

California Workers’ Compensation Institute

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July 10, 2015

**VIA E-MAIL** to WCABRules@dir.ca.gov.

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

**RE**: Rules of Practice and Procedure

Article 1-Section 10300 through Article 7Section 10498

Article 4 Section 10485 through Article 12 Section 10615

These comments on modifications to proposed WCAB Rules are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 72% of California’s workers’ compensation premium, and self-insured employers accounting for 28% of the state’s total annual self-insured payroll.

Insurer members of the Institute include ACE, AIG, Alaska National Insurance Company, Allianz (Fireman’s Fund Insurance Company), AmTrust North America, Chubb Group, CNA, CompWest Insurance Company, Crum & Forster, Employers, Everest National Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, Pacific Compensation Insurance Company, Preferred Employers Group, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, State Farm Insurance Companies, Travelers, XL America, Zenith Insurance Company, and Zurich North America.

Self-insured employer members are Adventist Health, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Santa Ana, City of Torrance, Contra Costa County Schools Insurance Group, Costco Wholesale, County of Alameda, County of San Bernardino Risk Management, County of Santa Clara, Dignity Health, Foster Farms, Grimmway Enterprises Inc., Kaiser Permanente, Marriott International, Inc., Pacific Gas & Electric Company, Safeway, Inc., Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group; Southern California Edison, Special District Risk Management Authority, Sutter Health, University of California, and The Walt Disney Company.

**Section 10352 -- Joinder**

**Recommendation**

After filing of an Application for Adjudication, the Appeals Board or a workers' compensation judge may ***issue a notice of intent to*** order the joinder of additional parties necessary for the full adjudication of the case ***and provide*** ***adequate time for any objections to be heard***.

**Discussion**

The party or parties to be joined should be given adequate time to file an appropriate objection and have that ruled on prior to joinder. It is not unusual for overbroad requests for joinder to be filed and any objections from a prospective party should be determined at the outset.

**Section 10455 -- Identification of Parties**

**Recommendation**

The third party administrator ***~~may~~*** ***shall*** be included on the official address record and case caption if identified as such.

**Discussion**

The third party administrator is the claims administrator and must be included on the official address record to ensure consistent and accurate communication.

**Section 10498 -- Petition for Credit**

**Recommendation**

Delete this proposed regulation.

**Discussion**

**Authority**

An expression of the need for a rule, no matter how compelling, cannot fill a gap in legal authority. State Compensation Insurance Fund v. WCAB (Sandhagen ) (2009), 73 CCC 981.

Mendoza v WCAB (2010) 75 CCC 634:

 “ … no regulation adopted is valid or effective unless consistent and not in conflict with the statute.” Therefore, it has been said that “[w]hen a statute confers upon a state agency the authority to adopt regulations…, the agency’s regulations must be consistent, not in conflict with the statute” and that “[a] regulation that is inconsistent with the statute it seeks to implement is invalid.”  No matter how altruistic its motives, an administrative agency has no discretion to promulgate a regulation that is inconsistent with the governing statutes.”

There is nothing in section 4909 that supports the proposition that all claimed benefit overpayments must be adjudicated by the appeals board. The Board has no authority to implement proposed section 10498.

**The Board’s Rationale**

This regulation precludes adjusting an overpayment until it is adjudicated by the WCALJ. In Crocker v Warner Bros (2014) (Board Panel Decision), the Panel reaffirmed the authority to allow or disallow a credit for overpayment. In Crocker, the defendant deducted a claimed overpayment from a judicial order awarding benefits. The issue in that case was not whether

the defendant under section 4909 could take a credit for an overpayment, but whether the defendant failed to pay the award correctly. The penalty was based on the failure to pay the benefits as awarded.

The Board Panel cited the settled interpretation of section 4909:

“The WCJ has discretion to allow credit where the employer has voluntarily made payments. *{Sea-LandService* v. *Workers' Comp. Appeals Bd. {Lopez)* (1996) 14 Cal.4th 76, 86 [61 Cal.Comp.Cases 1360, 1367].) The WCJ generally has discretion to grant or deny credit for overpayments under section 4909 ***when fixing the amount of compensation to be paid***. *{Herrera* v. *Workmen's Comp. App. Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382].)” (Emphasis added.)

Citing the 1983 case of Rohrback, the Panel then notes that if the failure to pay benefits as awarded could result in a penalty for unreasonable delay:

A defendant who unilaterally takes credit for an alleged overpayment against benefits by withholding ***awarded benefits*** may be liable for a penalty under section 5814. *{Rohrback* v. *Workers' Comp. Appeals Bd.* (1983) 144 Cal.App.3d 896 [48 Cal.Comp.Cases 78]; *Delta Airlines v. Workers' Comp. Appeals Bd. {Fox)* (2000) 65 Cal.Comp.Cases 177 [writ den.].) (Emphasis added.)

The Board’s rationale for the proposed regulation is that, pursuant to “settled case law,” section 10498 clarifies that an employer must not unilaterally take credit for alleged overpayment of benefits, but must file “a petition for credit with the WCAB to have the issue adjudicated.” The proposed regulation requires all assertions of benefit overpayments to be adjudicated. There is no case law supporting that proposition, settled or otherwise.

The Board cites Rohrback for the proposition that when an employer unilaterally takes credit for an overpayment without first obtaining an order from the WCAB, the employer risks a 5814 penalty. The rationale of Rohrback does not, in fact, say that and it certainly does not translate into the mandatory adjudication of every claimed overpayment, as it deals with the failure to pay an award of benefits. The citation of Delta in the Rohrback opinion is equally unavailing as it is a Writ Denied summary, as is California Comp. Ins. Co.

We are recommending that the proposed regulation be eliminated because it seems to be addressing a problem that does not exist. The Board provides no evidence of the scope of incorrect overpayments, yet it is suggesting a global fix that will require every claimed overpayment to be adjudicated at the local District Offices. From a purely logistical standpoint, the effect of the proposed rule is inconceivable.

It is not unusual for the employer and injured worker to initially provide the claims administrator with an incorrect wage statement, resulting in TD overpayments for a period of time. When the wage statement is corrected, the rate is adjusted, the employer and the injured worker are advised, and the overpayment is recovered from PD or sometimes the injured worker will issue a check for it. Frequently, MMI examinations are conducted while TD is being paid and the permanent and stationary reports are received weeks later but it clearly supports an adjustment to the PD benefits. The vast majority of corrections arise from incidents like these. Allowing these frequent, necessary adjustments to the benefits is far superior to requiring petitions and orders. The requirement to file a Petition for Credit and adjudicate every instance like these would slow the system to a crawl and produce no beneficial effect.

Defendants are required to pay “estimated” permanent disability benefits even before the injured worker becomes permanent and stationary. Therefore, these payments will rarely be correct and will have to be adjusted. To date the adjustment of benefit overpayments has not required routine judicial intervention, but it is readily available when it is needed. If claims administrators are precluded from recovering overpayments until a WCALJ rules, it is likely that benefits will be stopped whenever it appears likely that an overpayment might occur. There will undoubtedly be significant and unnecessary delays in the adjustment of benefit payments if this regulation is implemented.

Thank you for the effort put into these proposed regulations and for considering our comments.

Sincerely,

Michael McClain

General Counsel, California Workers' Compensation Institute

MMc/pm

cc: Christine Baker, DIR Director

 Destie Overpeck, DWC Administrative Director

 Dr. Rupali Das, DWC Executive Medical Director

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