



## 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 Emergency Telehealth 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 Proposed QME Telehealth Emergency Regulation (§78) in Response to COVID-19. 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.

The Institute's comments in response to QME Emergency Regulation §78, submitted on May 4, 2020 and posted on your website on May 7, 2020, are indicated by **underscore** and **strikeout**. Comments and discussion by the Institute are identified by *italicized text*.

The Institute appreciates the efforts of the submitting agency, the Division of Workers' Compensation (DWC), to address the current health crisis and its impact on the workers' compensation system process.

## § 78 QME 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 evaluation may be performed and remunerated as follows:
  - (1) A QME or AME may reschedule in-person medical-legal appointments **currently calendared**. When an **currently calendared** in-person medical-legal appointment is rescheduled, the physician shall reschedule the evaluation to take place within 90 days after the date that both the statewide stay-at-home order limiting travel outside one's home, and any similar local order in the jurisdiction where the injured worker resides or the visit will occur, if applicable, are lifted; or

### Discussion:

*We suggest that the references to "currently calendared" should be omitted since they would effectively limit rescheduling of the in-person medical-legal appointments to those appointments that were scheduled prior to the effective date of the proposed emergency regulation. Further, the limitations would preclude rescheduling in-person medical-legal appointments after that date until either the stay-at-home orders are extended or lifted.*

### Recommendation:

- (2) A QME or AME may provide a record review and injured worker electronic interview summary report **if there is agreement in writing by both the injured worker and the carrier or employer. If there is written agreement, T-the** physician may interview the injured worker either by telephone or by any form of video conferencing. **The record review and injured worker electronic interview summary shall be submitted to the parties within 45 days of the scheduled interview consistent with the timeframe in 8 CCR §38(a) and this proposed emergency regulation.** Once the statewide stay-at-home order, and any similar local order in the jurisdiction where the visit will occur, are lifted, the QME **or AME** may then schedule a face-to-face evaluation taking all necessary **safety** precautions.

## Discussion:

*The written agreement of the parties should be required since often there are no records to review at the time the interview of the injured worker is undertaken. In that circumstance it would be reasonable to wait until the in-person medical-legal evaluation is completed to avoid an unnecessary additional expense under this subsection. Consistent with the revisions proposed to enforce 8 CCR §38(a) above, if the electronic interview and record review are undertaken, the QME or AME should be required to submit the report within 45 days of the date of the injured worker's electronic interview. Additional language has been added to the final sentence for clarity.*

## Recommendation:

- (3) A QME or AME may complete a medical-legal evaluation through telehealth when a physical examination is not necessary and all of the following conditions are met:
  - (A) The injured worker is not required to travel outside of their immediate household to accomplish the telehealth evaluation; and
  - (B) There is a medical issue in dispute which involves whether or not the injury is AOE/COE (Arising Out of Employment / Course of Employment), or the physician is asked to address the termination of an injured worker's indemnity benefit payments or address a dispute regarding work restrictions the nature of the injured worker's medical condition(s) does not require an in-person physical examination to evaluate the injured worker and make determinations related to the issues in dispute; and
  - (C) There is agreement in writing to the telehealth evaluation by the injured worker, the carrier or employer, and the QME. Agreement to the telehealth evaluation cannot be unreasonably denied. If either the employee or employer opposes the telehealth evaluation, the opposing party shall document the opposition in writing to the QME and all parties within 20 days of notification of the telehealth appointment (if the injured worker is represented) or 30 days (if the injured worker is unrepresented) outlining the specific nature of the opposition to the telehealth evaluation. If a party to the action believes that agreement to the telehealth evaluation has been unreasonably denied under this section, they may within 10 days file an objection with the Workers' Compensation Appeals Board, along with a Declaration of Readiness to Proceed to set the matter for a hearing, and the telehealth evaluation shall not proceed until the issue is adjudicated; and

- (D) The telehealth visit under the circumstances is consistent with appropriate and ethical medical practice, as determined by the QME; and
- (E) The QME attests **in writing** that the evaluation does not require a physical exam.

### **Discussion:**

*Regarding subsection §78 (a)(3)(B), inclusion of the opportunity to perform telehealth evaluations to determine TTD status or work restrictions is likely to cause unnecessary litigation and expense. The use of telehealth should be limited to the determination of issues such as causation of the underlying injury (AOE-COE) or medical conditions that do not require a physical examination of the injured worker to render a medical opinion and/or resolve disputes. Orthopedic and neurologic examinations require the physician to complete an in-person physical assessment examination of the injured worker because the physician's manual recording of measurements (e.g., range of motion, muscle strength testing, sensory loss, reflexes, etc.) using appropriate diagnostic instruments (e.g., dynamometer, inclinometer, Semmes-Weinstein, two-point discrimination, reflex testing, electro-diagnostic study, etc.) are always necessary to substantiate the ability of the injured worker to resume regular work activities or impose work limitations that would affect the injured worker's entitlement to termination or continuation of benefits. Moreover, if the injured worker is determined to be at Maximal Medical Improvement (MMI) at the telehealth evaluation, it will always require an in-person examination for these injury types as impairment determinations for individual joint and neurologic injuries are conditioned on and substantiated by the reproducibility of measurements under relevant chapters of the AMA Guides, 5<sup>th</sup> Edition. Limiting the scope of telehealth evaluations to AOE-COE, psychiatric, or other medical conditions which can reasonably be undertaken without an in-person evaluation will serve to avoid incomplete and unnecessary evaluations, costs, litigation, and medical reports lacking substantial evidence.*

*Regarding subsection §78 (a)(3)(C), both the agreement and any opposition to the agreement should be made in writing in order to provide a clear record. A timeframe is required for the opposition to the agreement by a party and for the objection to a party's denial if deemed unreasonable. The telehealth examination should not proceed if one party is not in agreement, or unless and until the issue has been resolved at the WCAB. Finally, the subsection is part of an inclusive list, and thus the conjunctive "and" needs to be added to the end.*

*Regarding subsection §78 (a)(3)(E), the Institute suggests that the attestation from the QME be in writing in order to create a clear record.*

### **Recommendation:**

- (e) Upon the lifting or termination of Governor Gavin Newsom's Executive Order N-33-20, and when there is no longer any statewide stay-at-home order, or any similar local applicable order in the jurisdiction, QME evaluations **may shall** take place under the

provisions of the non-emergency QME regulations and the parties **may shall** comply with all timeframes, billing and reporting requirements under the non-emergency regulations.

**Discussion:**

*If these emergency regulations expire and are not readopted without further rulemaking, medical-legal evaluation must be conducted under the non-emergency QME regulations in effect on the date of service.*

Thank you for the opportunity to comment. 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  
George Parisotto, DWC Administrative Director  
Maureen Gray, DWC Regulations Coordinator  
Katrina Hagen, DIR Director  
CWCI Claims Committee  
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