



LAW OFFICES
of
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LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

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NEW RULES FOR 2009

On November 17th, a large number of new or amended procedural rules went into effect. They are wide ranging, and for the most part will affect those making appearances before the WCAB, those preparing documents for filing, and those who serve documents or those who must respond to service within a limited time. Come to think of it, that's most everybody that deals in the Workers' Comp system.

The changes are wide ranging, including finalization of procedures relating to EAMS, expanded mandates relating to imposition of sanctions, procedures for filing Petitions for Reconsideration, and new protections from "vexatious litigants." Here are just a few we wanted to highlight:

Rule 10397 prevents the WCAB from rejecting any time limited documents solely on the basis that the filing fails to comply with the procedural requirements of EAMS. In other words, you can't blow the statute of limitations, at least for now, by failing to have a proper cover sheet,

document separators, or the like. However, this does not mean you will not have to correct the error of your ways, and do things again properly. And there are now sanction provisions for habitual failure to follow the EAMS rules.

New consolidated rules governing service of documents by parties and lien claimants are now in **Rule 10505**. The "default" service method is by first class mail, although a party may opt for overnight mail delivery. To legally serve a party by email or fax, the receiving party or its representative must first agree to such service. Each alternative service method now has very specific and detailed rules governing the documentation for the particular method. As an example, the following rules apply to service by facsimile:

"If a document is served by a party or lien claimant by fax on persons listed on the official address record who have designated fax as their preferred method of service, or who have previously agreed to accept fax service in

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accordance with subdivision (g), the proof of fax service must state:

- (1) the sending fax machine telephone number of the person making the fax service;
- (2) the date and time of the fax service;
- (3) the name and the fax machine telephone number of the person served; and
- (4) that the document was served fax transmission and the transmission was reported as complete and without error.

Absent evidence to the contrary, service by fax shall be deemed complete at the time of transmission, unless a document is re-served in accordance with subdivision (h). (Rule 10505(f)).

Rule 10505(h) mandates re-service if the receiving party notifies the sending party of a failure of receipt. This seems to beg the question of how the receiving party is supposed to know they didn't get something, if nothing arrived.

Rule 10507 was amended and now applies the CCP "five day rule" to responses to documents served by facsimile or e-mail. The rule extends the time limits within which a party may respond by an additional five days, just as it has always applied to most legal documents served by mail.

Rule 10550 now requires attorneys and hearing representatives to be very specific and accurate in correctly identifying the true legal names of any parties they represent, and to state (if applicable) whether they are representing an insurance carrier, an employer, or both. A lien claimant must now disclose whether it is the original owner of the alleged debt or whether it has purchased the alleged debt from the original owner or some subsequent purchaser.

Rule 10770.5 sets out expanded verification requirements for lien claimants, but failure to verify the lien with the mandatory language,

apparently, is not listed as a basis for dismissal of the lien, although it may form a basis for sanctions.

Rule 10782 is a new rule designed to give some protection from "vexatious litigants." For those who believe this term should apply to every applicant and lien claimant in their caseload, the definition is carefully set out.

"(a) For purposes of this rule, "vexatious litigant" means:

(1) A party or lien claimant who, while acting in propria persona (i.e., while representing himself or herself) in proceedings before the Workers' Compensation Appeals Board, repeatedly re-litigates, or attempts to re-litigate, an issue of law or fact that has been finally determined against that party or lien claimant by the Workers' Compensation Appeals Board or by an appellate court;

(2) A party or lien claimant who, while acting in propria persona in proceedings before the Workers' Compensation Appeals Board, repeatedly files unmeritorious motions, pleadings, or other papers, repeatedly conducts or attempts to conduct unnecessary discovery, or repeatedly engages in other tactics that are in bad faith, are frivolous, or are solely intended to cause harassment or unnecessary delay; or

(3) A party or lien claimant who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction(s), or occurrence(s) that are the subject, in whole or in substantial part, of the party or lien claimant's workers' compensation case."

A party who is declared a vexations litigant will have significant restrictions placed on their ability to initiate case movement within the WCAB system.

For a full review of these and other important rule changes, go to:

<http://www.dir.ca.gov/WCAB/WCABRulemaking.html>

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New Mileage Reimbursement Rate

In a novel twist compared to recent trends the Internal Revenue Service has announced that the standard mileage rate for business miles will decrease to 55 cents a mile from 58.5¢ on Jan. 1. That means the mileage reimbursement rates injured workers will also drop to 55 cents per mile. Why? Because under Labor Code Section 4600(e)(2), the mileage reimbursement rate is pinned to the mileage rate adopted by the California Department of Personnel Administration for non-represented state employees, which in turn is pinned to the IRS rate.

The new mileage rate applies to claims by injured workers for travel related to medical treatment or evaluation of their injuries. Workers' compensation claims administrators should apply the new 55 cents per mile for travel on or after January 1, regardless of the date of injury, but the old rate of 58.5 cents per mile still applies to retroactive reimbursement for travel from July 1 through Dec. 31, 2008.

Normally we only see these rate changes once each Fall. However, in the last two years gasoline prices have been unstable, first showing a meteoric rise in the latter part of 2007 and the first part of 2008, and then a precipitous decline in the latter half of this year. This, in turn, has caused the IRS to adjust its allowance on a special 6 month basis to 58.5 cents beginning July 1st, 2008. Now, with the recent declines, the adjustment is downward. Remember, it is the date the mileage was incurred that controls the reimbursement rate.

Article by Howard Stevens, Orange Office

Benson Update

Oral argument in *Benson v. WCAB* took place on December 9th before the First Appellate District. The case is now submitted and the Court of

Appeal will issue its decision. We do not expect the litigation to stop here: The losing side will undoubtedly seek a hearing before the State Supreme Court.

For a review of the Benson decision, go to www.mcdermott-clawson.com, select "recent events," and open the December 2007 newsletter.

NEED ASSISTANCE WITH TRAINING? GOT EAMS?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers, including compliance with EAMS and proper use of the OCR forms. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](mailto:Howard.Stevens@mcdermott-clawson.com) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

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