



## California Workers' Compensation Institute

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May 11, 2020

VIA E-MAIL - [staff@oal.ca.gov](mailto:staff@oal.ca.gov)

To: OAL Reference Attorney  
300 Capitol Mall, Suite 1250, Sacramento, California 95814

**Re: Comments on Proposed Emergency Regulatory Action (2020-0504-)1E)  
QME Electronic Service Regulation in Response to COVID-19**

Dear OAL Reference Attorney:

On behalf of its members, the California Workers' Compensation Institute (the Institute) offers these comments on the proposed amendments to the QME Proposed Electronic Service Emergency Regulation in Response to COVID-19 (§36.7). The Institute members include insurers writing 83% of California's workers' compensation premium, and self-insured employers with \$65B of annual payroll (30% of the state's total annual self-insured payroll).

Insurer members of the Institute include AIG, Alaska National Insurance Company, Allianz Global Corporate and Specialty, AmTrust North America, AXA XL Insurance, Berkshire Hathaway, CHUBB, CNA, CompWest Insurance Company, Crum & Forster, EMPLOYERS, Everest National Insurance Company, GUARD Insurance Companies, The Hanover Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, North American Casualty Company, Pacific Compensation Insurance Company, Preferred Employers Insurance, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, Travelers, WCF National Insurance Company, Zenith Insurance Company, and Zurich North America.

Self-insured employer members include Albertsons/Safeway, BETA Healthcare Group, California Joint Powers Insurance Authority, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Los Angeles, City of Pasadena, City of Torrance, Contra Costa County Risk Management, Costco Wholesale, County of Los Angeles, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, East Bay Municipal Utility District, Foster Farms, Grimmway Farms, Kaiser Permanente, Marriott International, Inc., North Bay Schools Insurance Authority, Pacific Gas & Electric Company, 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.

Recommended revisions to the proposed regulation are indicated by underscore and ~~strikeout~~. Comments and discussion by the Institute are identified by *italicized text*.

The Institute appreciates the efforts of the Division to address the current health crisis and its impact on the workers' compensation system.

## **§ 36.7 QME Electronic Service Emergency Regulation in Response to COVID-19**

### **Recommendation:**

(a) During the period that this emergency regulation is in effect, a QME, AME, or other medical-legal report and required documents may be served electronically as follows:

(2) Electronic service shall be permitted only where the parties agree to such service and a written confirmation of that agreement is made. Written confirmation may be made electronically. At the time of giving consent to electronic service, a party or entity shall provide the party's electronic address for the purpose of receiving electronic service. If a party's electronic service address changes during the period this emergency regulation is in effect, the party must immediately submit a notice of change of address electronically to the physician and must serve the change of address notice on all other parties required to be served under this emergency regulation.

### **Discussion:**

*In keeping with the intent of this regulation, the Institute suggests that language be added to permit the written confirmation required under this subsection to be made electronically. The proposed regulation does not address the circumstance where a party's electronic service address changes. The Institute suggests that new language be added consistent with Rules of Court §2.251(g)(1) such that, in the event of a change of address under this section, the party with the address change is responsible for filing a notice of change of address with the physician and serving notice electronically on all other parties.*

### **Recommendation:**

(3) ~~Electronic service shall not be permitted on any unrepresented party or unrepresented injured worker.~~ When the medical-legal report and supplemental report(s) involve a claimed or disputed injury to the psyche, electronic service upon an unrepresented worker is subject to the provisions of 8 CCR §36.5.

### **Discussion:**

*The Institute notes that the majority of medical-legal evaluation reports are generated in cases involving unrepresented injured workers. If the injured worker agrees to receive a copy of the report electronically, this choice should be supported and not prohibited. Likewise, unrepresented employers should be permitted to choose to receive copies of medical-legal reports electronically. Permitting both sides to engage in electronic communication in instances such as this helps to move the system forward into a more efficient method of functioning overall.*

*It is noted that if the claimed injury pertains to a psychiatric or psychological condition, the decision whether or not to electronically serve the unrepresented injured worker with the report or supplemental report(s) is at the discretion of the medical-legal evaluator pursuant to 8 CCR §§36.5(a) and (b).*

#### **Recommendation:**

(4) For purposes of electronic service, the medical-legal report or other papers/documents must be transmitted to an electronic address maintained by the person or entity on whom it is served, using the most recent electronic address provided to the physician by the party who consented to accept service electronically. An “electronic service address” is presumed valid for any party who serves electronic documents from that address and has not notified the medical-legal physician or other parties that are required to be served that the electronic address has ceased to be valid.

#### **Discussion:**

*We suggest using consistent language throughout the regulation. We recommend deletion of superfluous language regarding the electronic address. Finally, in keeping with Rules of Court §2.251(g)(3), we recommend additional language confirming that, absent notice, the electronic address used by a serving party will be presumed valid for that party.*

#### **Recommendation:**

(d) For purposes of electronic service of all medical-legal reports, the mandatory form 122 may be replaced by an Affidavit of Proof of Electronic Service, which shall be deemed to have been signed using a digital or electronic signature. The Affidavit of Proof of Electronic Service shall set forth the exact title of the document served in the action, showing (A) the name and residence or business address of the person making the service, (B) that he or she is a resident of, or employed in, the county where the electronic service occurs, (C) that he or she is over the age of 18 years, (D) that he or she is readily familiar with the business’ practice for serving electronically, and (E) that the document would be electronically served that same day in the ordinary course of business following ordinary business practices. The Affidavit of Proof of Electronic Service shall be signed, under penalty of perjury under the laws of the State of California. The Affidavit of Proof of Electronic Service, and shall also include all of the following:

(1) The electronic service address and the name and residence or business address of the person making the electronic service.

(2) That the person making the service is readily familiar with the business’ practice for serving electronically.

(3) That he or she is a resident of or employed in the county where the electronic service occurs.

(4) That he or she is over the age of 18 years.

(5) The date of electronic service.

(6) The name and electronic service address of the person or entity served.

(7) A statement that the document was served electronically on that same day in the ordinary course of business following ordinary business practices.

(8) The person making the electronic service declares that the information submitted is true and correct.

**Discussion:**

*New language has been added to clarify that an electronic signature on the Affidavit is permissible and the Affidavit is deemed signed when served under penalty of perjury pursuant to Rules of Court §§2.752 (b)(1) and 2.251. In the original proposal, there was duplication between subsection (d) and subsections (d)(1) and (4). The Institute's suggested changes provide a simple listing of all requirements without duplication that might lead to confusion or conflicting interpretation. Subsection (d)(8) has been added since Electronic Filing and service when signed under penalty of perjury requires a declaration that the individual signing attest that the information being electronically served is true and correct.*

**Recommendation:**

- (e) For purposes of electronic service, the physician shall maintain an original copy of all documents electronically served, pursuant to the terms of section 39 of title 8, California Code of Regulations. The documents maintained by the physician pursuant to this section shall contain an original signature.

**Discussion:**

*The Institute recommends that this proposed subsection be revised for purposes of clarity. It is unclear whether the Division intends for subsection (e) to require the physician to maintain a hard copy or an electronic copy of the documents served electronically. The reference to 8 CCR §39 does not seem to be relevant to a requirement that the physician maintain documents as that regulation relates to the Medical Director's obligations to maintain certain QME forms. It is not clear whose signature and what documents are referenced in the final sentence (the report? the Affidavit?).*

Thank you for the opportunity to comment, and please contact us if additional information would be helpful.

Sincerely,

Jackie Secia

Jackie Secia, CWCI Claims and Medical Director

JS/me

cc: Nicole Richardson, DWC Legal  
Maureen Gray, DWC Regulations Coordinator  
George Parisotto, DWC Administrative Director  
Katrina Hagen, DIR Director  
CWCI Claims Committee  
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CWCI Legal Committee  
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