2009 PROPOSED REVISIONS TO THE DWC'S QME REGULATIONS

– *Practice Points* –

By California Society of Industrial Medicine & Surgery

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Introduction

Senate Bill 228 (Alarcón, ch. 639, Stats. 2003) and Senate Bill 899 (Poochigian, ch. 34, Stats. 2004), among others, changed the workers' compensation laws in California with respect to the roles of treating physicians, Agreed Medical Examiners[1] (AMEs) and Qualified Medical Evaluators (QMEs). One of the changes made by SB 228 was to eliminate the Industrial Medical Council (IMC) and to transfer to the Administrative Director (AD) of the Division of Workers' Compensation (DWC) the authority to regulate (examine, appoint, reappoint and discipline) QMEs and to issue panel lists of QMEs to parties in workers' comp cases. [Sections 8 and 52 of Stats. 2003, ch. 639]

On November 30, 2007, the AD issued a rulemaking to propose amendments, repeals and additions to the regulations governing QMEs that were originally adopted by the IMC. The AD held hearings on January 14 and 17, 2008, to elicit public comments on the proposed regulations. There were also two additional 15-day comment periods during the year to receive input on revisions the AD made to the proposed regulations. The AD filed the final regulatory package with the Office of Administrative Laws on November 26, 2008, and they are scheduled become operative on February 17, 2009.

The objective of this **Practice Points** article is to highlight the most significant recent revisions to the QME regulations. Unless specified to the contrary, all statutory references are to the California Labor Code, and all references to administrative regulations are to Title 8 of the *California Code of Regulations.* All quotations of comments made by the AD are taken from various "Statements of Reasons" or "Notices of Rulemaking" contained in the official rulemaking file available for inspection at http://www.dir.ca.gov/dwc/DWCPropRegs/qme_regulations/qme_regulations.htm.

All of the regulatory changes in the rulemaking affect physicians who do forensic examinations and reports in the California workers' compensation system. Although the

[1]The term "Agreed Medical Examiner" was eliminated in these new regulations. Now an "AME" is an "Agreed Medical Evaluator." [8 *California Code of Regulations §*1(f)]

revised official title of the chapter reads, "Division of Workers' Compensation - Qualified Medical Evaluator Regulations," certain portions of the revisions also apply to AMEs and treating physicians who occasionally write forensic reports.

Many of the revisions are either "changes without regulatory effect" (such as grammatical, spelling, capitalization, punctuation changes, etc.) or are non-substantive, such as recognizing the abolition of the IMC and the transfer of functions to the AD. This article will focus primarily on the substantive revisions to the regulations and not the minor or technical changes.

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Definitions §1

This section contains definitions for terms used throughout the regulations governing QMEs.

Section 1(b) defines the terms "ACOEM" and "ACOEM Practice Guidelines" by referring to the existing definitions in Sections 9792.20(a) ["ACOEM"] and 9792.20(b) ["ACOEM Practice Guidelines"], respectively since QMEs must use the Medical Treatment Utilization Schedule (MTUS), found at Sections 9792.20 *et seq.* to address disputes regarding the extent and scope of medical treatment.

Section 1(d) provides a new definition for "Agreed Panel QME." The term means the panel QME that the claims administrator, or if none the employer, and a represented employee agree upon and select from a QME panel in a represented case pursuant to Labor Code Section 4062.2(c). It also provides that such an evaluator will be entitled to be paid at the same rate as an AME. Agreed Panel QMEs should use modifier "-94" as defined in Section 9795(d) for billing medical-legal evaluation services.

Section 1(e) defines "AMA *Guides*." Due to amendments made to Labor Code Section 4660(b) by SB 899, physicians are now required to describe and evaluate the nature of physical injury or disfigurement as well as resolve disputes over the nature and extent of permanent disability from an industrial illness or injury by reference to the Fifth Edition of the AMA *Guides*.

Section 1(f) adds the word "represented" to the existing definition of Agreed Medical Evaluator (AME) to clarify the long standing practice that only cases in which the employee is represented by an attorney involve the use of an AME.

Section 1(i) now includes references to Labor Code Sections 4062.1, 4062.2 and 4067 consistent with their adoption when SB 899 was enacted.

Section 1(j) amends the definition of Claims Administrator to add the phrase "the person or entity responsible for the payment of compensation."

Section 1(q) adds a new definition for "Education Provider" to distinguish use of this term, referring to continuing education course providers approved by the Administrative Director, from use of the word "provider" as a synonym for physician.

Section 1(r) amends the definition of "Employer" to avoid ambiguity and confusion. It adds references to Section 3300 of the Labor Code, to insured, self-insured and lawfully uninsured employers in order to be consistent with other regulations.

Section 1(t) defines "Follow-up comprehensive medical-legal evaluation" in order to clarify that such an evaluation and report have the same meaning as Section 9793(f) and also to distinguish this type of evaluation from a "Supplemental medical-legal evaluation."

Section 1(u) defines the "Medical Treatment Utilization Schedule" or "MTUS."
Section 1(w) defines a "Mental health record" as a medical treatment or evaluation record created or reviewed by a licensed physician as defined in Labor Code Section 3209.3 in the course of treating or evaluating a mental disorder.

Section 1(y) defines a "Physician's office" as a bona fide office facility which is identified by a street address and any other more specific designation such as a suite or room number and which contains the usual and customary equipment for the evaluation and treatment appropriate to the physician's medical specialty or practice.

Section 1(x) defines a "Panel QME" as the physician, from a QME panel list provided by the Medical Director, who is selected under Labor Code Section 4062.1(c) when the injured worker is not represented by an attorney, OR when the injured worker is represented by an attorney, the physician whose name remains after the striking process or who is otherwise selected as provided in Labor Code Section 4062.2(c) when the parties are unable to agree on an Agreed Panel QME.

Section 1(bb) adds a new definition for QME competency examination for "acupuncturists". Due to the limitation in Labor Code Section 3209.3(e), the Administrative Director determined a separate QME competency examination for acupuncturists should be developed and administered.

Section 1(dd) adds "Specified Financial Interests" and defines it as a shared financial interest that must be reported or disclosed pursuant to Sections 17, 29, 50 or on the "SFI Attachment Form" attached to the QME Form Section 100 (application for appointment), Section 103 (annual QME fee) or Section 104 (application for reappointment) as required by the QME regulations. See Section 29 for more information.

Section 1(ee) defines "Supplemental medical-legal evaluation" in order to distinguish this type of evaluation and report, as defined in Section 9793(*l*) of Title 8 as a report produced without any physical examination of an injured employee.

Eligibility (§§10-19)

Several subdivisions were added to Section 10. New Section 10(b) provides that if a physician is on probation with his/her licensing board, his/her application for QME or renewal QME shall be reviewed by the DWC Medical Director on a case-by-case basis consistent with Labor Code Section 139.2(m) which happens to provide that the AD "shall suspend or terminate as a medical evaluator any physician who has been suspended or placed on probation by the relevant licensing board."

New Section 10(d) provides that if "while under investigation" or after being served with a statement of issues or an accusation alleging a violation of the QME regulations or the Labor Code, a physician withdraws his/her application for appointment or reappointment as a QME, or resigns or fails to seek reappointment, shall be subject to having the disciplinary process reactivated whenever he/she subsequently files an application for appointment or reappointment. If the AD finds the alleged violations occurred, the physician's application may be denied.

Section 10.5, which heretofore limited the ability of certain unqualified aliens and nonimmigrant aliens from being appointed as QMEs, was repealed in its entirety because such determinations of citizenship and visa status are made by the physician's professional licensing agencies, and that licensing process is a condition precedent to becoming a QME.

Section 11(b)(2) and 11(e)(4) were added to the QME eligibility standards to require an applicant for QME appointment or reappointment to report fully and accurately, under penalty of perjury, all specified financial interests that may affect the physician's assignment to QME panels as outlined in Section 29, discussed below.

Similarly, Section 11(e)(1) was amended to require a QME applicant to state, under penalty of perjury, any license restrictions or terms of probation imposed by his/her licensing board.

Although the previous regulations required the QME applicant to "declare that he or she has not performed a QME Evaluation without QME Certification," the revised regulations now require that statement to be under penalty of perjury. [Section 11(e) (3)]

Section 11(f) recognizes that acupuncturists take a special QME exam because they cannot perform disability evaluations by virtue of Labor Code Section 3209.3(e).

Section 11(f)(8) was amended to provide that any QME applicant, who upon good cause shown by the test administrator, is suspected of cheating may be disqualified from the exam and, upon a finding that the cheating occurred, will be denied admittance to any QME exam for a period of at least five years.

Section 11.5 was amended to clarify that only education providers accredited by the AD may offer the 12-hour report writing course required of QME applicants. In addition, the

mandatory curriculum for the report writing course was expanded to include discussions of several new topics including the Medical Treatment Utilization Schedule (and relevant portions of the ACOEM *Practice Guidelines*), the AMA *Guides to the Evaluation of Permanent Impairment* (Fifth Edition), and the importance of preparing reports that comply with Section 35.5 (discussed below) and relevant statutes. Furthermore, as a condition to completing the report writing course, a physician enrollee must draft at least one practice written medical-legal evaluation report which shall be critiqued by the course provider. [Section 11.5(i) (8)]

Sections 12 and 13 were extensively rewritten and now provide that the AD will only recognize specialties that have specialty boards that are recognized by the respective California licensing agencies. This revision primarily affects chiropractors and the Board of Chiropractic Examiners is presently in rulemaking to address this issue for its licensees. A QME applicant must provide to the AD adequate documentation that he/she is either board certified or has completed the appropriate postgraduate specialty training.

Section 14 was amended in a manner similar to Section 11.5 to expand the curriculum of the 44-hour chiropractic workers' compensation certification program.

Assignment of Qualified Medical Evaluators, Evaluation Procedure (§§29 – 39)

Section 29 "Specified Financial Interests That May Affect Assignment to QME Panels," specifies that QMEs are required to provide specified financial information necessary to assure that two or more QMEs with shared financial interests are not assigned to the same QME panel issued to parties in a disputed claim. "Specified financial interests" must be disclosed when a physician is applying for appointment, at the time of paying the annual fee or when applying for reappointment.

"Specified financial interests" include being a general partner or limited partner in, or having an interest of five (5) percent or more in, or receiving or being legally entitled to receive a share of five (5) percent or more of the profits from, any medical practice, group practice, medical group, professional corporation, limited liability corporation, clinic or other entity that provides treatment or medical evaluation services for use in the California workers' compensation system.

The "Disclosure of Specified Financial Interests" (SFI) Form 124 is to be filed along with the QME Form 100, 103 or 104, respectively. Failure to complete and file a "SFI Form 124," when required, shall be grounds for disciplinary action.

Section 30 describes how parties apply to the Medical Unit of the DWC to request the issuance of a panel (list of three names) of QMEs.

SB 899 added Labor Code Sections 4062.1 to govern procedures in cases in which the employee is not represented by an attorney, and 4062.2, to govern procedures when both parties are represented by attorneys. Labor Code Sections 4060, 4061 and 4062 address the conditions under which an injured employee or the employer (or the employer's insurer or third party administrator) may obtain a medical-legal evaluation to address disputes over various issues in a worker's compensation claim.

Labor Code Section 4062.1 sets out the procedures for an unrepresented employee to obtain a QME to resolve any dispute under Labor Code Sections 4060 through 4062. Labor Code Section 4062.2 sets out procedures for the parties in a represented case either to agree on an AME or, if that is not done within prescribed time limits, to obtain a QME panel. The represented parties then use a prescribed procedure to strike names from the list of three QMEs, leaving a single QME to perform the evaluation and report. This procedure includes an initial ten day period in which both sides can choose a name from the panel to serve as an AME. Failing that agreement, one side strikes or eliminates a name from the list after which the other side may also eliminate a name. If the second side fails to strike the second name within three days of the initial side's action, then that initial party can choose the QME from the remaining two names. Labor Code Section 4062.2 specifically requires this new procedure. The requirement to obtain a QME panel in a represented case by this method is triggered after at least one party who disputes an opinion of the treating physician has sent the other party a written request naming one or

more physicians to serve as an AME and at least ten days has elapsed but the parties failed to agree on an AME.

The parties in an unrepresented case are directed to apply for a QME panel by submitting QME Form 105 to the Medical Unit of the DWC. As required by Labor Code Section 4062.1, the claims administrator is required to provide QME Form 105 (Request for QME Panel) and its attachment (How to Request a Qualified Medical Evaluator if you do not have an Attorney) to the unrepresented injured employee.

The parties in a represented case are directed to obtain a QME panel pursuant to the process in Labor Code Section 4062.2, submitting QME Form 106 (Request for QME Panel) with: 1) a statement of the disputed issue or issues; 2) a copy of the first written proposal for an AME; 3) a specialty selected for the QME panel, as well as the specialty of the treating physician and the specialty preferred by the opposing party, if known. When parties represented by an attorney in a case with a date of injury prior to January 1, 2005, agree to use the QME panel process under Labor Code Section 4062.2, either party may request a QME panel upon submission of these required documents and evidence of the parties' agreement.

The Medical Director may delay issuing a new QME panel, if necessary, until the parties answer a request from the Medical Director for information about whether a QME panel previously issued in the case was used.

The party is entitled to only one QME panel unless there is a basis for replacing one or more QMEs listed on a panel due to the reasons specified in Section 31.5.

After a claim form is filed, an employer, or the employer's claims administrator, may request a panel of QMEs as provided in Labor Code Section 4060, to determine whether to accept or reject part or all of a claim within the period for rejecting liability in Labor Code Section 5402(b) and only after providing evidence of compliance with Labor Code Section 4062.1 or 4062.2.

This regulation makes clear that the claims administrator or employer may request and obtain an evaluation during the 90-day period for investigating the claim in order to decide whether to accept any part of or the entire claim or to reject part or all of the claim.

Once the claims administrator, or if none, the employer, has accepted as compensable any body part in the claim, a request for a panel QME may only be filed based on a dispute arising under Labor Code Section 4061 or 4062.

Labor Code Section 4061 addresses disputed issues over the existence or extent of permanent impairment, permanent disability and the payment of permanent disability indemnity.

Medical determinations by a treating physician such as whether or not the injured employee's condition has become "permanent and stationary", or the need for medical treatment in the future, or the existence of new and further disability, or regarding the employee's work restrictions or preclusion to engage in his or her usual occupation, are all medical determinations that are not covered by Labor Code Section 4061 and also not subject to Labor Code Section 4610.

Labor Code Section 4062(a) also provides that, "If the employee objects to a decision made pursuant to Labor Code Section 4610 to modify, delay or deny a treatment recommendation, the employee shall notify the employer of the objection in writing within 20 days of receipt of that decision." Depending on whether the employee is represented, the objecting employee then obtains a comprehensive medical evaluation pursuant to Labor Code Section 4062.1 (unrepresented) or 4062.2 (represented) to resolve the dispute.

In cases in which the employer objects to treating physician's recommendation for spinal surgery, the parties must use the process in Labor Code Section 4062(b) and (c).

This regulation also provides that whenever an injury or illness claim has been denied entirely by the claims administrator or, if none, by the employer, within the time allowed under Labor Code Section 5402(b), only the employee may request a panel of QMEs pursuant to Labor Code Sections 4060(d) and 4062.1(b), if unrepresented, or as provided in Labor Code Sections 4060(c) and 4062.2, if represented. Once the claims administrator or employer has denied all liability for a claimed industrial injury or illness, only the injured employee needs a remedy in order to secure medical treatment and indemnity benefits.

The employer is entitled to use the utilization review process under Labor Code Section 4610 to obtain an opinion from a reviewing physician of the employer's choice regarding whether the medical treatment recommended by the treating physician is consistent with the MTUS. Labor Code Section 4610, and its implementing regulations in Sections 9792.6 *et seq.,* describe the procedures the employer must use when, based on the opinion of the reviewing utilization review physician, the employer decides to modify, delay or deny the treatment.

If the employer believes a comprehensive medical-legal evaluation is needed during the 90 day period under Labor Code Section 5402(b) to determine compensability, as discussed above, the employer may initiate the AME/QME process to obtain an evaluator under Labor Code Section 4060 and Section 30(d)(1).

The Workers' Compensation Appeals Board held and explained in the en banc decision in *Simmons v. State of California, Dept. of Mental Health* (2005) 70 Cal. Comp. Cases 866, 2005 Cal. Wrk. Comp. LEXIS 149: "Where a utilization review physician finds that a treatment is medically necessary but questions whether the need for that treatment is causally related to the industrial injury, the defendant must either: (a) authorize the treatment; or (2) timely deny authorization based on causation within the deadlines set forth

in Labor Code Section 4610(g)(1); timely communicate the denial based on causation to both the treating physician and the applicant within the deadlines set forth in 4610(g)(3)(A); and timely communicate the AME/QME process within twenty days of receipt of the utilization review physician's report, if the employee is represented by an attorney, or within 30 days, if the employee is unrepresented, in accordance with Labor Code Section 4062(a);…"

The Board also explained in *Simmons* that the UR physician does not have the "authority" to determine causation and that the UR physician's report is not admissible on the issue of causation, but the report may be used to deny the recommended treatment and to object and initiate the AME/QME process under Labor Code Section 4062(a).

Parties shall, to the extent feasible, obtain a follow-up evaluation or a supplemental evaluation from the AME or the QME who has already reported in the claim. "Good cause" as used in Section 30(d)(4) includes evidence discovered after the period specified in Labor Code Section 5402(b).

In the event the evaluator who previously reported is no longer available or is not medically qualified to address the disputed compensability issue or there has been no prior comprehensive medical-legal evaluation in the claim, the party seeking the evaluation shall follow the procedures set out in Labor Code Section 4060(c) or 4060(d), as applicable.

Section 30.5 provides the Medical Director shall use the type of specialist indicated on a QME panel request form. The wording has been modified to refer to both QME Form 105 and 106, since separate panel request forms exist for parties in unrepresented and represented cases.

Section 31 describes conditions governing the random selection of QMEs for placement on a panel of three QMEs to be provided to a party requesting a panel.

Section 31.1 explains how the Medical Director will select among requests for a QME panel filed by different *represented* parties that are received by the Medical Unit on the same day, and what additional information the party should supply when requesting a panel in a medical specialty different from that of the treating physician.

Section 31.1 (c) provides that in the event the Medical Unit is unable to issue a QME panel in a represented case within thirty (30) calendar days of receiving the request, either party may seek an order from a Workers' Compensation Administrative Law Judge that a QME panel be issued. Any such order shall specify the specialty of the QME panel or the party to be designated to select the specialty.

Section 31.3 "Scheduling Appointment with Panel QME," specifies that when the employee is not represented by an attorney, the unrepresented employee shall select a QME from

the panel list, contact the QME to schedule an appointment and inform the claims administrator of the QME selection and the appointment.

If the unrepresented employee fails to select a QME from the QME panel or fails to schedule an appointment with the selected QME, the claims administrator may schedule an appointment with a panel QME only as provided in Labor Code Section 4062.1(c).

Whenever the employee is represented by an attorney and the parties have completed the conferring and striking processes described in Labor Code Section 4062.2(c), the represented employee shall schedule the appointment with the physician selected from the QME panel. If the represented employee fails to do so within ten (10) business days of the date a QME is selected from the panel, the claims administrator or administrator's attorney may arrange the appointment and notify the employee and employee's attorney.

Section 31.5 describes the conditions under which a QME name on the QME panel may be replaced with a new QME selected at random or the entire QME panel may be replaced.

The Medical Director may replace an entire panel of QMEs rather than simply replacing one QME named on an initial panel. This is necessary because Labor Code Section 4062.2 requires parties in a represented case to use a procedure of each striking one name from the three panel list, leaving the remaining QME to be designated to do the evaluation. Once the parties have stricken the names of the other two QMEs, if the remaining QME is unavailable or unable to perform the evaluation, it is more fair and consistent with the legislative intent of the striking process to allow the parties to have a new list of three QMEs from which to obtain an evaluator.

This regulation also addresses the situation when the employee fails to select a QME and schedule an appointment, allowing the employer to do so.

The chosen QME can be replaced if the QME on the panel issued cannot schedule an examination for the employee within sixty (60) days of the initial request for an appointment, or if the 60 day scheduling limit was waived under Section 33(e) the QME cannot schedule the examination within ninety (90) days of the date of the initial request for an appointment.

Section 31.5(a)(7) added the phrase "secondary physician". The role of the QME is to resolve disputed medical issues arising from a dispute over the treating physician's opinion. A secondary physician, as defined by Section 9785(a)(2), is another physician who treats the injured employee without being primarily responsible for the care and coordination of care of the employee.

Section 31.5(a)(8) was amended to strike "unrepresented," in order that this reason may also apply in represented cases.

Section 31.5(a)(9) adds "or a replacement panel" to address cases in which the wrong

specialty was requested.

Section 31.5(a)(11) is new language that permits a party to obtain a replacement QME or QME panel if the selected QME failed to complete the evaluation and report on time and both parties do not waive the right to a new QME, as provided under Labor Code Section 4062.5. Failure by a party to object to an evaluator's report within fifteen (15) days of the date the report was served by the evaluator on the grounds of a violation of Section 34 shall be deemed a waiver of the objection, unless otherwise ordered by a Workers' Compensation Administrative Law Judge.

Section 31.5(a)(14) is new language added to enable a party to obtain a replacement QME after the Administrative Director has ordered that a new evaluation by a different QME be obtained due to the AD's grant of a petition for a rating reconsideration pursuant to Section 10164(c).

Section 31.5(a)(15) is new language added to enable a party to obtain a replacement QME when the existing QME, who is otherwise qualified and competent to address all disputed medical issues, fails or refuses to provide a complete medical evaluation as required in Labor Code Section 4062.3(i) or a written statement explaining why the evaluator believes he or she is not medically qualified to address one or more issues in dispute in the case.

Additionally, this regulation provides that in the event the parties in a represented case have struck two QME names from a panel and subsequently a valid ground under Section 31.5 arises to replace the remaining QME, none of the QMEs whose names appeared on the earlier QME panel shall be included in the replacement QME panel.

Section 31.7 "Obtaining Additional QME Panel in a Different Specialty," specifies that once an AME, an Agreed Panel QME, or a panel QME has issued a comprehensive medical-legal report in a case and a new medical dispute arises, the parties, to the extent possible, shall obtain a follow-up evaluation or a supplemental evaluation from the same evaluator.

Section 32 specifies the conditions under which a consulting report may be obtained by a QME from another physician.

In addition, for injuries occurring on or after January 1, 1994, a QME may obtain a consultation from any physician as reasonable and necessary pursuant to Labor Code Section 4064(a). This section clarifies the obligations of the referring evaluator. For example, the referring evaluator must notify the parties of the consulting appointment using Form 110, "The Appointment Notification Form." In addition, the parties cannot communicate directly with the consulting evaluator, but must communicate only through the referring evaluator. In his/her report, the referring evaluator must incorporate by reference and comment upon the findings of the consultant and must include a list of the medical records that were and were not forwarded to the consultant.

Section 32.6 "Additional QME Examinations Ordered by the Appeals Board," implements the provision of Labor Code Section 4064(a) which allows for a reasonable and necessary comprehensive medical-legal report to resolve disputed issues under Labor Code Sections 4060, 4061 or 4062, at the employer's expense.

Section 33 "Unavailability of QME," describes the circumstances in which a QME may request and obtain a change of status from "active" to "unavailable" for a period up to 90 days. It also describes the rights and procedures of a party to obtain a replacement QME when he or she finds that the selected QME is not available to schedule an appointment within at least 60 days of the request for an appointment.

Section 33(c) was added to provide that a QME granted unavailable status may, during that time, complete reports for examinations already performed and complete supplemental reports which do not require an examination, but shall not perform new evaluation examinations as a QME until the physician returns to active QME status.

Section 33(d) makes minor edits for clarity that the party with the legal right to select the QME may decide to waive his or her right to a replacement QME and wait for an appointment with the selected QME. Wording has been amended to reflect the statutory changes of SB 899 that now require parties in both unrepresented and represented cases to use panel QMEs and schedule appointments.

Section 33(e) provides that whenever a party with the legal right to schedule an examination with a QME is unable to obtain an appointment within 60 days of the request, the party may waive the right to a replacement in order to accept an appointment no more than ninety (90) days after the date of the party's initial appointment request. If the evaluation cannot be scheduled within 90 days, either party may report the unavailability of the QME to the Medical Director and obtain a replacement QME name.

Section 33 (f) explains that when a QME fails to submit the form in Section 109 (Notice of Qualified Medical Evaluator Unavailability) regarding his or her unavailability at a medical office at least thirty (30) days prior to the change, the Medical Director may designate the QME to be unavailable at that location for thirty (30) days from the date the Medical Director learns of the unavailability.

Section 33(g) was added to describe the procedure the Medical Director will use to notify a QME by certified letter when the Medical Director becomes aware of the QME's unavailability at a specific location and the QME is otherwise not responding to calls or mail at that location. The QME would be made unavailable at that location for failing to respond within 15 days of the date of the certified letter.

Section 34 "Appointment Notification and Cancellation," describes the manner by which a QME selected from a panel must notify the parties of the date of the physical examination, by use of QME Form 110 (QME Appointment Notification Form).

Section 34(a) applies to both unrepresented and represented cases and to allow the QME to serve the appointment notification form on the employee and the claims administrator, or if none, the employer, and the parties' attorneys in a represented case within five business days of the date the appointment was made. The word "working" is changed to "business" days. NOTE: Failure to comply with this requirement shall constitute grounds for denial of reappointment under Section 51.

Section 34(b) was amended to add language allowing the injured worker, for his or her convenience, to make a written request to the QME to move the appointment to another office of that QME as long as that office location is certified with the Medical Unit of the DWC.

Section 34(d) adds that an appointment scheduled with an AME, Agreed Panel QME or QME, shall not be cancelled or rescheduled by the QME or by any party less than six (6) business days before the date scheduled. Whenever the claims administrator, or if none the employer, or the injured worker, or either party's attorney, cancels an appointment scheduled by a panel QME, the cancellation shall be made in writing and state the reason for the cancellation. Oral cancellations shall be followed with a written confirming letter.

Section 34(e) sets out the timeframe in which a cancelled QME or Agreed Panel QME appointment must be rescheduled. The rescheduled appointment is to be no later than 30 days from the date of cancellation and within 60 days of the date of the initial request for an appointment unless the parties agree in writing otherwise.

Section 34(f) sets out the timeframe in which a cancelled AME appointment must be rescheduled. The rescheduled appointment is to be no later than 60 days from the date of cancellation.

Section 34(g) stipulates that failure to receive relevant medical records prior to the scheduled appointment does not constitute good cause for cancellation.

Section 34(h) states that the parties may not cancel or reschedule an AME, Agreed Panel QME or QME within six business days of the appointment date except for good cause. Written notice of cancellation must be served on all parties. Verbal cancellations must be followed up in writing within 24 hours of the verbal cancellation. The Appeals Board retains jurisdiction regarding what constitutes good cause.

Section 35 "Exchange of Information and *Ex Parte* Communications," regulates communication between the parties and the evaluator. It identifies the types of medical and non-medical records, reports and other evidence either party may send to the QME, Agreed Panel AME or AME for consideration as part of the evaluation. It also specifies the procedures by which each party must advise the other, prior to sending such information to the evaluator, of the nature of the medical and non-medical records and the period for

a party to object to any such information. It requires the parties to communicate in writing with the QME or AME while simultaneously sending a copy of such communication to the opposing party.

Section 35(a) was added to clarify that the claims administrator, or if none the employer, must provide, and the injured employee may provide, to the QME or AME the types of records, documents and other things listed in the remainder of the section.

Section 35(a)(4) requires that whenever the treating physician's recommended treatment is disputed, the evaluator must be provided with a copy of the treating physician's report recommending the disputed treatment along with all supporting documentation, a copy of the employer's decision to approve, delay, deny or modify the disputed treatment with all supporting documentation, and all other relevant communications exchanged during the utilization review process regarding the disputed treatment. The claims administrator shall attach a log to the front of the records and information being sent to the opposing party that identifies each record or other information to be sent to the evaluator and lists each item in the order it is attached or appears on the log. In a represented case, the injured worker's attorney shall do the same for any records or other information to be sent to the evaluator.

Section 35(a)(5) was added to specify that relevant non-medical records may include films and videotapes, as previously provided under this regulation in Section 35(a)(2).

Section 35(b)(1) was added to require all communications by either party with the AME or QME to be in writing and sent simultaneously to the opposing party, except as provided in Sections (c) and (k).

Section 35(b)(2) requires represented parties who have selected an AME or an Agreed Panel AME to agree on what information will be provided to the AME, as specified in Labor Code Section 4062.3(c).

Section 35(d) was added to clarify that once a party has objected to the evaluator's consideration of non-medical records or information, the records or information shall not be provided to the evaluator unless so ordered by a Workers' Compensation Administrative Law Judge.

Section 35(e) was added to clarify that no party may forward any medical-legal report which was rejected as untimely pursuant to Labor Code Section 4062.5, any evaluation report written by a physician other than the treating physician, secondary physician or evaluator obtained pursuant to Labor Code Sections 4060 through 4062.2, or which was otherwise stricken or found inadequate by a Workers' Compensation Administrative Law Judge.

Section 35(f) was added to clarify that either party may use discovery to establish the accuracy or authenticity of non-medical records or information prior to the evaluation.

Section 35(k) was amended to clarify that the Appeals Board retains jurisdiction to determine disputes arising from objections and whether *ex parte* contact in violation of Labor Code Section 4062.3 or this regulation has occurred. Additional edits are made to provide either party a remedy for *ex parte* communications. New language, consistent with Labor Code Section 4062.3(h), allowing oral or written communications by the employee in the course of the examination or at the request of the evaluator is added.

Section 35(l) was added to provide that the evaluator must address all contested medical issues arising from all injuries reported on one or more claim forms, consistent with Labor Code Section 4062.3(i), as long as the issues are within the evaluator's scope of practice and area of clinical competency. Where the disputed medical issues are outside of the scope of practice and area of clinical competency, the evaluator must notify the parties in writing at the earliest opportunity in order that the parties may initiate the process for obtaining an additional QME or AME evaluation. Such notice must be made no later than the date a report is served so that the parties may obtain another evaluator in a different specialty.

In the case of a panel QME, the evaluator shall notify the Medical Director at the same time as notifying the parties under this section.

Section 35.5 "Compliance by AMEs and QMEs with Administrative Director Evaluation and Reporting Guidelines," describes general guidelines for AMEs and QMEs to use in evaluating and reporting on disputed issues in a workers' compensation claim. Pursuant to Labor Code Sections 139.2(j)(2) and 139.2(j)(3), the Administrative Director must adopt regulations concerning the procedures to be followed by all physicians in evaluating, respectively, the existence and extent of permanent impairment and limitations from industrial injury consistent with Labor Code Section 4660, and disputed medical issues in a manner consistent with Labor Code Section 5307.27 (Medical Treatment Utilization Schedule).

Section 35.5(b) requires the reporting evaluator to state in the body of the report the date the examination was completed and the street address at which the evaluation examination was performed. If the evaluator signs the report on any date other than the date the examination was completed, the evaluator shall enter the date the report is signed next to or near the signature on the report.

Section 35.5(c) was amended to add the sentence: "The reporting evaluator shall attempt to address each question raised by each party in the issue cover letter sent to the evaluator as required by Section 35(a)(3)."

Section 35.5(d) was added such that in the event a new injury or illness is claimed involving the same type of body part or body system and the parties are the same, or in the event either party objects to any new medical issue within the evaluator's scope of practice and

clinical competence, the parties shall utilize to the extent possible the same QME or AME who reported previously.

Section 35.5(f) was added to require that any deposition of the evaluator be held at the location where the examination was performed and that the evaluator be available for a deposition within at least 120 days of the party's initial deposition request or notice. The parties are allowed to move the location of the deposition within a 20 mile radius of the original evaluation site.

Section 35.5(g) requires an AME or QME, when providing an opinion on a disputed medical treatment issue, to apply and be consistent with the standards of evidence-based medicine set out in the Medical Treatment Utilization Schedule (Sections 9792.20 et seq. of Title 8 of the *California Code of Regulations*). In the event the disputed medical treatment, condition or injury is not addressed by the MTUS, the evaluator's medical opinion must be consistent with Section 9792.20 et seq., and refer to other evidence-based medical treatment guidelines, peer reviewed studies and articles, if any, and otherwise shall explain the medical basis for the evaluator's reasoning and conclusions.

Section 36 "Service of Comprehensive Medical-Legal Evaluation Reports by Medical Evaluators Including Reports Under Labor Code Section 4061," addresses the requirements for serving medical-legal reports.

The QME is only required to use QME Form 111 when serving a comprehensive medical-legal report that discusses permanent impairment or permanent disability, in cases involving an unrepresented injured worker. When any other type of dispute is being addressed, the QME should use the "Proof of Service Form," Section 122.

Section 36(c) was added to provide that whenever the injured worker is represented by an attorney, a comprehensive medical-legal report that addresses disputes under Labor Code Section 4061 shall be served, within the time frames specified in Section 38, on each party and on the party's attorney with QME Form 122 (AME or QME Declaration of Service of Medical-Legal Report), except as provided in Section 36.5.

Section 36.5 addresses service of a medical-legal report in cases involving a disputed injury to the psyche. The section gives the AME or QME two options for serving the report on the injured worker, but requires that in all situations, the report must also be served on the treating physician.

In cases in which the evaluator makes a determination as provided under Health and Safety Code Section 123115(b), that the evaluation report or other medical records reviewed by the evaluator should not be seen directly by the injured worker due to a substantial risk of significant adverse or detrimental medical consequences, the evaluator is directed to serve the report only on a physician designated by the injured worker who will be paid for one office visit to discuss the report without allowing the injured worker to review

it personally. The physician need not be the primary treating physician in the workers' compensation claim. The claims administrator, or if none the employer, is required to pay for such an office visit. A new proposed QME Form 121 is being proposed for the evaluator to use when he or she makes such a determination.

If the injured worker fails or refuses to designate a physician to discuss the report, the AME or QME, in serving the report on the treating physician, satisfies his/her obligation under this section.

Whenever the evaluator does not make the specific determination required by Health and Safety Code Section 123115(b), but is concerned the injured worker may misinterpret part or all of the comprehensive medical-legal report, the evaluator may ask the injured worker if he or she wishes to use a method of voluntary alternate service in which the worker will designate a physician to whom the report will be served and who will be paid for one office visit to review the report with the injured worker prior to giving the worker his or her copy. The physician need not be the primary treating physician in the workers' compensation claim. QME Form 120 reflects this process.

Section 36.5(a) requires an evaluator who makes a determination under Health and Safety Code Section 123115(b) to complete the declaration on proposed QME Form 121, advise the injured worker that such a determination has been made and that the report itself can only be provided to a physician designated by the injured worker, permit inspection and copying of the report only by a licensed physician, as defined in Labor Code Section 3209.3 or a health care provider as defined in Health and Safety Code Section 123105(a), attach a copy of the completed QME Form 121 to the medical-legal report or other medical record it pertains to, and only serve the completed medical-legal report with the Form 121 attached on the physician designated by the injured worker, on the claims administrator, or if none the employer, on the DEU when the report addresses permanent impairment or permanent disability, and on the parties' attorneys, if any.

Section 36.5(c) defines "mental health record."

Section 36.5(d) provides that service in compliance with this section shall be deemed to satisfy the evaluator's obligation to serve the report under Labor Code Sections 139.2(j)(1) and 4061(c) and under Section 36.

Section 36.5(e) requires the claims administrator and all parties and their attorneys to keep mental health records subject to a determination under Health and Safety Code Section 123115(b) and this section confidential, and when filing such a report at the Workers' Compensation Appeals Board to request and obtain a protective order from a Workers' Compensation Administrative Law Judge that specifies the manner in which the record may be inspected, copied and entered into evidence.

Section 36.5(f) provides that when injury to the psyche is in dispute and the evaluator does not make a determination as described in Section 36.5(a) above, but is concerned the injured worker may misinterpret part or all of the report, the evaluator may ask the injured worker whether the individual wishes to voluntarily direct that an alternate method of service of the report be used, by completing QME Form 120 prior to the end of the evaluation visit.

Section 36.5(g) provides that upon receipt of a QME Form 120 completed by the injured worker, the evaluator shall serve the report on the physician designated by the employee.

Section 36.5(h) provides that when the injured worker directs alternate service on QME Form 120 that the evaluator serve two copies of the report, one of which will be provided to the injured employee during the visit with the physician designated on the form.

Section 36.5(i) provides that as an additional medical expense incurred in the claim, the claims administrator, or if none the employer, shall reimburse the physician designated by the injured worker on QME Form 120 or 121, for one office visit, when used for the purpose of reviewing and discussing the evaluator's report with the injured worker, at the OMFS rate for an office visit and may include, as appropriate, record review, any necessary, face-to-face time during the visit in excess of that specified in the CPT office visit code and charges, if necessary, for time required to prepare a treatment report.

Section 38 describes the time limits for an evaluator to issue a comprehensive medical-legal report and the conditions and procedures for obtaining an extension of time to complete the report. The section applies to QME, Agreed Panel AME and AME reports.

Sections 38(a) and (b) as currently worded were deleted.

New Section 38(a) provides that the time frame for both initial and follow up comprehensive medical-legal evaluation reports is 30 days from the commencement of the evaluation, unless the evaluator requests and is granted an extension of time. Wording is added to provide that when the evaluator fails to issue the report within this timeframe and fails to obtain an extension of time from the Medical Director, either party may request a replacement QME under Section 31.5 and neither party shall be liable for the cost of the late report. The wording also permits the QME to complete the report beyond the 30 day time limit only if both parties waive their right to a replacement QME. The wording explains the use of QME Form 113 (Notice of Denial of Request for Time Extension) and QME Form 116 (Notice of Late QME/AME Report – No Extension Requested).

New Section 38(b) directs the evaluator to request an extension of time using AME/QME Form 112, and provides that an extension of up to 30 days may be granted. As expressly stated in Labor Code Section 139.2(j)(1)(B), when the evaluator's reason for the extension request is for good cause as defined in that section, an extension of 15 days may be granted.

New Section 38(c) provides the evaluator must notify the Medical Director, the employee and the claims administrator not later than five days before the initial 30-day deadline to complete the report, of the request for an extension of time.

New Section 38(d) provides that the Medical Director will notify the parties of the decision to grant or deny the request on QME Form 112. When the request is denied, the Medical Director will also send the parties QME Form 113 or QME Form 116, to use in the event the parties wish to waive their right to a replacement QME and wait for the late report from the original QME.

New Section 38(e) provides that when the Medical Director becomes aware of a late report and the evaluator never requested an extension of time, the Medical Director will notify the parties by use of QME Form 116. The parties are able to complete part of Form 116 and return it to the Medical Director to indicate whether the party wishes to accept the late report.

Section 38(h) was amended to provide that the time frame of 60 days for completion of supplemental reports applies to both unrepresented and represented cases.

New Section 38(j) provides that the failure of a party to object to an evaluator's report, on the grounds of untimeliness under this section, prior to the date the report is served, shall be deemed a waiver of the objection, unless otherwise ordered by a Workers' Compensation Administrative Law Judge."

Section 39.5 directs QMEs to keep a copy of all comprehensive medical-legal reports for five years from the date of each report, to return original imaging studies and medical records upon written request and to submit a copy of any such report to the Medical Director upon request.

Section 39.5(a) was amended to add a sentence allowing a QME to satisfy the report retention requirement by retaining a true and correct electronic copy of the original report that was signed and served on the parties. Other minor edits to improve syntax were also made to the existing wording.

Evaluation Procedures (§§40-47)

Section 40 previously mandated that QMEs selected from a panel make specified disclosures to unrepresented injured workers. That section was amended to require those disclosures be made to both represented and unrepresented workers. One of the disclosures is that the worker may discontinue the evaluation for good cause. The revised regulation expands on the enumerated examples of "good cause" to include, "abusive, hostile or rude behavior including behavior that clearly demonstrates a bias against injured workers." [Section 40(a)(2)(B)]

Extensive revisions to Section 41 increase the number of ethical requirements placed on QMEs. In an apparent attempt to preclude the use of non-medical facilities (such as hotel rooms) for the performance of disability evaluations, Section 41(a) requires the "physician's office" to have functioning medical instruments and equipment appropriate to the physician's specialty and that it also have a functioning business office phone listed with the DWC Medical Director for that location which a party may use to schedule an exam or conduct other business. Section (a), however, contains some ambiguities. First, although it now specifically refers to requirements for a "physician's office" which is defined in Section 1(y), Section 34(b) requires all QME exams to be conducted at the "medical office" registered with the DWC (unless moved elsewhere at the injured worker's request). "Medical office" is not defined in the regulations. Originally, Section 41(a) referred to a "medical office," but the new regulations changed the wording to "physician's office." In view of these changes, there is now an ambiguity between Section 34(b) and 41(a). Furthermore, the reference to Section 1(w) in Section 41(a)(1) should be to Section 1(y). Second, it is unclear whether each physician's office must have a separate and distinct telephone number since the new regulation requires that there be a number "for that location." It is common practice with physicians who have multiple offices to have a single phone number for patients to call to conduct business for any of their office locations.

Previously, it was assumed that a panel QME could not solicit to treat an injured worker, but he/she could treat if the injured worker unilaterally asked. Section 41(a)(4) now positively states that a QME must refrain from treating or soliciting to provide medical treatment, medical supplies or medical devices to the injured worker.

Section 41(a)(5) was added to require a QME to communicate in a respectful, courteous and professional manner with the injured worker.

Section 41(a)(6) was added to make a conflict of interest under Section 41.5 (discussed below) by a QME an ethical violation that will result in discipline.

Section 41(a)(7) provides that a QME shall refrain from unilaterally rescheduling a panel QME exam more than two times in the same case.

Section 41(a)(8) provides that a QME shall refrain from cancelling a QME exam less than six business days from the scheduled date without good cause and without providing a new exam date within 30 calendar days of the date of cancellation. This section is ambiguous in that it is unclear whether the new exam must occur within 30 days of the cancellation or if only a new date (at sometime in the future) must be provided within 30 days of the cancellation. The AD's intent is likely the former since her explanation of the rulemaking is that "This section is added to avoid repeated delays due to examination rescheduling."

Section 41(b) was expanded to prohibit *ex parte* communications in all panel situations, not just those involving unrepresented injured workers.

Section 41(c) was expanded to put more duties on all QMEs. Section 41(c)(2) now requires the medical-legal report to list and summarize all medical and non-medical records reviewed as part of the evaluation.

Section 41(c)(5) requires a QME report to address all relevant "and contested" issues "as presented on one or more claim forms." Although the AD said these changes were "minor edits to improve clarity," they may more likely are an attempt to prevent QMEs from discussing (1) uncontested issues, or (2) issues the QME discovered during the evaluation that were not raised on a claim form. This same theme may be seen in Section 41(d).

Section 41(c)(6) requires that the date on the QME report must be the date it was signed and served. According to the AD, this requirement was "added due to problems arising from significant discrepancies on the date of the report and the date it is received, which cause confusion about when the time for actions and obligations contingent on the report begin to run." Specifically, this appears designed to identify clearly whether the QME timely issued the report pursuant to Section 38.

Section 41(c)(7) was added to clarify that the evaluator must write all portions of a report involving the discussion of medical issues, medical research relied upon, medical determinations and medical conclusions. This is apparently designed to prevent ghost writing and substantive editing by others. More importantly, however, if more than one QME signs a report, each signing physician must state which part(s) of the evaluation examination he/she performed, and which portion(s) of the report discussion and conclusions he/she drafted. If the QME(s) also obtained a consultation report from a physician in a different specialty, the consultation report must be incorporated into the report by reference and appended to the report itself.

Section 41(c)(8) was added to require the QME report to be served on all parties, and their attorneys, at the same time. It is no longer permissible to delay serving one of the parties.

Section 41(d) was amended to provide that no evaluator (including AMEs) shall engage in any physical contact with the injured worker that is unnecessary to complete the examination. According to the AD, "this requirement was added due to complaints from

injured workers." Another subtle change in the section provides that all aspects of the evaluation must be directly related to contested issues raised either by any party or in a treating physician's report. This may be designed to prevent evaluators from going on fishing expeditions to create new, heretofore uncontested, medical issues.

Section 41(f) was expanded to include AMEs, and not just QMEs, in the requirement that the injured worker cannot be forced to wait more than an hour in the evaluator's office.

Section 41(g) was expanded to include conflicts of interest under Section 41.5 as good cause for injured workers to terminate an examination by a QME or AME. Similarly, the provisions of Sections 41(h) and (i) have been expanded to permit both QMEs and AMEs to terminate evaluations based on misconduct by the injured worker.

Section 41.5 is a totally new section dealing with conflicts of interest by both QMEs and AMEs. It was originally mandated in 1993 by Labor Code Section 139.2(o) added by AB 110 (Peace and Brulte) [ch. 121, Stats. 1993]. According to the AD, "an evaluator shall not request or accept any compensation or other thing of value from any source that does or could create a conflict with his or her duties as an evaluator under the Labor Code. Section 41.5(b) provides that a conflict with the duties of the evaluator for the purposes of Section 139.2(o) means having and failing to disclose a disqualifying conflict of interest. Section 41.5(c) lists the parties and entities with whom a disqualifying conflict of interest may exist, i.e. the parties, their attorneys, if any; primary or secondary treating physicians in the case if treatment is in dispute; the reviewing utilization review physician or utilization review organization if the UR decision is in dispute; and the surgical center if the need for the surgery is in dispute." In a revision to the rulemaking, certain purveyors of medical goods and services were added to the list of entities with whom a disqualifying conflict of interest could exist.

Section 41.5(d) defines a "disqualifying conflict of interest" and lists the types of familial relationships, disqualifying financial interests, professional affiliations and other relationships that cause a person to have a conflict of interest. According to the AD, "Significant disqualifying financial interests include employment or a promise of employment; an interest of five % or more in the fair market value of any form of business involved in workers' compensation matters or of private real property or personal property or in a leasehold interest; five % or more of the evaluator's income is received from direct referrals by or from one or more contracts with a person or entity listed in 41.5(c), excluding MPN contracts; a financial interest as defined in Labor Code Section 139.3 that would preclude a referral; a financial interest as defined under the Physician Ownership and Referral Act of 1993 (PORA) set out in Business and Professions Code Sections 650.01 and 650.02 that would preclude referral. Professional affiliations include performing services in the same medical group or other business entity comprised of medical evaluators who specialize in workers' compensation medical - legal evaluations. Section 41.5(d)(4) is any other relationship or interest not addressed above which would cause a person aware of the facts to reasonably entertain a doubt that the evaluator would be able

to act with integrity and impartiality."

Section 41.5(e) authorizes any QME or AME to disqualify himself/herself if they decide they have a potential conflict of interest.

Under Section 41.5(f), if a QME or AME knows, or should know, he/she has a disqualifying conflict of interest, he/she must give written notice to the parties. It also provides that whenever the evaluator declines to do the evaluation due to disqualifying himself or herself, the parties are entitled to a replacement QME or QME panel. If the evaluator notifies the parties of a disqualifying conflict but declines to disqualify himself or herself, the parties must follow the procedures set forth in Section 41.6, below. If the injured worker is unrepresented, the evaluator must FAX a copy of the notice of conflict to the DWC Medical Unit at the same time he/she notifies the parties.

Section 41.5(g) contains similar conflict of interest provisions with regard to the parties to a case. According to the AD, "each party who knows of or becomes aware of a potential disqualifying conflict of interest as defined in Section 41.5 [must] notify the evaluator at the earliest opportunity and no later than five business days of becoming aware of the potential conflict, to enable the evaluator to determine whether a conflict exists. Notice of the alleged conflict must be served on the other party at the time the evaluator is notified."

New Section 41.6 sets forth the procedures for obtaining a replacement evaluator after the initial AME's or QME's notice of a disqualifying conflict of interest. Under Section 41.6(b), an evaluator must proceed with the evaluation or supplemental report unless the evaluator declines to proceed by disqualifying himself or herself or if either party is entitled to a replacement QME. Under Section 41.6(c), within five days of receiving the evaluator's notice of a conflict of interest, if the worker is unrepresented, the parties shall request a new QME or QME panel pursuant to Section 31.5. If the worker is represented, the parties may either waive the conflict or request a new QME or panel. If the parties waive the conflict, Section 41.6(c)(3) sets forth the procedure for memorializing the waiver. Section 41.6(d) gives workers' compensation administrative law judges authority to determine whether a conflict of interest may affect the evaluator's integrity and impartiality and any dispute over a waiver of any conflict of interest.

New Section 41.7 was added to regulate the nature and value of gifts to AMEs and QMEs which could create a conflict of interest. Section 41.7(a) provides that no AME or QME shall accept gifts for a single source in a twelve month period that have a total fair market value in the aggregate of $360 or more. According to the AD, "single source is defined as source that handles workers' compensation matters and includes but is not limited to one or more attorneys, physicians, employers, claims administrators, medical or health care or insurance or utilization review business entities." The section properly excludes reasonable and appropriate income earned from a Medical Provider Network, a Health Care Organization, a Preferred Provider Organization or managed care organization for services

performed as a treating physician, or reasonable and appropriate income paid for services performed as an AME or QME.

Section 41.7(b) defines the term "gift" as any payment to the extent that consideration of equal or greater value is not received. The term also includes any rebate or discount in the price of anything of value unless the rebate or discount is also made in the regular course of business to members of the public, and any loan, forgiveness or other thing of value having a fair market value in excess of $360 in the aggregate. Under Section (c), the burden of proof is on the person claiming the payment is not a gift. A QME (but not an AME) who violates Section 41.7 can be disciplined by the AD.

Sections 43 to 47 discuss evaluation methods for evaluating disability for common industrial injuries in the area of psychiatric, pulmonary, cardiac, neuromusculoskeletal, foot and ankle, and immunologic disability. The revised sections identify, for each type of disability, which guidelines are to be followed depending on whether a specific case is subject to the AMA *Guides* or the evaluation guidelines that the Industrial Medical Council adopted prior to the passage of Senate Bill 899 in 2004.

With regard to psychiatric injuries, Section 43(b) was added to provide that with regard to cases subject to the January 2005 Permanent Disability Rating Schedule, the method for evaluating the psychiatric elements of impairment shall include describing the employee's symptoms, social, occupational and, if relevant, school functioning, and describing the rationale for the evaluator's assignment to a level of impairment.

Minimum Time Guidelines (§§49-49.9)

Sections 49 to 49.9, concerning the Minimum Face-to-Face Time Guidelines, were amended to require the QME to specify in the report the "amount of face to face time actually spent with the injured worker" rather than merely specifying that he or she complied with the minimum face to face time set forth in the regulations. This change primarily affects non-time-based reports charged as ML-102s under the Medical-Legal Fee Schedule. The regulations retain the requirement for the QME to explain any variance below the specified minimum times.

Reappointment (§§50-57)

Section 50 was amended to require a QME, as part of the reappointment process, to attest under penalty of perjury that: (1) he/she has accurately reported on the QME Form 104-SFI to the best of his/her knowledge the financial interest information required by Section 29; (2) his/her license to practice is neither restricted nor encumbered by suspension or probation, nor has been convicted of a misdemeanor or felony related to his/her practice or moral turpitude, and that the physician will notify the AD if there are any subsequent restrictions, encumbrances or convictions; (3) he/she will abide by all regulations of the AD and refrain from making any referrals in violation of those regulations; and, (4) the physician has not performed a QME evaluation during a time when he/she was not appointed as a QME. These reappointment standards are essentially the same as the appointment standards set forth in Section 10.

Among other things, former Section 52 permitted the AD to discipline any QME for refusing, "without good cause to perform a medical-legal evaluation for an unrepresented employee." The revised regulation struck "for an unrepresented employee," thus permitting discipline for refusing to evaluate any injured worker without good cause. According to the AD, this change was "to improve . . . syntax and clarity."

Section 53, dealing with board certification was repealed because it was inconsistent with revisions to Labor Code Section 139.2 made by AB 776 (Calderon, ch. 54, Stats. 2000).

Section 55(c)(4) was added to require the education provider of a continuing education course that is seeking accreditation to submit an outline of course content, or actual course content, consistent with the topics set forth in Section 11.5(c).

Consistent with Section 10(b) and the attestation mentioned in Section 50, supra, Section 57 was amended to permit the AD to deny appointment or reappointment to any physician who performed a QME examination or evaluation without having a valid QME certification at the time of the evaluation or at the time of signing the initial or follow-up report.

Discipline (§§60 – 65)

Section 60 states the various grounds for disciplinary action to be charged against a QME.

Section 60(b)(9) was added to include that failure to disclose a disqualifying conflict of interest as required by Section 41.5 is grounds for disciplinary action.

Section 60(b)(10) was added to include that failure to disclose a significant financial interest that may affect the fairness of a QME panel, as defined in Sections 1(ee) and 29 are grounds for disciplinary action

Section 60(d) was added to expressly delegate from the Administrative Director to the Medical Director, or designated Associate Medical Director. the powers and discretion to conduct investigations, assign investigators, issue subpoenas, propound interrogatories, receive and file requests for hearing and notices of defense, set and calendar cases for hearing, issue notices of hearing, assign counsel and perform all other functions related to QME discipline except for issuing statements of issues, accusations or disciplinary orders after hearing, which are reserved to the authority of the Administrative Director.

Section 61 sets out the procedures to be used in conducting a disciplinary hearing, making findings and issuing a decision, imposing disciplinary sanctions, responding to a petition for reconsideration and seeking judicial review of any such decision. Section 62 describes matters relating to QME probationary status.

Section 63 is intended to clarify the procedures that govern the denial, and any appeal of the denial, of an application for appointment or reappointment filed with the AD. This section applies to all applications for appointment or reappointment as a QME.

Section 63(a) provides that whenever the AD determines that an application for appointment or reappointment as a QME will be denied, the AD shall notify the applicant in writing of the reasons and the decision to deny the application and provide notice that if the applicant submits a specific written response to the notice of denial within 30 days, the AD will review the decision and within 60 days of receipt of the response notify the applicant of a final decision.

Section 63(b) provides that if the applicant fails to respond to the notice of denial within 30 days, the decision to deny shall become final.

Section 63(c) provides that if the applicant files a timely specific, written response, and the AD finally determines the application should be denied, the notice of final decision shall be provided in the form of a statement of issues and notice of the right to a hearing.

Section 63(d) provides that notices and responses must be made by certified mail. This section clarifies the procedures to be used when applications for appointment or

reappointment are being denied, while ensuring that applicants who wish to proceed to a full evidentiary hearing to contest the denial may still do so.

Section 65 consists of the guidelines for imposing disciplinary sanctions and terms of probation, if appropriate, on a QME found to be in violation of the QME regulations.

No substantive changes were made to this section which retains the original Industrial Medical Council's Sanction Guidelines.

Due to the size and extent of the Sanction Guidelines found in this section, interested parties should access Section 65 directly from the Division of Workers' Compensation web site at **www.dir.ca.gov/DWC**.

Practice Parameters for the Treatment of Common Industrial Injuries (§§70 -77)

The individual sections in this article were deleted in their entirety because SB 228 dissolved the Industrial Medical Council and all of the treatment guidelines it had adopted, replacing the treatment guidelines with the Medical Treatment Utilization Schedule as found in Sections 9792.20 – 9792.23.

Forms (§§100 – 125)

All of the forms described in Sections 100 through 125 are available at no charge by downloading from the web at www.dir.ca.gov/dwc/forms.html or by requesting at 1-800-794-6900.

Section 100. The Application for Appointment as Qualified Medical Evaluator Form is the form that must be completed by physicians applying for certification as a QME and filed with the Medical Unit.

Instructions that accompany Form 100 require a completed, signed QME "Specific Financial Interest" (SFI) Form 124 document be submitted prior to obtaining an appointment as a QME.

The following QME specialty codes were merged into another specialty code because too few QMEs were listed in the specialty to randomly select a three-name QME panel in some areas of the state, as required by Labor Code Section 139.2(h). The wording of the specialty codes created by such merging as well as other specialty code changes are shown as they appear on the QME panel request forms used by injured employees or claims adjusters:

- MAA (Anesthesiology) will be merged into a new code of MPA (Pain Medicine and Anesthesiology),
- OFP (Family Practice – DO) will be merged into MFP (Family Practice),
- OFM (Family Practice – DO including Osteopathic manipulation) will be merged into MFP (Family Practice).
- MHH (Hand – Orthopaedic Surgery, Surgery and Plastic Surgery) is added.
- MOH (Hand – Orthopaedic Surgery) will be merged into the new code MHH (Hand – Orthopaedic Surgery, Surgery and Plastic Surgery) along with the following two other codes that are now deleted: MPH (Hand – Plastic Surgery) MSH (Hand – Surgery)
- MOS now reads "Orthopaedic Surgery (other than Spine or Hand)".
- MNB (Spine – Orthopaedic and Neurological Surgery) is added.
- MOB (Orthopaedic Surgery – Including Back) will be merged into the new code MNB (Spine – Orthopaedic and Neurological Surgery) along with MPB (Neurological Surgery – Including Back),
- MAP (Pain Management – Anesthesiology) will be merged into the new code MPA (Pain Medicine and Anesthesiology),
- MMO is added for (Internal Medicine – Oncology), (Orthopedic Surgery – Oncology) and (Radiology – Oncology)
- MNM (Nuclear Medicine) is deleted,
- MOQ (Medicine Otherwise Qualified). Is deleted,
- MPA (Pain Medicine and Anesthesiology) is added.
- MPA Psychiatry – Pain Medicine, is added for those psychiatrists who wish to

evaluate disputes involving pain problems.

- MPD now reads "Psychiatry (other than Pain Medicine)" for those psychiatrist who do not wish to evaluate disputes involving pain problems.
- MPP (Pain Management – Pain Medicine) will be merged into the new code MPA (Pain Medicine and Anesthesiology),
- MPS now reads "Plastic Surgery (other than Hand)".
- MPT (Toxicology – Occupational Medicine) will be merged into a new code MPT (General Preventive Medicine - Toxicology) along with MET (Toxicology – Emergency Medicine),
- MRS (Colon & Rectal Surgery) is deleted
- MSY now reads "Surgery (other than Spine or Hand)".
- MRY (Radiology) will be merged into the existing code MMO (Radiology - Oncology),
- Pediatrics (MEP) and Pediatrics – Allergy & Immunology (MAI) are being deleted because there are no such QMEs at this time

The following QME specialty code designations were deleted and the QMEs listed in these specialty codes will be merged into the existing code of DCH (Chiropractic). This change is made because the Administrative Director recognizes only those specialties in a California licensed health profession that are recognized by the physician's licensing board. The Board of Chiropractic Examiners currently does not recognize any specialties or subspecialties among licensed doctors of chiropractic in California. In addition, it will reduce the distance an injured employee must travel to the selected QME. However, any certified post graduate diplomate program completed by the doctor of chiropractic QME will be listed under the heading "Physician's Education" on QME Form 107, the QME panel list letter sent to the parties by the Medical Unit.:

DCN (Chiropractic – Neurology), DCO (Chiropractic – Orthopaedic), DCR (Chiropractic – Radiology), DCS (Chiropractic – Sports Medicine), DCT (Chiropractic – Rehabilitation)

Section 101 - The Alien Application Form was deleted.

Section 102 - The Application for QME Competency Examination Form must be completed by physicians who seek appointment as a QME and who must register for the QME competency examination required by Labor Code Section 139.2 as a condition of appointment as a QME.

Section 103 - The QME Fee Assessment Form is used to explain to each QME the criteria to be used in assessing annual QME fees and for the QME to report the proper fee to be assessed when returning the fee payment.

Section 104 - The Reappointment Application as Qualified Medical Evaluator Form consists of the form to be used by QMEs seeking reappointment.

Section 105 - The Request for Qualified Medical Evaluator Unrepresented Form and Attachment to Form 105 (How to Request a QME if You Do Not Have an Attorney) was changed completely. The old form (an instruction sheet for Form 106) is being deleted.

Section 106 - The Request for Qualified Medical Evaluator Panel – Represented Form and Attachment to Form 106 (How to Request a QME in a Represented Case) was changed significantly. The new form will be used to request a QME panel (a list of three randomly selected QMEs of a specified specialty) by parties in a represented case.

Section 107 - The Qualified Medical Evaluator Panel Selection Form depicts the panel letter that is issued by the Medical Unit, listing three QMEs, in fulfilling a request made by a party using either QME Form 105 or QME Form 106 and is substantially the same as the existing version with a number of improvements.

Section 108 - The Qualified Medical Evaluator Panel Selection Instruction Form is used by the Medical Unit of DWC as an insert with the QME panel (list of three QMEs) which is sent to the injured employee.

Section 109 - The Qualified Medical Evaluator Notice of Unavailability Form is used by QMEs who wish to change status to "unavailable" as a QME for a limited period of time up to 90 days. The conditions for doing so are set out in Section 33. During this period of unavailability, the QME's name will not be issued on QME panels.

Section 110 - The Appointment Notification Form is used by the QME to notify the claims adjuster/employer that an injured employee has selected the QME and scheduled an appointment for an evaluation examination. This form is to be used by the referring QME to notify parties of the scheduled appointment with a consulting evaluator.

Section 111 - The Qualified Medical Evaluator Findings Summary Form is attached to a medical-legal report by the QME who wrote the report to summarize the contents of the report. This form is only required to be used when the QME is evaluating an unrepresented injured worker and the report addresses permanent impairment or permanent disability. AMEs do not need to use this form.

Text providing for a declaration of service by mail or delivery by courier was added to the form for ease of completion by the evaluator's office staff.

Section 112 - The QME/AME Time Frame Extension Request Form is used by an evaluator to request an extension of time for completing the medical-legal report. As amended, this form will now be used by the Medical Unit to advise the QME and the parties of the decision to approve or deny the request for an extension.

Section 113 - Notice of Denial of Request for Time Extension will be used by the Medical Unit to notify the parties of the decision to deny a request by an evaluator for an

extension of time to complete a medical-legal report, to advise the parties of their options and for the parties to report which option they prefer. The form provides the opportunity for the parties to waive the right to a new QME or AME report and accept the late report instead. Each party would complete the form and return it to the Medical Unit within 15 days. This form and process is needed pursuant to the procedures specified in Labor Code Section 4062.5, which provide that when an QME or AME report is late, neither party will be liable for payment for the late report unless both parties waive the right to a new evaluation report and elect to accept the late report.

Section 114 - The Denial of Time Extension Form was deleted.

Section 115 - The Notice of Late Qualified Medical Evaluator Report Form was deleted.

Section 116 - Notice of Late QME/QME Report – No Extension Requested Form is used by the Medical Unit to advise the parties that the Medical Unit has become aware that an AME or QME's report is late, that no extension of time was requested and to advise the parties of their options. The parties then will complete the form and return it to the Medical Unit to indicate the action they wish to pursue within 15 days. The form provides the opportunity for the parties to waive the right to a new QME or AME report and accept the late report instead.

Section 117 - Qualified Medical Evaluator Course Evaluation Form is a postage prepaid post card QMEs are to be given by providers of continuing medical education, for the QME to complete and mail to the DWC after evaluating the course taken.

Section 118 - Application for Accreditation or Re-Accreditation as Education Provider is used by a person applying to become accredited or reaccredited by the Medical Unit as an education provider for QMEs.

Section 119 - Faculty Disclosure of Commercial Interest is provided to the faculty of a QME education course by the accredited education provider to complete regarding any financial interests the faculty member must disclose in the course.

Section 120 - Voluntary Directive for Alternate Service of Medical-Legal Evaluation Report on Disputed Injury to Psyche is a new form to be provided by a QME to an unrepresented injured employee who is being evaluated for a disputed injury to the psyche. By completing the form, which is voluntary, the injured employee directs the evaluator to serve the evaluator's report on a physician designated by the injured employee, such as the treating physician, at the same time it is served on the parties.

Physicians have expressed concern that the discussion of some employees' condition in a report may be misunderstood or cause an adverse psychological reaction if interpreted

only by the employee, without the assistance of his or her physician to explain the interpretation.

The form asks for identifying information about the case (injured employee name, date of injury, claim number, WCAB case number, employer/insurer, name of QME, date of evaluation exam).

The employee will print his or her name on a line within a statement that says the employee understands that although he or she has a right to be served with the medical-legal report by the QME, that by signing the form he or she is giving direction regarding to whom to serve the QME report, that it is being signed voluntarily, and that the options include sending a copy to the injured employee's home address and to the designated-physician who will be paid for an office visit by the employer for the purpose of reviewing the report with the injured employee, or only sending a copy to the injured employee.

Section 121 - Declaration Regarding Protection of Mental Health Record was added for use by an evaluator who makes a determination under Health and Safety Code Section 123115(b). The necessity for this form and this procedure is discussed more fully under the discussion of Section 36.5 supra.

Section 122 - AME or QME Declaration of Service of Medical-Legal Report was added for use by AMEs and panel QMEs in represented cases when serving any medical-legal report. In unrepresented cases, this form must be used by a panel QME when serving a medical-legal report, except when QME Form 111 is used.

Section 123 - QME/AME Conflict of Interest Disclosure and Objection or Waiver by Represented Parties Form was added for use by evaluators to notify parties of a conflict of interest, as defined in Section 41.5, with one of the parties or entities involved in a specific case.

Parties in a represented case are given choices to check. One choice states: "I wish to object to the evaluator due to the conflict." The other choice states: "I wish to waive the conflict and continue using the QME/AME in this case in spite of this conflict."

The evaluator is advised of the duty to disclose disqualifying conflicts of interest to the parties in writing within five business days of becoming aware of the conflict. If the injured employee is not represented, the evaluator is instructed to fax the completed form to the Medical Unit at 510-622-3467. The evaluator is also advised that upon notice from any party that the party believes the evaluator has a disqualifying conflict of interest, the evaluator must review the information submitted and advise the parties within five (5) business days of receipt of the notice whether a conflict exists. The evaluator is instructed to use the form to disclose any conflict or to indicate no conflict exists.

Parties in a represented case are instructed that within five business days of receiving a notice of conflict on QME Form 123 from an evaluator, each party must complete the

bottom portion of the form to indicate whether the party objects to the evaluator or wishes to waive the disclosed conflict.

Section 124 - Specified Financial Interest Attachment to QME Forms 100, 103 or 104 ("SFI Attachment Form") requires a physician to disclose specified financial interests, as defined in Section 1 of the QME regulations that, the AD has determined may affect the fairness of QME panels when two or more QMEs with such shared financial interests are assigned to the same QME panel. To the extent feasible, the AD will use the information disclosed to avoid assigning two or more QMEs with such shared financial interests to the same panel list when it is issued to parties in a given case. The definition of "Specified Financial Interests" is printed at the bottom of the form.

The form requires the QME to enter in designated boxes: identifying information (name, professional license number, business address, business telephone number, fax number, QME number, if applicable); partnership interests (name of business entity in which have limited or full partnership interest, address of business entity, names of partners who are physicians); interests of 5% or more in medical practice, medical group or other medical or medical-legal business entity in California workers' compensation system (name of medical practice/group/business entity; address of business entity; names of participating physicians); receipt of 5% or more of profits from medical practice, medical group or other medical or medical-legal business entity in California workers' compensation system (name of medical practice/group/business entity; address of business entity; names of participating physicians). The QME declares under penalty of perjury that the foregoing information is current, complete and accurate to the best of his or her knowledge.

Fraudulent or Misleading Advertising (§§150-158)

Although the Industrial Medical Council adopted stringent regulations to proscribe fraudulent and misleading advertising more than 15 years ago, some physicians continue to advertise inappropriately and contrary to those regulations. Recent revisions to the advertising regulations are designed to focus physicians' attention on these important regulations.

Section 153(b) was amended to clarify that a physician who is currently or was previously certified as a QME may state this fact in advertising copy, a curriculum vitae or descriptive text only for the period of time that is/was true and correct. A corresponding amendment was made in Section 154(a) (4). Section 153(e) was amended to clarify that only individual physicians who are currently certified as a QME may use that designation or the phrase "Qualified Medical Evaluator" in advertising copy. Accordingly, it would be improper for a physician to advertise that he/she is a "former QME."

Section 153(f) was amended to clarify that no physician subject to the regulations shall use the phrases "Qualified Medical Examiner", "AME", "Agreed Medical Examiner", "Independent Medical Examiner", "Independent Medical Evaluator" or "AME" as part of a firm name, trade name or fictitious business name in advertising copy. Similarly, Section 153(h) was added to prohibit any advertising copy which states or implies that the physician is currently an "Agreed Medical Examiner" or "Independent Medical Examiner" in the California workers' compensation system. Accordingly, a true statement that a physician has "served as an AME in the past" would not appear to violate these regulations.

Section 155 was amended to state the new address for filing complaints alleging unfair, false or misleading advertising: Medical Director, Division of Workers' Compensation, Medical Unit, P.O. Box 71010, Oakland, CA 94612.

Extensive edits were made to Section 157 so that the hearing procedures to be used to address alleged advertising violations conform to the hearing procedures for other disciplinary matters involving QMEs, as set out in Sections 60 through 65 of the regulations. More specifically, the amended section provides if the Medical Director, after reviewing a physician's advertising copy, determines the advertising violates Business and Professions Code Section 651 or the AD's regulations and the physician is currently a QME, the disciplinary and hearing procedures set forth in Sections 60 through 65 shall apply and the Medical Director shall forward a copy of any final decision of such a violation to the physician's licensing board for such proceedings as that board may deem proper. Existing language in Sections 157(c) through 157(d) (6) was deleted.

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