

DWC 21th Annual Conference Top Litigation Tips



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1. Home Health Care Services

LC §4600(h): Employer not liable for home health care services provided “more than 14 days prior to the date of the **employer’s receipt** of the **physician’s prescription**.”



LC §5307.8: “No fees shall be provided for...any services provided by a member of the employee's household, to the extent the services had been regularly performed in the same manner and to the same degree prior to the date of injury.”

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1. Home Health Care Services

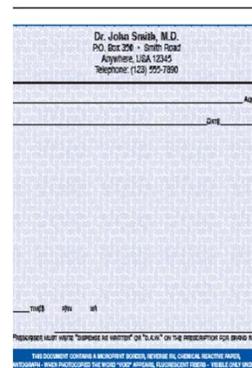
Applicant’s burden of proof:

LC §4600(h):

- Insurance Company rec’d Dr’s script for services
- Services are reasonable & necessary

LC §4603(b)(1):

- “an itemization of services provided”



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1. Home Health Care Services



Effective Date:

LC §4600(h) “applies to all pending cases prospectively from the date the statute became effective regardless of the date of injury.”

SB863: “This act shall apply to all pending matters, regardless of the date of injury, unless otherwise specified in this act.” (Stats 2012, ch. 363, § 84.)

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1. Home Health Care Services

Salguero v. Gemeiner Cabinets, 2013
Cal Wrk Comp PD LEXIS 450

Mulford v. El Toro RV, 2013 Cal Wrk
Comp PD LEXIS 219

Neri-Hernandez v. Workforce Staffing,
2013 Cal Wrk Comp PD LEXIS 325;
41 CWCR 195 (Issued August 12,
2013, and then granted for study on
August 16, 2013)



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2. Rules: Policy and Procedure Manual



The DWC/WCAB “Policy and Procedure Manual” was reissued on February 14, 2013.

A copy of these procedures can be found at:

http://www.dir.ca.gov/wcab/WCAB_Policy_ProcedureManual/Policy_andProcedure_Manual.pdf

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3. Rules: Practice & Procedure Rules



The **WCAB** “Rules of Practice and Procedure” (8 CCR §§10250 – 10959) **effective 10.23.2013:**

Handling disputes not subject to IMR and/or IBR (8 CCR 10451.2(c))

(Reg 10451.2 & WCAB statement of reasons)

Petition to Appeal IMR Determination (8 CCR 10957.1)

<http://www.dir.ca.gov/WCAB/WCABPropRegsApr2013.htm>

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3. Rules: Practice & Procedure Rules

DWC Reg 9792.10.7 (c): The parties may appeal an IMR determination by filing a petition with the WCAB.

NEW WCAB Reg 10957.1: (Effective 10.23.13)
Provides rules for appealing the IMR decision. The Petition shall be filed with the WCAB w/in 20 days after service of the IMR determination. **(A DOR must also be filed to place the matter on calendar with a WCJ.)** Aggrieved parties may file Pet'n Recon from WCJ's decision w/WCAB.



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3. Rules: Practice & Procedure Rules



NEW WCAB Reg 10957.1:
(Effective 10.23.13) The Petition shall be filed with the WCAB w/in **20 days after service** of the IMR determination.

Since **service** of document is triggering event, would the “+5 days for mailing” rule apply?

See *Messele v. Pitco Foods, Inc; California Insurance Company*, (2011) 76 CCC 956?
The “+5 days for mailing” mailbox rule applies when the triggering event is **service** of a document.

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3. Rules: Practice & Procedure Rules

NEW WCAB Reg 10957.1(e) & (g):
Caption of Petition shall include:

**“Petition Appealing Administrative
Director’s Independent Medical
Review Determination.”**

1. IW’s first and last name
2. Names of defendant(s)
3. Case # assigned by the AD to the IMR determination
4. ADJ # assigned by the WCAB



Failure to comply shall = valid grounds to
dismiss or deny the Petition

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3. Rules: Practice & Procedure Rules

**NEW WCAB Reg 10450(e) now
mandates verifications be added
to all petitions:**



“All petitions and answers shall be
verified under penalty of perjury in
the manner required for verified
pleadings in courts of record. A
failure to comply with the
verification requirement constitutes
a valid ground for summarily
dismissing or denying a petition or
summarily rejecting an answer.”

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4. Rules: Medical Provider Networks (MPN)



HUGE CHANGE IN CALIFORNIA:

California's 2004 WC reform package, SB899, mandates IMR process when the IW disputes MT recommendations w/in MPN.

LC §4616.4 added to the Labor Code to define IMR process. See IMR regulations re MPN disputes by e'ee at 8 CCR 9768.1 – 9768.17.

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4. Rules: Medical Provider Networks (MPN)



See NEW MPN regs 9767.1 – 9767.19 Effective 1.1.2014

Full discussion of proposed AD regs w/ statement of reasons on DWC website:

http://www.dir.ca.gov/DWC/DWCPropRegs/MPNRegulations/MPN_Regulations.htm

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4. Rules: Medical Provider Networks (MPN)

SB863 Revised Labor Code re MPNs:

- A. Facilitate access to treatment w/in the MPN for IWs.
- B. Tighten the **burden of proof** for IW's attempting to treat o/s the MPN.



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4. Rules: Medical Provider Networks (MPN)



- A. To facilitate access to treatment w/in the MPN for IWs:

NEW LAW = LC 4616(a)(3)-(5):

As of 1.1.14 MPNs are required to:

1. List their doctors on their website for ease of access by all. AD Reg. 9767.12
2. Provide medical assistants to help IWs find a doctor in the MPN and to help them make appointments. AD Reg 9767.5 (h)

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4. Rules: Medical Provider Networks (MPN)

B. Tightening the Burden of Proof - Existence of MPN:

LC4616(b)(1) MPN **conclusively presumed valid**, upon showing that MPN approved by AD

LC 4616.3(b): The employer must provide the obligatory notices. However, in order for IW to treat outside the MPN, WCJs will have to make a specific finding that “failure to provide notice resulted in a denial of medical care.”



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4. Rules: Medical Provider Networks (MPN)



B. Tightening the Burden of Proof - Violation of Notice Requirements:

Applicant's burden to establish lack of notice = denial of MT (See *Hernandez. Aramark, ACE/USA*, 2013 Cal Wrk Comp PD LEXIS 310, where IW did not meet burden of proof.)

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4. Rules: Medical Provider Networks (MPN)



B. Tightening the Burden of Proof - Violation of Notice Requirements:

Defendant's burden to show compliance with the regulations and notice requirements. If applicant claims violation of 8 CCR 9767.5(b) – MPN must have “treating physicians” (PTPs) located within 30 minutes or 15 miles of IW's home or office, defense should be prepared to offer into evidence a list of 3 PTPs that fall within this category.



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5. Rules: Independent Medical Review (UR/IMR)



HUGE CHANGE IN CALIFORNIA:

California's 2012 WC reform package, SB863 mandates IMR process for **all** MT dispute issues.

LC §§4610.5 and 4610.6 added to the Labor Code to define IMR process.

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5. Rules: Independent Medical Review (UR/IMR)



Emergency **DWC** UR & IMR Regs **effective < 1.1.2014**

Proposed **DWC** UR & IMR Regs on website

http://www.dir.ca.gov/DWC/DWCPropRegs/IMR/IMR_Regs.htm

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5. Rules: Independent Medical Review (UR/IMR)



PROPOSED Reg 9792.6.1 (t)(3)

The ~~form~~ request for authorization must be signed by the **treating** physician and may be mailed, **faxed** or e-mailed. **By agreement of the parties, the treatment physician may submit the request for authorization with an electronic signature.**

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5. Rules: Independent Medical Review (UR/IMR)



Step 5:

Reg 9792.9.1(e)(3) CS must communicate a decision to modify, delay, or deny to PTP w/in 24 hours of the decision by telephone, **facsimile**, or email.

CS must also mail the decision to the PTP, **IW, and IW's atty** within:

- 24 hours of the decision for concurrent review
- two (2) business days for prospective review and
- for expedited review within 72 hours of receipt of the request.

(Red text indicates addition in PROPOSED regulation.)

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5. Rules: Independent Medical Review (UR/IMR)



Burden of Proof doc was **FAXed** (i.e., RFA or UR decision) **Reg 9792.9.1 (a)(1):**

- A copy of the cover sheet for the UR decision with a notation of the date, time and place of the transmission; **or**
- The UR decision with “an unsigned copy of the affidavit” **or**
- A certificate of transmission; **or**
- A FAX transmission report with the telephone number to which the form was transmitted on the report.

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6. Rules: EAMS



New **DWC** EAMS Regs **effective < 1.1.2014**

FINAL version DWC EAMS Regs effective > 12.16.13

http://www.dir.ca.gov/DWC/DWCPropRegs/LienfilingFee/LienfilingFee_Regs.htm

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6. Rules: EAMS



WCAB Regulation (effective as of 1.1.2013) 8 CCR § **10206.3**

provides: “(a) An electronically transmitted document shall be deemed to have been received by EAMS when the electronic transmission of the document into EAMS is complete. A document received electronically after 5:00 pm of a court day (i.e., Monday through Friday, except designated State holidays) shall be deemed filed as of the next court day.”

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6. Rules: EAMS



Breshears v. Kroger Company, LEXIS - NPD issued October 22, 2013; 2013 Cal Wrk PD LEXIS 299

WCAB stated, "...defendant admits that the petition was e-filed at 5:32pm. Thus, because the petition was not timely filed, and we were without jurisdiction to accept it, the petition should have been dismissed."

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7. Rules - QMEs



New QME Regulations §§1 – 117 effective 9.16.2013

For a complete list of final regs and statement of reasons as well as new QME forms see:

http://www.dir.ca.gov/DWC/DWCPropRegs/QME_PermanentDisabilityRatingDetermination_Regs/QME_PermanentDisabilityRatingDetermination_Regs.htm

7. Rules - QMEs

8 CCR 35 – **NO Ex Parte Communications**



(b)(1) Except as expressly provided in Labor Code section 4062.3 (f) concerning communications with an agreed medical evaluator, all communications by the parties with the evaluator shall be in writing and sent simultaneously to the opposing party when sent to the medical evaluator, except as otherwise provided in subdivisions (c), (k) and (l) of this section.

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7. Rules - QMEs

Quiz re communications w/ **Panel QMEs**:

If **Panel QME** calls to change the date of her deposition, you should:

- (a) hang up the phone without saying a word,
- (b) have a long discussion with her about your opinion of the case; or
- (c) restrict your conversation the procedural issue of setting the date of deposition.

(See *Alvarez v. WCAB*, (2010) 75 CCC 817; 2010 Cal. Wrk. Comp. LEXIS 154 (2nd DCA))



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7. Rules - QMEs

Quiz re communications w/ AMEs:

If **AME** calls to change the date of her deposition, you should:

- (a) hang up the phone without saying a word,
- (b) have a long discussion with her about your opinion of the case; or
- (c) restrict your conversation the procedural issue of setting the date of deposition.



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7. Rules - QMEs



LC 4062.3(f) Change per SB863: (8 CCR 35(b)(1)):

"Oral or written communications with physician staff or, as applicable, with the **AME**, relative to **nonsubstantial** matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, **do not constitute ex parte** communication in violation of this section unless the appeals board has made a specific finding of an impermissible ex parte communication."

(Emphasis added.)

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7. Rules - QMEs

**“Agreed Panel QME” per 8 CCR §1(c)
means:**

The QME selected by BOTH the IW & the
D from the QME panel list.

Agreed Panel QME is NOT an AME
BUT An Agreed Panel QME shall be
entitled to be paid at the same rate as
an AME per Reg 9795 for
medical/legal evaluation procedures
and medical testimony.



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7. Rules - QMEs

**Quiz re communications w/ Agreed
Panel QMEs:**

If **Agreed Panel QME** calls to change
the date of her deposition, you
should:

- (a) hang up the phone without saying a
word,
- (b) have a long discussion with her about
your opinion of the case; or
- (c) restrict your conversation the
procedural issue of setting the date
of deposition.



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7. Rules - QMEs

Quiz re communications w/ “**regular physicians**”
appointed by a WCJ per LC 5701:

If a “**regular physician**” calls to change the date of her deposition, you should:

- (a) hang up the phone without saying a word,
- (b) have a long discussion with her about your opinion of the case; or
- (c) restrict your conversation the procedural issue of setting the date of deposition.

(See AD Rule 10718, and *State Farm v. WCAB (Pearson)*(2011) 76 Cal. Comp. Cases 69 (2nd DCA)



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7. Rules - QMEs



AD Rule §10718 & 10213(c):

“All correspondence concerning the examination and reports of a physician appointed pursuant to LC §5701...shall be made through the WCAB, and no party... shall communicate with that physician with **respect to the merits of the case** unless ordered to do so by the WCAB.” (Emphasis added.)

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7. Rules - QMEs

LC §4062.2.(f) – Parties can agree to AME anytime (“except as to issues subject to the IMR” per LC §4610.5.)

For the most part, AMEs and Panel QMEs will no longer be used to determine MT issues...but may weigh in on Causation of Injury, need for future MT, etc.



7. Rules - QMEs



35.5 AD Reporting Guidelines:

(g)(2) “For any evaluation performed on or after July 1, 2013, and regardless of the DOI, an AME or QME **shall not provide an opinion on any disputed medical treatment issue,** but shall provide an opinion about whether the injured worker will need future medical care to cure or relieve the effects of an industrial injury.”

7. Rules - QMEs



NEW Post SB863:

8 CCR 1(t) "Future medical care" means MT as defined in LC 4600 that is reasonably required to cure or relieve an IW of the effects of the industrial injury after an injured worker has reached MMI or P&S status including a description of the type of the MT which might be necessary in the future.

This opinion is not binding in any proceeding concerning an injured worker's need for MT.

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General Preparation Tips

- ALWAYS BE PREPARED for any hearing you attend.
- When you attend any hearing, you are the ATTORNEY OF RECORD. This simple fact means that no WCJ should, or wants to, hear "This isn't my file...."
- Always identify the firm to which you belong and whom you represent (*Coldiron* case).
- Bring your ENTIRE file, and NEVER make a statement or claim to a WCJ that you can't back up.



MSC Preparation Tips

- Review the file BEFORE the MSC and consider your strategy. What are your strongest and weakest issues? (For example, consider who has the burden of proof on an issue.)
- What is your settlement authority or “bottom line?” For applicant counsel, do you have “client control?” For defense counsel, have you “translated” the issues into dollars for appropriate settlement authority?



MSC Preparation Tips

- Make sure that the PTCS is complete before you sign it, which means the stipulations are accurate, the issues really exist, list all evidence you intend to offer at the time of trial, and disclose the name of any potential witness(es) you may want to call.
- Do not go to the WCJ until you have had an opportunity to discuss the case with the opposing party/counsel and really tried to settle the matter.

Exhibit Preparation Tips

- See generally Rule 10629 and Policy and Procedure Manual 1.40
- Rule 10629(d): Clearly identify exhibits in EAMS by:
 - Document Title (i.e., “AME Report”)
 - Author (i.e., “Marc Jacobs, M.D. “)
 - Date of report/document (i.e., “12/27/2012”)
 - Document Type (i.e., “Medical Doc”)



Exhibit Preparation Tips

- Medical-legal exhibits (PQME, AME, QME, IMR): Each report should be a separate exhibit.
- Medical treatment reports:
 - PR-4 or any treatment report needed to establish a fact on a likely issue to be contested by the parties should be a separate exhibit.
 - All remaining treatment exhibits should be grouped by doctor/facility and in reverse chronological order.

Exhibit Preparation Tips

- At trial, applicant's and lien claimant's exhibits are usually designated by numbers and defendant's exhibits are designated by letters.
- If there is more than one exhibit by a doctor or other entity, start labeling with the most recent report first.

Temporary Disability Preparation Tips

- If the issue is earnings or TD rate, have your evidence ready to present at trial regarding earnings (i.e., paycheck stubs, W-2 forms, etc.) Try to avoid relying just on applicant's testimony.
- Provide a trial brief if necessary to support the way you calculate earnings.



Temporary Disability Preparation Tips

- If the issue is modified duty and was it provided in lieu of TD, consider bringing an employer witness.
- Make sure that the employer's offer of modified duty matches exactly the conditions that the doctor provides for modified duty.

Permanent Disability Preparation Tips

- A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion and not merely his or her conclusions (*Granado v. W.C.A.B.* (1968) 69 Cal. 2d 399, 407, 33 Cal. Comp. Cases 647).
- If PD is an issue, make sure the physician's opinion on which you are relying provides a report that explains why applicant's disability is at a certain level (and the exact percentage if a range is provided) and covers all aspects of the AMA Guides relevant to applicant's disability.



Permanent Disability Preparation Tips

- The 2005 PDRS may be rebutted, but it is not permissible to go outside of the four corners of the AMA Guides to do so (*Milpitas Unified School District v. W.C.A.B. (Guzman)* (2010) 187 Cal.App.4th 808).
- How far afield can the doctor go?
 - *City of Sacramento v. WCAB (Cannon)*

Apportionment Preparation Tips

- If the issue is apportionment, make sure your physician, AME, or PQME properly addressed apportionment and the basis for apportionment consistent with:
 1. Labor Code sections 4663 or 4664;
 2. *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (*en banc*);
 3. *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 145 Cal. App. 4th 922;
 4. *Benson v. The Permanente Medical Group* (2007) 72 Cal.Comp.Cases 1620 (*en banc*);
- Remember, burden of proof is on defendant for this issue. Therefore, review doctor's discussion about apportionment and if the discussion is not complete, defense counsel must take action by obtaining supplemental opinion.



Lien Trial Preparation Tips

- A lien claimant has the same burden of proof as an applicant for AOE/COE, parts of body, nature and extent.
- Lien Claimant must prove by a preponderance of the evidence all elements necessary to establish the validity of their lien before the burden shifts to defendant (*Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113 (*en banc*) and *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228 (*en banc*)).



Lien Trial Preparation Tips

- Labor Code section 4603.6 (a): If the part of body or the injury is disputed, must try that issue first before IBR becomes applicable, but this only delays IBR until after resolution of this issue, except as provided in section 4622.

Petition Appealing IBR WCAB Rule 10957

- Can be filed by any aggrieved party.
- The Petition can be regarding the amount payable to a provider or a decision that the dispute is not subject to IBR.
- Needs to be filed 20 plus 5 days after service of the IBR determination or it can be subject to dismissal.



Petition Appealing IBR WCAB Rule 10957

- Caption should state is is a Petition Appealing Administrative Directors' Independent Bill Review determination.
- Caption should include case # assigned by the AD to the IBR determination as well as the ADJ number.
- A copy of the IBR determination and proof of service of that determination should be attached to the petition.

Petition Appealing IBR WCAB Rule 10957

- Petition needs to raise one of the 5 grounds set forth in Labor Code 4603.6(f).
- Petition needs to set forth factual and/or legal grounds for the dispute. Anything not raised is deemed waived.
- A copy of the Petition needs to be served on all adverse parties and the IBR Unit.



"Actually, I'm a litigator."

Petition Appealing IBR WCAB Rule 10957

- IBR unit may download some or all of the records of the IBRO into EAMs.
- WCJ may admit some or all of these documents into evidence or allow the parties to offer it into evidence.
- Petition is not placed on calendar until a DOR is filed which can be concurrently or subsequently.
- Petition is heard by a WCJ at the trial level.

Petition Appealing IBR WCAB Rule 10957

- There is a presumption that the IBR determination is correct.
- The decision of the WCJ can be the subject of the Petition for Reconsideration to the WCAB.
- If the IBR determination is reversed by the WCJ or WCAB the dispute is remanded back to the AD.
- If final decision results in defendant being liable for payment to the provider they need to pay this forthwith.

Petition Appealing IMR Determination WCAB rule 10937.1

- Applies only to Petition appealing IMR determination of AD regarding treatment.
- Doesn't apply where IW contends the UR is untimely or otherwise invalid.
- Any aggrieved party can file the petition.



Petition Appealing IMR Determination WCAB rule 10937.1

- The petition needs to be filed 20 plus 5 days after service of the IMR determination or it may be summarily dismissed.
- Caption must identify is as a Petition Appealing the Administrative Director's Independent Medical Review Determination.
- Caption must include the case # assigned by the AD to the IMR determination as well as the ADJ # if any.
- A copy of the IMR determination and proof of service must be attached to the petition.

Petition Appealing IMR Determination WCAB rule 10937.1

- The Petition shall be limited to raising one of the 5 grounds for an appeal under Labor Code section 4610.6(h).
- The Petition must be serviced on the DWC's IMR Unit.
- The IMR unit may download some or all of the records of the IMRO into EAMS.



"So you see your honor, it's obvious."

© Legally Drawn & Visually Sarcastic 2009

Petition Appealing IMR Determination WCAB rule 10937.1

- WCJ may admit some or all of these documents into evidence or allow the parties to offer them into evidence.
- The petition is not placed on calendar until a DOR is filed. The DOR can be filed concurrently or subsequently to the petition.

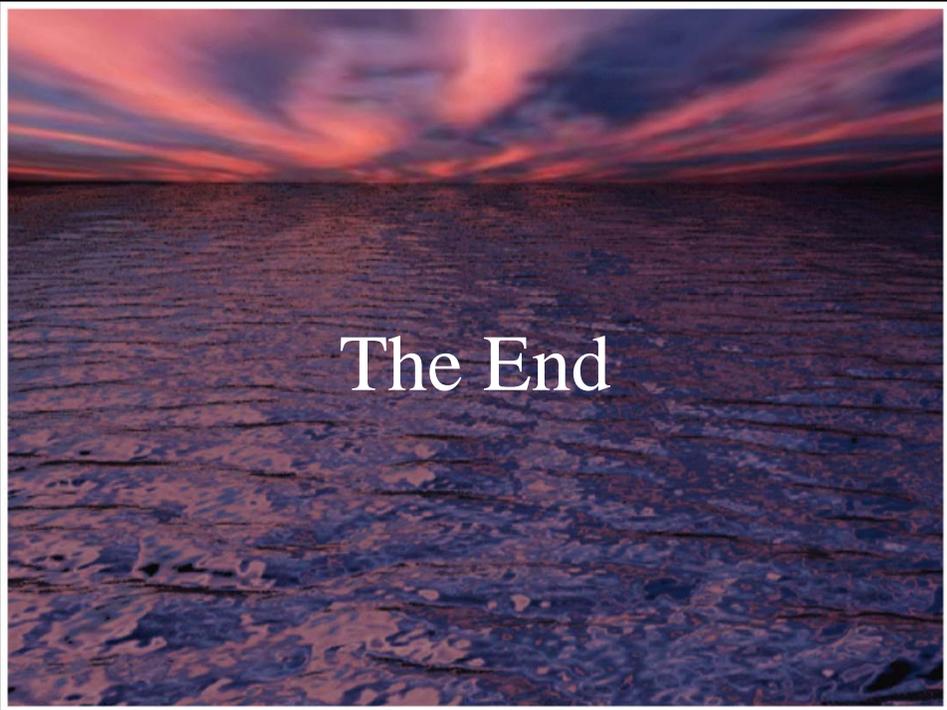
Petition Appealing IMR Determination WCAB rule 10937.1

- Even if a DOR is filed the petition may be deferred if the defendant is also disputing liability for treatment for any reason other than medical necessity.
- The case can be set for an MSC or an expedited hearing under Labor Code 5502(b).



Walk Through Procedures

- Walk through hours 8:00 a.m.-11:00a.m. and 1:00 p.m.-4:00 p.m. on court days
- Documents eligible for walk through:
 - Compromise & Release
 - Stipulation with request for award
 - Petitions for attorney fees re: vocational rehabilitation
 - 5710 fee requests
 - Petitions to compel attendance at Deposition or Medical Evaluation
- WCJ may approve, suspend action or accept for review at a later time
 - Once assigned to a judge then stays with that judge unless unavailable and then to PJ for possible reassignment



The End