STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

PUBLIC HEARING

Monday, March 13, 2023
Elihu Harris State Office Building Auditorium
1515 Clay Street
Oakland, California

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Moderator
Industrial Relations Counsel

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DIR Official Reporters: Julie Evans and Wendy Pun

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(Time Noted: 10:00 A.M.)

MR. WEST: Good morning everyone. Thank you for coming today. My name is Winslow West. I am one of the attorneys with the QME Discipline Unit of the Division of Workers' Compensation.

This is our noticed public hearing for the proposed amendments to regulations that govern the process of the Qualified Medical Evaluator program with the Division of Workers' Compensation. The Division is proposing to make updates to several of the regulations that govern the administration of the Qualified Medical Evaluator system, which for purposes of this rule-making package we are calling QME process regulations. The regulations affected are contained in Title 8 California Code of Regulations §1 through 63.

There's a sign-in sheet and copies of the Notice of Rulemaking for the proposed regulations on the desk near the door where most of you entered. The desk is to my right and from your perspective that desk is to your left. Please make sure you sign the sign-in sheet and indicate if you wish to testify today. Please also indicate your business affiliation, if any, and your stakeholder status: QME, medical management company, carrier, et cetera.

I would like to take a minute to introduce the other DWC staff with me today. There are so many of them. We are joined by Maureen Gray, the Division's Regulations Coordinator. Also

present today is Ted Richardson, the chief counsel of DWC Legal, and we are joined by Nicole Richardson, who is the other attorney with the QME Discipline Unit of DWC Legal. Our hearing reporters today are Wendy Pun and Julie Evans. I hope I pronounced that correctly.

If you wish to be notified of any subsequent changes or of the final adaptation of the QME process regulations, please provide your complete name and mailing address on our hearing registration attendance sheet located at the sign-in table. Any notice of changes and the final notice of the updates to the QME process regulations will be sent to everyone who requests that information.

The purpose of this hearing today is to receive comments on the proposed amendments to the regulations, and we welcome any comments you have about them. Please note, we will not question, respond to, and/or discuss anyone's comments; although, we may ask for clarification or ask you to elaborate further on any points that you are presenting today. All of your comments, both given verbally here today and those submitted in writing, will be considered in determining what revisions, if any, we make to the proposed regulations.

It's not very full today, so we will allow you to speak without the normal three-minute limit. Don't make me regret that.

I will call the names of those who have indicated they

wish to testify today, and I apologize in advance if I mispronounce anyone's name. When you come up to testify, please first give your business card to Ms. Gray and if you have any written testimony that you'd like to submit. All testimony today will be taken down by the hearing reporters. When you give your testimony, please state your name first for the benefit of the hearing reporters.

When everyone on this list has had a chance to testify, I will check to see if anybody new has come in who wants to testify or if anybody else has additional comments. This hearing will continue as long as there are people present who wish to comment on the proposed regulations, but it will close at 5 o'clock this afternoon. If the hearing continues into the lunch hour, we will take at least an hour break.

Finally, all written comments can be given to Ms. Gray if you have them today, or the DWC will accept written comments by hand delivery up to 5 o'clock this afternoon at the Division's office located on the 18th floor of this building. Please give them to our receptionist, even though we don't have one. The DWC will also accept all written comments by fax at the following number: (510) 286-0657 or to the following e-mail address: dwcrules@dir.ca.gov. Written comments submitted by fax or by e-mail will be accepted until midnight tonight.

With that, let me look at the sign-in sheet and call the first speaker who will be Diane P. --

MS. PRZEPIORSKI: Yes.

MR. WEST: -- from California Orthopaedic Association.

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DIANE PRZEPIORSKI

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Good morning. Diane Przepiorski with the California Orthopaedic Association. I really appreciate the opportunity to submit some comments on these QME regs. We recognize that many of the changes that are in the proposal came about as a result of discussions at the stakeholder meeting, and so there's been some discussion. And we really do appreciate the Division moving forward with these changes because, as you all know, COA has been adamantly working to help improve the quality of reporting, and whatever we can do to try to make that happen is worthwhile.

I'm going to walk through some of our comments, but perhaps not all of them. And the first comment is, we notice that you're changing the requirement for a QME to apply to sit for the test from 30 calendar days to 60 calendar days. You know, if that's needed for the Division to process the number of applications, we wouldn't object to that. But I'm sure you recognize that it will discourage and delay some physicians from sitting for the QME test. I can't tell you how many calls I get right before the QME test wanting to know what's the process for applying and if it's -- you know, oftentimes it's,

you know, right before the test, so if you would -- I'm sorry. If you increase it to 60 days, you know, many of those doctors will miss the deadline and won't be able to take it for another six months. So, again, if it's -- if it's important to the Division and you need that extra time. Otherwise, we would urge you to stay with the 30 days to make it easier for QME's to apply for the test.

The second comment we would make is about the mandatory unconscious bias training. I must say that COA generally opposes any type of mandatory CME. What always seems to be a good idea at the time, in time, becomes less important. We really don't have to look very far. We can go back to when the Medical Board was actually disciplining physicians for under-prescribing narcotic medication. There was a time when they wanted professional organizations to include in their CME courses an encouragement that physicians prescribe narcotic medications for patients. As we now know, that would not have been advisable, and now the Medical Board has just taken the opposite position that you shouldn't prescribe narcotic medications unless absolutely necessary.

So we would much prefer the Division -- and I see in the proposal that the Division would be posting topics that they believe should be covered by QME CME providers. We would much prefer input from the Division on an annual basis as to what topics you think should be covered in our CME courses rather

than a mandate to every single time or in every course having to cover certain topics.

I know that anti-bias training is a popular topic right now. COA has started to include it in our QME courses already. We find that a half an hour is really about all the time we need to cover the topic, make people aware, present some examples. So if you do move forward with mandating the anti-bias training, both in the disability evaluation course and on a QME requirement, we would urge you to reduce the time to just one hour rather than the two hours.

We also really have to continue to question -- and I know that we questioned it during the stakeholder meetings -- the requirement that all QME's must undergo training, and we must include an example about breast cancer. I've asked a lot of people -- I asked judges -- why it would be important for an orthopedic surgeon to be knowledgeable in how breast cancer relates to a musculoskeletal injury. And really, everyone has said to me that an orthopedic surgeon would not be considered an expert in breast cancer or oncology issues. So we really fail to understand why all medical specialties would need to include an example on an issue that is not related to their specialty.

So, again, we don't necessarily object to having to include two examples, but we would urge the Division to leave it up to the course provider to have the examples applicable to

your audience and not just us having to go out and find oncologists to bring into our course.

Then the next section, 11(j), we know -- we saw in the regulations that you're talking about in-person disability evaluation courses and onsite QME courses. And to us, it's pretty similar, and we would certainly urge the Division to adopt one definition. And we don't believe that the -- let's see if I get it right here -- the in-person definition is as clear as the onsite definition, and we hope that either definition does allow for live, virtual courses. Again, if we're not allowed to do that, there'll be a delay in the potential physicians potentially getting through the disability evaluation course 'cause no CME provider is going to set up a live course for a handful of people. If we do, it'll be so cost prohibitive and very expensive for the doctors to attend. And, again, it just discourages physicians from sitting for the QME test or even staying as a QME.

So if we have to have a definition, we hope that you would standardize on the definition you've included for onsite and make sure that the definition does allow for virtual. Live -- it wouldn't be our preference to have everything live, but we understand from the stakeholder discussion that there's been some problems with courses where it's been all virtual and they may not be doing a good job of accounting for people and making sure they're actually staying for the course. We've always

given a test on our distance learning courses, and they have to pass by 70 percent, so -- so, in our mind, that's sort of proof that they have gone through the course materials. But we understand the problem. We just would like one uniform definition.

We also know that -- moving on to §35(i). We know that -- again, from those stakeholder discussions -- that there's some problems with QME's going out and self-procuring medical records that they claim is necessary, medically necessary to complete the evaluation. We are not supporting those efforts. We know that because people are being billed on a per page basis, that could potentially be getting out of control. But we are also in a situation these days where the parties are not sending any medical records to the QME's, so the QME's that want to get the case resolved will call the treating physician and try to get an op report, et cetera. We think that's acceptable, and it would be a good, responsible QME to do that. But we also recognize the payor side who doesn't want to be billed for just miscellaneous records.

So we are -- we're proposing a middle ground for that section, and the middle ground would be that the QME could go out and self-procure medical records as long as it didn't incur an additional expense for the parties. So the parties that haven't sent any medical records -- if the doctor went out and got an op report, it would still fall under the -- potentially

the 200 pages, but we don't really want to have to ask everyone's permission to go out and get the records. It'll just delay the QME, and we believe the QME won't then go out and get the records and just say in their report that no records were provided, which will all just delay the whole process. So we're hoping that you won't discourage the QME's that are actually trying to get the medical records that they need, as long as there's not an additional cost to the parties.

Also in that section, "without good cause" is really not defined. Believe it or not, we're having more injured workers coming into our office and they're refusing to cooperate with the QME. They won't -- like for a shoulder evaluation, they won't remove their shirt. They won't -- they carry weapons. They actually commonly bring knives into the appointment. They're somewhat threatening to the office staff. And in our mind, if the QME decided not to continue with the evaluation under those circumstances, it would be with good cause. And it's not clear from your regulations how you're defining "without good cause," so we would like you to take that into consideration and really have two issues there. One would be a better definition of what good cause is, and the second would be whether or not and when the QME could bill for that evaluation. It seems like we're in a much more adversarial world these days, and it's not uncommon for me to get these kinds of complaints.

The other -- §51.5 talks about a QME could be disciplined for five evaluations being rejected in a two-year period of time. We really don't think picking a number is the best way to do that. It could be five evaluations and maybe the QME only did five evaluations in that two-year period of time, and that would be very onerous for that QME. Or it could be a QME that might do a couple hundred evaluations, and then the five would not necessarily have as much meaning. So we think a better way to approach it would be to do a percentage of the number of total evaluations that they do in a given year rather than arbitrarily picking a number.

I think there's a typographical error in §55(a)(2)(b). It says, "Credit for distance learning courses shall be granted for the actual time spent viewing and for the reasonable and necessary time to take the examination for up to eight hours per program." We don't think the Division is trying to limit the CME hours to eight hours per program. It could be a two-day program that could easily cover the 16 hours. I think what you meant to say, examination for up to eight hours per day rather than per program.

And then lastly, §63(b) certainly lays out the mechanisms for the Division to discipline a QME. You'll recall a few years ago when several QME's were being investigated by the Division, it was very hard for that QME to ever get to a judge to have them review the case, and we would just ask that there

be some clarity on the mechanism for the physician to actually get before the judge to have their case reviewed. I'm not aware that any QME ever made it to a judge during that time. So while you're tightening up on the requirements and the reasons the Division could investigate a QME, we would just like some clarity on the process for them to actually get to a judge review.

I appreciate the opportunity to submit comments. Thank you very much.

MR. WINSLOW: Next we have Moses Jacob.

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MOSES JACOB

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Thank you for this opportunity. I'm Moses Jacob. I represent both myself, ExamWorks and California Chiropractic Association or CalChiro. I've been here quite a few times.

First, I want to thank the Division for finally getting us the break in the 44-hour education requirements. As you know, I've been here for a good ten years trying to maneuver this downward, so thank you for that, although, I still have some questions about where we're going forward.

Chiropractors are now gonna have to take up to 25 hours of training in order to be able to sit for the examination. Other physicians who are defined under 3903.2 are going from 10 to 16, so I'm not sure we're going forward. It seems to be the

inequity is perpetuated. If we're gonna take courses in bias training, I'm just curious why the bias is between the physician's group as defined by the workers' comp rules and regulations are still kept separate and different. Not sure you can even get the full training in 16 hours, but we've gone around this many times.

I'm gonna finish by saying the simple question from Yul Brynner: "Why this is going forward is to me a puzzlement." So I thank you for the time and thank you for what you've at least done as to giving us a break.

MR. WEST: The only other person here who wants to talk is Steve Cattalica.

MS. SPICER: I signed up.

MR. WEST: I'm sorry. Alexis Sepulveda. You checked yes.

MS. SPICER: I'm Margaret. I'm second on the list.

MR. WEST: I'm so sorry.

MS. SPICER: No worries.

MR. WEST: Old age is my excuse.

Margaret Spicer.

MS. SPICER: Thank you.

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MARGARET SPICER

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Good morning. Thank you very much. My name is Dr. Margaret Spicer. I'm a chiropractor and a QME. I'm also

with the California Chiropractic Association.

So I've been a QME for one year, and I've been in private practice going on my seventh year now. I became a -- I became a chiropractor to help people live a better quality of life. I decided to become a QME and researched how I could become a treating provider in the work comp system. I discovered early on that to be part of the MPN I would have to join third-party companies that control most of the major insurance programs. I have also learned they require me to dramatically reduce my fees below the OMFS.

Prior to being allowed to sit for the QME exam with my license of a doctor of chiropractic, I had to take an additional pre-requisite 44-hour course. My pain management and orthopedic friends did not have to take this additional program; only us.

To learn more about work comp I worked as an associate in an office that accepted workers' comp cases. I saw how claims were rejected, legitimate injuries were delayed treatment leading to other compensatory issues and injuries, and learned how far people had to drive to find an MPN provider as many of my colleagues have left the networks in recent years. I saw that even if chiropractic -- even how chiropractic was demonstratively helping and was consistent with the MTUS, more care was denied after the arbitrary 24-hour -- 24-visit cap.

I have spoken to chiropractic students, experienced

chiropractors and other specialists to encourage them to become QME's. However, they don't even want to try once they hear my journey. Many of my colleagues do not want to treat in the MPN due to the 15-to-50-percent transfer of funds from their pocket to third-party quasi-legal interloper companies' bank accounts.

We need new doctors in the workers' compensation system. As a new doctor to the work comp system, this has been a difficult journey that seems to be specifically challenging for chiropractors to participate in. My education has allowed me the opportunity to enter into the Department of Veteran's Affairs, working with other doctors in urgent care settings, orthopedics, vascular clinics, et cetera. We were able to corroborate on cases and speak as physicians. The mandatory 44-hour course which is now 25 -- thank you -- prior to sitting for the exam, required for only doctors of chiropractic, is discriminatory and creates greater barriers for injured workers' access to care.

While I appreciate the DWC's long-overdo attempt to improve chiropractic parity in becoming a QME and recognize we all take the exact same exam, I believe that all physicians under Labor Code 39 -- 3209.3 should be treated equally in terms of the requirement to become a QME.

Thank you very much.

MR. WEST: I'll probably get it right this time. Alexis Sepulveda.

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ALEXIS SEPULVEDA

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Good morning everyone. Apologies for my tardiness. I'm here to submit a written comment I submitted via e-mail, so I'm just gonna read it off for everyone.

My name's Alexis Sepulveda and I'm a local doctor of physical therapy. I would like to submit a written comment regarding Article 2: QME Eligibility, Section 11: Eligibility Requirements for Initial Appointment as a QME. Currently, as I'm sure you all know, medical doctors, osteopaths, chiropractors, dentists, optometrists, podiatrists, psychologists and acupuncturists can become QME's, and I am proposing physical therapists should also be eligible for QME initial appointment, at least to sit for the exam, take the course, all of that.

Physical therapists are licensed healthcare professionals specializing in musculoskeletal system impairments and their effects on activities of daily living. Additionally, as I'm sure you are aware, there is a current shortage of QME's. Allowing physical therapists to take the QME exam would reveal an untapped resource and help alleviate the shortage.

Speaking to my experience, I've been out of school roughly three years. For the last two years I've been working in industrial health, both in the onsite capacity helping with

functional capacity evaluations, helping with injury prevention services, managing both work-related and none work-related care. And so, obviously, as everyone has spoken here today, there is such a need for all this help with our injured workers.

So, again, I'm helping on the pre-workers' comp side. And in my research for different projects that we're working on in my job, I came across the QME thing. Quite honestly, I hadn't heard of it before until January. So then I heard about this public hearing, so I decided to stop by, bring this up, bring it to your attention if it's the first time you're hearing about it, or if it's something that you guys have already discussed I'm happy to not only complain here today but also to help in any capacity moving forward.

So thank you for your time, and thank you to everyone for all your great comments.

MR WEST: Now we have Steve Cattolica.

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STEPHEN CATTOLICA

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Good morning. My name is Steve Cattolica. I represent QME's and have been in the business of med-legal evaluations since the mid '80s, and so I have the opportunity to have watched the industry mature as they say.

My comments really have to do with some of the structure

of the regulations, maybe not so much, I'm gonna say, the strict content. And I'm not gonna go through all four pages. I promise. But on page 6 -- well, first of all, the pages weren't numbered, so when I refer to page 6, I'm -- you're gonna have to find them.

At §11, of course you've given chiropractors some relief from the burdensome training requirement that was arbitrary from the beginning, but the way that those -- it's described in that one section, it seems to me that that 16 -- that 25 hours is in addition to the 16-hour course that's named in the next paragraph. So in effect, 45 has become 41. I don't think that's much of a concession.

Now, if you restructure the paragraphs and put the chiropractor's requirement where it's now titled "M.D.'s," which wouldn't be appropriate necessarily, but nonetheless, then you've got the alignment that I think that you want. Now, I might be mistaken. It wouldn't be the first time. But that's the way I read it.

Page 13, §11.5(i)(8) talks about quality reports. And when I had the opportunity to convene with the panel that was working on report quality back, what was it now, three years ago, two and a half or so, at least three, maybe three, there were several suggestions about how to do that, you know, review and people getting credit for reviewing, all those things, and it boiled down to what you folks have put together. But what

is missing is a reference to what a good report -- excuse me, a good report actually is.

And I believe that it would be extremely important to reference Labor Code 4628 and Regulation 10682, 'cause that's the guts of a report. And it seems to me that if we're gonna be talking about that in a regulation, it's -- it's appropriate to refer to it.

Page 26, §35.5(f). And the content of that paragraph really isn't in question as far as I'm concerned. And the industry has become very aware during the QME inquisition that often it's not the QME him or herself but their management company at fault for the administrative or other problem at hand. The QME may want and expect cooperation from the staff assigned to him or her, but they don't have the control necessary to compel cooperation or accountability, and the "accountability" is the primary word there.

At the same point -- at some point soon, and maybe it's now, there must be some formal recognition of the great value but the limited accountability assigned to management companies. I think the QME's deserve a little education on that point, too. And where they're being educated I think they need to be told the implication of when they are managed, and that's in my comments as well. I forget the reference but, nonetheless, that -- the managers are, in effect, their employees. They're responsible for what the management staff

they're assigned to them do because they're being held accountable for what the output is.

And if it's going to be the other way around, if in fact the QME is simply doing their job coming in and going out, that's a different thing, and the administrative staff that may or may not be controlling the output of this product needs to be held accountable. So we've got to have it either one way or the other, and I think the best way today is to protect the QME by educating them with what their responsibility actually is and that if they're managed, they need to manage their manager because that's really the way the law is written.

The only other comments I'm gonna make that I think are of any import is the implementation dates for these specific -- well, I'll mention one specifically, and that is the -- it's on page 30, §55. You know, this whole thing is gonna take place -- isn't going to take into effect until October 2025? At least that's the way I read it. And if that's the case, there's going to be thousands, tens of thousands of reports, maybe even hundreds of thousands of reports written between now and then that aren't going to be subject to any of this, or at least the training that's required. And I think that that's a mistake. I think the accountability, if it's gonna be put on the shoulders of the QME or transferred to their management company or whomever staff, however it takes place, the education and the ability to become subject to these needs to

be significantly sooner. I can't see why would it take two years to get it done.

The rest of it is a little bit more self-explanatory. Thank you.

MR. WEST: I would like to give anybody an opportunity to make additional comments if they'd like before we close. Going once? Going twice?

Having seen none, if we don't have anyone else who wishes to make a verbal comment today, the time is 10:36 and this public hearing is now closed. Thank you.

(The proceedings concluded at 10:36 a.m.)

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REPORTER'S CERTIFICATE

I, the undersigned Official Hearing Reporter for the State of California, Department of Industrial Relations, Division of Workers' Compensation, hereby certify that the foregoing matter is a full, true and correct transcript of the proceedings taken by me in shorthand, and with the aid of audio backup recording, on the date and in the matter described on the first page thereof.

Dated: March 17, 2023

Santa Rosa, California

/s/ Julie A. Evans

Julie A. Evans

Official Hearing Reporter