficiencies**

SB 863, much like SB 899 (Poochigian, 2004), implements a host of cost-saving reforms that rely on detailed processes performed by highly regulated organizations. Medical Provider Networks (MPN), Independent Bill Review (IBR) and Independent Medical Review (IMR) all fit this description. These cost-saving tools are often controversial because they are intended to provide uniformity, consistency, and predictability in a system that is frequently exploited through novel litigation tactics.

Historically, opponents of change have attempted to undermine reforms by claiming that any technical or procedural deficiency should, in essence, serve as a “death penalty” for the underlying reform. Attorneys have effectively argued that a minor procedural glitch should sever the applicability of utilization review or cease the medical control of an MPN. Opponents of the underlying reform use this approach not to ensure justice for injured workers, but rather to create legal gray areas where they can flourish. The result is more delay and litigation – the exact scourge that is being openly attacked by SB 863.

Our coalition is strongly opposed to this type of “gotcha” litigation and would urge the WCAB in the strongest possible terms to protect against this type of strategy as you update the Rules of Practice and Procedure. We would request that the WCAB clarify in the Rules of Practice and Procedure that routine procedural and regulatory deficiencies are not sufficient to undermine UR, MPNs, IMR, IBR and other cost-saving reforms. Unless otherwise required by statute, we would recommend that the WCAB reflect the legislature’s intent to reform excessive litigation and burdensome procedures in its Rules of Practice and Procedure.

### **E-Mail Communications**

Our coalition is supportive of modernizing the workers’ compensation system to take advantage of new technologies, but we are also well aware of the many pitfalls associated with electronic communications. As a general rule we would urge the WCAB to modify the regulations to ensure that electronic mail (e-mail) is only considered an acceptable form of communication when there has been a prior agreement between the parties.

For instance, Section 10451.3(d) defines “written demand” to include “a demand served electronically including but not limited to by e-mail or fax”. While there is a great deal of predictability that comes with written demands received by traditional mail or fax, the same cannot be said of e-mail. Fax machines and traditional mail are typically received and distributed to the appropriate party through a centralized and tightly controlled process. E-Mail does not have the same characteristic because individual people have their own e-mail addresses that are not processed through a central location. There is a high probability that, without the proper preparation, important e-mails will be lost.

Our coalition urges the WCAB to modify the regulations to allow e-mail communications only where there has been a prior agreement by the parties. There is simply too much potential for misuse and error, and it is in the best interest of all parties to ensure that proper steps are taken to ensure effective communication.

### **§10451.1 (c) Medical-Legal Expense Disputes Not Subject to IBR**

Our coalition is concerned that language contained in Section 10451.1(c)(1) creates an opening for lien claimants to argue that their billing dispute is not subject to the IBR process. This portion of the regulation creates a list of medical-legal expense disputes between a defendant and a medical-legal provider that are not subject to IBR.

#### *Coalition Recommendation*

Strengthen this portion of the regulation by ensuring that the list of non-IBR disputes is clear, complete, and closed to legal wrangling. Again, this is consistent with the intent of SB 863, which was to simplify procedures and reduce litigation. Specifically, we would recommend eliminating the final five words in 10451.1(c)(1).

#### *Recommended Modification to Section 10451.1(c)(1)*

Where applicable, independent bill review (IBR) applies solely to disputes directly related to the amount payable to a medical-legal provider under an official fee schedule

in effect on the date the medical-legal goods or services were provided. Other medical-legal expense disputes between a defendant and a medical-legal provider are non-IBR disputes. Such non-IBR disputes shall include, ~~but are not limited to:~~

Section 10451.1 (c)(1)(B) does not conform with LC § 4603.6 and § 4620 as further defined by SB 863 § 84. Section 84 of SB 863 address application of IBR to all dates of injury for bills received after 1/1/2013 and this section should be made to conform with that requirement.

Our coalition does believes that the petitions established in section **10451.1(c)(2)** can and should be more appropriately defined as a Petition or cover letter explaining the purpose & containing the pertinent facts together with the Declaration Of Readiness filing. We believe that the “cover letter” will provide the same result with far less complication and greater compliance.

Coalition Recommendation

Change Petition references to Petition in Paragraph A & B to reflect the above recommendation. Our coalition believes that the procedures enumerated in section **10451.1(c) (3)** are overly complicated should be simplified to allow the medical-legal provider to file a Cover Letter or Petition, requesting an Order of Costs.

Recommended Re-Write of 10451.1(c)(3)(A)

Should the defendant fail to comply with the requirements of paragraph (c) (2) above, then Medical-Legal expense provider shall be permitted to submit a request of Labor Code § 4622 fees, subject to the below requirements, and this may result in an Order for Costs.

Maintain paragraphs B & C.

**§10451.1 (g) Waiver of Medical-Legal Expense Issues**

The coalition is extremely concerned about the application of Section 10451.1(g), which pertains to a defendant’s waiver of objections to a medical-legal provider’s billing. We do not believe that this subsection is necessary because the statute is self-executing and there is no need for procedural clarification. We are concerned that this subsection will create more problems than it solves because parties will enter into disputes over what does or does not constitute a waiver of objections under this subsection.

Coalition Recommendation

Delete, in its entirety, section 10451.1(g) because it will create confusion and additional litigation while providing no benefit because the statute (LC 4620, 4621, and 4622) is already self-executing.

**§10451.1 (h) Bad Faith Actions or Tactics**

The addition of this portion of the regulations covering bad faith actions and the applicability of sanctions is unnecessary and duplicative. Our coalition believes that Labor Code Section 5813

and Title 8, Section 10561 provide sufficient guidance for workers' compensation judges to evaluate bad faith actions and potentially applicable penalties and sanctions.

In addition to being duplicative, Section 10451.1(h) is unnecessarily focused on the defendant and contains no direction on how to assess bad faith actions and potentially applicable sanctions on other parties such as lien claimants. This is an unfair application of the authorizing statute and DWC regulations, which are far broader in their application.

*Coalition Recommendation*

Delete, in its entirety, Section 10451.1(h) because it is duplicative, one-sided, and unnecessary considering the ample direction provided by Labor Code Section 5813 and Title 8, Section 10561.

**§10451.2 (c) Medical Treatment Disputes Not Subject to Independent Medical Review and/or Independent Bill Review**

Consistent with our theme throughout these comments, our coalition is concerned that certain aspects of this subsection would expose the IMR process to unnecessary legal wrangling. The WCAB should avoid provisions in the Rules of Practice and Procedure that unnecessarily create ambiguity that could detract from the legislative intent of SB 863. The current draft of section 10451.2 (c) is contrary to the legislative intent establishing the IMR & IBR processes.

Specific reference is made to section 1 of sb-863:

(11) The bill would require that final determinations made pursuant to the independent bill review processes be presumed to be correct and be set aside only as specified.

*Coalition Recommendation #1*

Strengthen 10451.2(c)(1) by ensuring that the list of non-IMR/IBR disputes is clear, complete, and closed to legal wrangling. Again, this is consistent with the intent of SB 863, which was to simplify procedures and reduce litigation. Specifically, we would recommend eliminating the final five words in 10451.2(c)(1).

*Recommended Modification to Section 10451.2(c)(1)*

Where applicable, independent medical review (IMR) applies solely to disputes over the necessity of medical treatment where a defendant has conducted a timely and otherwise procedurally proper utilization review (UR). Where applicable, independent bill review (IBR) applies solely to disputes directly related to the amount payable to a medical treatment provider under an official fee schedule in effect on the date the medical treatment was provided. All other medical treatment disputes are non-IMR/IBR disputes. Such non-IMR/IBR disputes shall include, but are not limited to:

*Coalition Recommendation #2*

We recommend completely striking 10451.2(c)(1)(C) because it would establish, as a matter of WCAB policy, that a mere assertion of procedural deficiencies is sufficient to

avoid the protections established by the legislature through the creation of IMR and IBR. This is an issue that is more appropriately addressed in the IMR and IBR regulations, which are currently being promulgated by the Division of Workers Compensation (emergency regulations are in place). Our coalition would once again ask the WCAB to act in furtherance of the legislature's clearly expressed intent to limit unnecessary litigation and burdensome procedures.

### **§10451.3 Petition for Costs**

We commend the WCAB for strengthening the regulations with respect to scenarios where a petition for costs can be used to pursue payment for medical treatment, medical legal services, and interpreter services. While it is clear that the labor code needs additional clarification, we believe that the modifications to this section are consistent with the legislature's intent when establishing lien reforms, IMR, and IBR.

### **§10608 (b) Service of Medical Reports and Medical-Legal Reports on a Party of Physician Lien Claimant**

First, our coalition is supportive of the amendment to 10608(b)(1) that allows for service of records within ten calendar days instead of six. Second, the draft rules currently require the service of medical reports and medical-legal reports on lien claimants before they are an actual party. We do not believe that this is necessary, or even desirable. A lien claimant is likely to have the medical records that are relevant to their billing dispute – the medical records from the treatment that they provided. There is no need to serve a physician lien claimant with all of the medical reports and medical-legal reports in a claims administrator's possession. Furthermore, additional service requirements on claims administrators distract from the primary function, which is to provide timely benefits to injured workers.

#### Coalition Recommendation

Our coalition recommends that the WCAB revise this subsection to clarify that lien claimants need not be served with medical records until after they have become a party. Earlier service is not needed, and it also represents a distraction from the core functions of claims administrators.

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

Our coalition is concerned that the wording in 10608.5(a) is confusing because instead of simply providing the different document service methods it notes that certain methods are "preferred". This preference has no effect on what is actually allowed and therefore serves no purpose. Please see the earlier reference to e-mail service.

#### Coalition Recommendation

Remove from 10608.5(a) all references to "preferred" methods of service since they carry no weight in cases before the WCAB.

#### Recommended Modification to 10608.5(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, except as provided in subdivision (b) below. ~~Production in PDF/A format shall be the preferred form of service. Indexing of documents and Bates-stamping of pages shall also be preferred.~~

### **§10770.1 Lien Conferences and Lien Trials**

The WCAB should be careful to not over-regulate and remove appropriate discretion from the hands of judges. We are concerned that section 10770.1(c)(2) does exactly that by regulating what a judge “may” do when a lien claimant fails to submit proper written proof of prior timely payment. Directing the judge on what he or she “may” do is a training issue and does not belong in the Rules of Practice and Procedure.

#### *Coalition Recommendation*

Remove the portion of 10770.1(c)(2) that overregulates the actions of judges and instead focus on proper training to ensure that they understand their options.

#### *Recommended Modification to 10770.1(c)(2)*

The following requirements must be met to satisfy the lien claimant’s burden of demonstrating prior timely payment:

- (A) Proof of prior timely payment shall be in the form provided by the Rules of the Administrative Director or by a printout from the Public Information Search Tool of EAMS. An offer of proof or a stipulation that payment was made shall not be adequate.
- (B) Proof of prior timely payment of a filing fee must establish that the fee was paid contemporaneously with the filing of the lien.
- (C) Proof of prior timely payment of an activation fee must establish that the fee was paid before the scheduled starting time of the lien conference set forth in the notice of hearing, except that, if the lien claimant filed the declaration of readiness, the proof shall establish that the activation fee was paid contemporaneously with the filing of the declaration of readiness.

~~If a lien claimant fails to submit proper written proof of prior timely payment, the Workers’ Compensation Appeals Board may elect to conduct a search within the Electronic Adjudication Management System to confirm prior timely payment, but is not obligated to do so, and a failure to conduct such a search shall not be a proper basis for a petition for reconsideration, removal, or disqualification.~~

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

Our coalition is generally concerned with what appears to be ambiguous language and regulatory overreach in this section.

Coalition Recommendations for Section 10957(h)

The term “IBR Unit” is used in this portion of the proposed rules. Our coalition is unclear what exactly this is referencing because we are not aware of an IBR Unit that has been established at the DWC. We would suggest modifying the language to avoid confusion, although we don’t have a recommendation for specific language because we are not clear on what is being referenced here.

Again, we are concerned that the regulations include in the draft rules what “may” be done by the WCAB, DWC, or other parties. Our coalition would recommend removing that language from the proposed rules.

Coalition Recommendation for Section 10957(j)

We recommend eliminating the mandatory settlement conference from this portion of the proposed rules because it is unnecessary and serves only to add time and cost to the dispute resolution process. A petition of an IBR determination by the AD does not need to go to an MSC and instead should go straight to trial. We would once again point to the expressed legislative intent in SB 863 and respectfully request that the WCAB’s procedure assist in efforts to streamline litigation.

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

The same concerns expressed with Section 10957, which is specific to IBR, are applicable to this section on IMR. Specifically, Section 10957.1(i) contains problematic language pertaining to what the WCAB “may” do. Again, we see this as unnecessary overregulation and would respectfully request that it be removed.

Also similar to the comments made with respect to Section 10957, we would recommend that the MSC be eliminated from this portion of the regulations. A petition of an IBR determination by the AD does not need to go to an MSC and instead should go straight to trial. We would once again point to the expressed legislative intent in SB 863 and respectfully request that the WCAB’s procedure assist in efforts to streamline litigation.

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

Our coalition is extremely concerned with Section 10959(a), which covers appeals of MPN-related determinations of the AD. First, we are concerned with the scope of the definition of “aggrieved person or entity”, which is so expansive that it could conceivably include unrelated MPNs seeking to undermine competitors in the marketplace. We are also concerned with the inclusion of “a group of injured employees” in the definition of “aggrieved person or party”. There is nothing in the authorizing statute (LC 4616 et seq.) that provides for this and would only serve a source of un-needed litigation.



Additionally, there have been extensive changes to the authorizing statute (lc4616 et seq) that are going to require regulation from DWC and our coalition believes it would be premature for the WCAB to wade in on this topic until the DWC regulations have been enacted.

Recommended Modification to Section 10959(a)

Any aggrieved person or entity may file a petition appealing a determination of the Administrative Director (AD) 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 alleging that the AD failed to act in accordance with the MPN regulations regarding third party petitions for suspension or revocation and should have suspended or revoked a previously approved MPN plan.~~

**Closing Comments**

Thank you once again for the opportunity to provide commentary on the proposed regulations. Our coalition looks at the revised proposal as an improvement over the initial version, and we look forward to the opportunity to work with you as the Rules of Practice and Procedure are finalized.

Sincerely,



Jason Schmelzer  
California Coalition on Workers' Compensation



Jeremy Merz  
CalChamber

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