

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

**Workers' Compensation – Qualified Medical Evaluator Regulations
(Title 8, California Code of Regulations sections 1- 159)**

**AMENDED NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED
REGULATIONS AND FORMS and NOTICE OF AVAILABILITY OF DOCUMENTS
AND OTHER INFORMATION ADDED TO RULEMAKING FILE**

**I. NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS
AND FORMS for SECOND 15-DAY PUBLIC COMMENT PERIOD
(Government Code § 11346.8(c) and 1 Cal. Code Regs. § 44)**

The Administrative Director of the Division of Workers' Compensation hereby is providing notice that changes were made to the text of the proposed regulations and forms in Title 8 of the California Code of Regulations, sections 1 through 159, pertaining to qualified medical evaluators in the workers' compensation system. Proposed changes to the existing regulations were first circulated for public comment from November 30, 2007, and continuing through public hearings held January 14, 2008 and January 17, 2008. Changes were made to the proposed regulation text and forms based on the comments received during the 45 day comment period, and the revised regulation text and forms were circulated for public comment during a first 15 day comment period between June 25, 2008 and July 10, 2008. The changes now proposed are being made in response to comments received during the first 15-day public comment period.

Background

During the 45-day public comment period, the changes proposed to the existing regulations were depicted by use of single line strikeout, for deletions (~~deletions~~), and single underlined text, for newly inserted text (newly inserted text). All forms, as proposed at that time, were shown simply in their proposed final text and format, while the text of the forms as they existed at the time of the 45 day public comment period were shown entirely in strikeout.

Changes to the text of the regulations for public comment during the first 15 day public comment period, due to comments received during the 45 day public comment period, are were depicted by use of double strike out, for proposed text deletions (~~newly proposed deletions~~), and bold, underlined italicized text, for newly inserted text (***newly inserted text***).

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For the first 15-day public comment period, QME Forms 105 (Request for QME Panel – Unrepresented) and 106 (Request for QME Panel – Represented) and the Attachments to Form 105 (How to Request a QME if You Do Not Have an Attorney), and to Form 106 (How to Request a QME in a Represented Case) were completely revised. New text format was presented for public comment during the first 15-day public comment period. Also, changes to the codes and lists of QME specialty designations for QME forms 100, 104, 105 and 106 were shown using the double strikeout and bold, underlined italic method described above. Finally, newly proposed QME Forms 121 (Declaration Regarding Protection of Mental Health Record) and QME Form 122 (AME or QME Declaration of Service of Medical-Legal Report) were shown in the proposed final, camera format, for the first 15 day public comment period.

Current Proposed Changes

Changes to the text of Administrative Director regulation sections 1 through 159 now proposed for public comment during this second 15-day public comment period are shown in the following manner:

Proposed deletions to the text, as it existed for comment during the first 15-day public comment period, are now shown in 14 pt., bold, underlined, outline Times New Roman (~~*like this for proposed text deletions*~~). Proposed new text being added to the regulations since the first 15 day public comment period is now shown in 14 pt., bold, italic, underlined Calibri font (**like this for newly proposed text additions**).

One new form is being proposed, QME Form 125 (Authorization for Release of Medical Information) (See, proposed 8 Cal. Code Regs. Section 125.). Use of this form is discussed in proposed section 36.5(k) of Title 8 of the California Code of Regulations, and its use is optional, not required by these regulations.

Changes also have been made to QME Forms 105 (Request for QME Panel – Unrepresented) (See, 8 Cal Code Regs. section 105), QME Form 106 (Request for QME Panel – Represented) (See, 8 Cal. Code Regs. Section 106), and the Attachments to Form 105 (How to Request a QME if You Do Not Have an Attorney) and to Form 106 (How to Request a QME in a Represented Case). Each of these forms, as they existed during the first 15-day comment period, is shown in double strikeout of the entire form and text. The current proposed text for QME Forms 105 and 106 and their attachments, are shown in the proposed, camera-ready format (i.e. without underlining or strikeout), for public comment during this second 15-day public comment period.

If you wish to comment on these proposed changes made for public comment during this second 15-day comment period to the regulations and forms, the Administrative Director will accept

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written comments which must be addressed as shown below and received **no later than 5 P.M. on Thursday, November 6, 2008:**

Maureen Gray, Regulations Coordinator
Division of Workers' Compensation, Legal Unit
P.O. Box 420603
San Francisco, CA 94142

Written comments may also be submitted by facsimile transmission (FAX), addressed to the contact person named above at (510) 286-0687. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov.

All written comments received by November 6th, 2008, pertaining to the changes now proposed, will be reviewed and responded to by the Administrative Director as part of the rulemaking file in this matter. **Please limit your comments to the newly proposed modifications to text made for this second 15-day public comment period.**

SUMMARY OF PROPOSED CHANGES TO SECTIONS 1 – 159

§ 1. Definitions

The following modifications were made in response to comments received.

§ 1(d). “Agreed Panel QME”:

Text, “...without using the striking process.” has been added to the end of the first sentence of this definition, for clarity. This distinguishes the Agreed Panel QME selected by represented parties under Labor Code section 4062.2(c), from the panel QME in a represented case who is identified after the represented parties have engaged in the striking process described in this Labor Code section.

The text referring to modifier -94 has been deleted and replaced by text providing that an Agreed Panel QME shall be entitled to be paid at the same rate as an Agreed Medical Evaluator under section 9795 of Title 8 of the California Code of Regulations (the medical-legal fee schedule) for medical/legal evaluation procedures and testimony. The Administrative Director expects to adopt a new modifier in section 9795 to identify billings by an Agreed Panel QME in a future rulemaking.

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This change is necessary to make clear the Administrative Director's intention that Agreed Panel QMEs be treated and paid the same as Agreed Medical Evaluators, as the Legislature intended by its wording in Labor Code section 4062.2(c) as enacted in SB 899.

§ 1(g). "AOE/COE":

This definition has been deleted in its entirety, and the subsequent subdivisions of section 1 have been re-lettered, accordingly.

This definition was deleted because the text in sections 1 through 159 of Title 8 of the California Code of Regulations that previously used this term was deleted.

§ 11.5 Disability Evaluation Report Writing Course

The reference in the first paragraph of this section to 'education providers' as defined in section 1 of the regulations was changed from 1(r) to 1(q) due to the re-lettering of subdivisions in section 1 for this second 15-day public comment period.

§ 17(d). Fee Schedule for QME

The wording that allowed the Administrative Director to waive any or all of the annual statutory fee for any or all QMEs whenever the Administrative Director determined that to be in the best interests of employers and injured employees has been deleted due to concerns raised by control agencies about the fiscal impact of this change. Subdivision 17(e) has been re-lettered to become subdivision 17(d).

§ 30. QME Panel Requests

The word 'request' was deleted from the last sentence of 30(b), for clarity.

The last sentence of 30(c) has been revised, by deleting the phrase "the parties answer a question from the Medical Director about..." and adding "...the Medical Director receives additional reasonable information requested from a party or both parties, needed to resolve the panel request." The next sentence in the subdivision reads: "Reasonable information as used in this subdivision includes but is not limited to whether a QME panel previously issued to the injured worker was used." The last sentence of this subdivision 30(c) that appeared in the prior version of the proposed regulation text, regarding the tolling of time frames, has been moved and re-worded as a new proposed subdivision 30(h), for clarity.

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Subdivision 30(d)(1) has been re-worded to delete the phrase 'part or all' and to add the phrase 'ninety (90) day period', and now reads: "(d)(1) After a claim form has been filed, the claims administrator, or if none the employer, may request a panel of Qualified Medical Evaluators only as provided in Labor Code section 4060, to determine whether to accept or reject a claim within the ninety (90) day 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 wording change is made for clarity.

Subdivision 30(d)(2) has added the words 'injury to', and now reads: "(d)(2) Once the claims administrator, or if none the employer, has accepted as compensable injury to 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."

Subdivision 30(d)(3) has been amended to delete the phrase "within the time allowed under Labor Code section 5402(b)" and now reads: "(d)(3) Whenever an injury or illness claim of an employee has been denied entirely by the claims administrator, or if none by the employer, only the employee may request a panel of Qualified Medical Evaluators, as provided in Labor Code sections 4060(d) and 4062.1 if unrepresented, or as provided in Labor Code sections 4060(c) and 4062.2 if represented."

The wording change is made for clarity and to comply with current workers' compensation law. Labor Code sections 4060(c), which applies to claims in which the injured employee is represented by an attorney, and 4060(d), which applies to claims in which the injured employee is unrepresented, each provide: "If a medical evaluation is required *to determine compensability...*" (emphasis added.) (See, Lab. Code § § 4060(c) and 4060(d).) Further, Labor Code section 4060(a) provides, in pertinent part, "This *section* shall not apply where injury to any part or parts of the body is accepted as compensable by the employer." Therefore, once any body part in a workers' compensation *claim* is accepted by the employer as *compensable*, the *claim* is accepted as compensable and there no longer is a need on the claims administrator's, or employer's, part *to determine compensability*.

Moreover, in the event a new body part is added to the claim after it has been accepted as compensable, or newly discovered evidence is received that was not available prior to the time of accepting a claim as compensable or the claim became presumptively compensable under Labor Code section 5402(b), the claims administrator or employer is able to object to and challenge the primary treating physician, or other physician's, *medical* determination that the new body part or accepted injury is a compensable industrial injury or illness, that is was caused by or arose out of employment and occurred in the course of employment from a *medical* standpoint, under Labor Code section 4062(a). That section provides, in pertinent part,

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“(a) If the employee or employer objects to a medical *determination* made by the treating physician concerning any medical issues *not covered by Section 4060 or 4061 and not subject to Section 4610*, the objecting party shall notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented by an attorney or within 30 days of receipt of the report if the employee is not represented by an attorney.” (emphasis added)

As the Legislature provided in section 4062(a), the situation of an employer's, or claims administrator's, objection to a claimed new body part, or to a previously accepted body part once newly discovered evidence is received, is “not covered by Labor Code section 4060” because, pursuant to Labor Code section 4060(a) above, the entire section does not apply once a claim has been accepted. Similarly, Labor Code section 4061 does not apply because it addresses only disputes pertaining to disability. Finally, Labor Code section 4610 does not cover such objections because section 4610, and its implementing regulations in sections 9792.6 *et seq.* of Title 8 of the California Code of Regulations, apply only to physicians' determinations of *medical necessity*, and does not cover or include determinations of work-relatedness. (See, Lab. Code sections 4610(a) and (e), 8 Cal. Code Regs. Sections 9792.6(s), 9792.9(f), 9792.9(j)(6); See also, State Compensation Insurance Fund v. Workers' Compensation Appeals Board (Sandhagen) (2008) 44 Cal. 4th 230, 186 P. 3d 535; 79 Cal.Rptr. 171; 73 Cal.Comp.Cases 981 (hereafter, Sandhagen).

Subdivision 30(d)(4) has been amended by deleting the words “order” and inserting instead “decision”, and by deleting the words “for this purpose” and inserting instead “to determine compensability”, so that the subdivision now reads:

“After the ninety (90) day period specified in Labor Code section 5402(b) for denying liability has expired, a request from the claims administrator, or if none from the employer, for a QME panel to determine compensability shall only be issued upon presentation of a finding and decision issued by a Workers' Compensation Administrative Law Judge that the presumption in section 5402(b) has been rebutted and an order that a QME panel should be issued to determine compensability.”

In addition, the phrase “residential or, if applicable, the employment-based zip code from which to select evaluators and either the” was inserted in the last sentence of the subdivision, to allow a Workers' Compensation Administrative Law Judge to order that a QME panel be issued from either the employee's residential zip code or workplace zip code, to conform with other regulations that allow a panel to be issued in the vicinity of the injured employee's workplace.

Subdivision 30(g) has been amended to add the phrase “first class mail” for clarity and to conform to other regulations addressing how parties in represented cases may deliver their

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requests for a QME panel under Labor Code section 4062.2, since the first valid request received must be filled. Due to the 'race' for filing created by the provisions of Labor Code section 4062.2, as amended by SB 899, the Administrative Director has determined it is necessary for fairness and to comply with this section, to require both parties to use the same method of delivery of their panel requests.

A new subdivision 30(h) is added, based on wording proposed in the prior public comment periods in subdivision 30(c):

“(h) The time periods specified in Labor Code sections 4062.1(c) and 4062.2(c), respectively, for selecting an evaluator from a QME panel and for scheduling an appointment, shall be tolled whenever the Medical Director asks a party for additional information needed to resolve the panel request. These time periods shall remain tolled until the date the Medical Director issues either a new QME panel or a decision on the panel request.”

§ 31. QME Panel Selection

The last two sentences of subdivision 31(c), pertaining to the circumstance of the name of the injured workers' treating physician or secondary treating physician appearing on the QME panel list, have been amended for clarity to read:

“Whenever that physician's name appears on a QME panel, he or she shall disqualify him or herself if contacted by a party to perform the evaluation. Either party may request a replacement QME for this reason pursuant to section 31.5 of Title 8 of the California Code of Regulations.”

§ 31.3. Scheduling Appointment with Panel QME

Subdivision 31.3(a) has been amended to add the phrase “within ten (10) days of having been furnished with the form,”. The addition of this phrase is consistent with the ten day time limit specified in Labor Code section 4062.1(b), which requires the unrepresented injured worker to select a medical specialty for the QME and submit the form to the Medical Director so that a panel may be issued.

Subdivision 31.3(c) has been amended to add the phrase, “within ten (10) days of the issuance of a QME panel”, as provided in Labor Code section 4062.1(c). This subdivision of section 31.3 allows a claims administrator to select a QME and schedule an appointment if the unrepresented injured worker fails to do so within 10 days of issuance of the panel.

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§ 31.5. QME Replacement Requests

Subdivision 31.5(a)(2) has deleted the word “was” and replaced it with “has been”, and replaced the word “under” and replaced it with the words “pursuant to”, for clarity.

Subdivision 31.5(a)(3) deleted the word ‘employee’ and replaced it with the words “injured worker”, and added the phrase “and prior to the date of the initial evaluation of the injured worker.”

Subdivision 31.5(a)(8) has been amended and now reads: “8) The claims administrator, or if none the employer, and the employee agree in writing, *for the employee’s convenience only*, that a new panel may be issued in the geographic area of the employee's work place *and a copy of the employee’s agreement is submitted with the panel replacement request.*” The new text shown in italics is added for clarity to conform to provisions in other regulations proposed during the previous comment period.

Subdivision 31.5(a)(10) has been edited to delete the words ‘submission of’ for clarity.

Subdivision 31.5(a)(11) has deleted and revised language addressing waiver of an objection to an evaluator’s report based on a violation of section 34, and now reads:

“The evaluator has violated section 34 (Appointment Notification and Cancellation) of Title 8 of the California Code of Regulation, except that the evaluator will not be replaced for this reason whenever the request for a replacement by a party is made more than fifteen (15) calendar days from either the date the party became aware of the violation of section 34 of Title 8 of the California Code of Regulations or the date the report was served by the evaluator, whichever is earlier.”

Subdivision 31.5(a)(12) has been amended to delete the words “asking for” and replace them with “requesting”, and to delete the word “requested” and replace it with “objected”. This change is made for clarity.

Subdivision 31.5(a)(15) has been edited and re-worded to provide:

“(15) The selected medical evaluator, who otherwise appears to be qualified and competent to address all disputed medical issues refuses to provide, when requested by a party or by the Medical Director, either: A) a complete medical evaluation as provided in Labor Code sections 4062.3(i) and 4062.3(j), or B) a written statement that explains why

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the evaluator believes he or she is not medically qualified or medically competent to address one or more issues in dispute in the case.”

The purpose of the subdivision is to clarify that an evaluator may be replaced if the evaluator, who appears qualified and competent to address all issues on one or more claim forms as required by Labor Code sections 4062.3(i) and 4062.3(j), refuses to either do so, or to provide a written explanation of why the evaluator believes she or he is not qualified to address one or more issues to the parties, if requested.

Subdivision 31.5(d), pertaining to requiring an order from a Workers' Compensation Administrative Law Judge to act on requests for replacements due to the evaluator's failure to timely serve the report, has been deleted. Labor Code section 4062.5, as amended by SB 899, does not require a Workers' Compensation Administrative Law Judge (WCALJ) order to issue a replacement QME. Other regulations enable the Administrative Director to replace an evaluator for an untimely report.

§ 31.7. Obtaining Additional QME Panel in a Different Specialty

Subdivision 31.7(b)(1) has been amended to add: “and the residential or employment-based zip code from which to randomly select evaluators”. This wording is necessary to ensure that the orders issued by a Workers' Compensation Administrative Law Judge (WCALJ) for a QME panel provide the information the Medical Director needs to do a random search consistent with Labor Code section 139.2.

Subdivision 31.7(a)(4) has been amended to add the phrase “and with the assistance of” before the words Information and Assistance Officer, for clarity. The intent is to allow the injured employee and the claims administrator to ask questions and obtain answers about their options while reaching agreement on a QME panel specialty.

§ 32. Consultations

Subdivision 32(a) has been amended to delete the phrase “party holding the legal right to select the specialty” and to replace it with the words “QME acupuncturist”. This change is needed to clarify that, in a case in which the QME selected is an acupuncturist who is unable to address disability issues, pursuant to Labor Code 3209.3(e), and therefore needs a consulting report from a physician as defined in Labor Code section 3209.3 that may address disability issues, it is the QME acupuncturist who must select the consulting physician, not a party.

Subdivision 32(b) has been amended to capitalize the word “Guides”.

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Subdivision 32(c) has been amended to delete the phrase “or upon agreement of a party to pay the cost.” Labor Code section 4064(a) provides that “the employer shall be liable for the cost of each reasonable and necessary comprehensive medical-legal evaluation obtained by the employee pursuant to Sections 4060, 4061 and 4062. Each comprehensive medical-legal evaluation shall address all contested medical issues arising from all injuries reported on one or more claim forms.” The Administrative Director has determined that the wording as currently proposed in 32(c) would allow a QME to obtain a consultation from any physician as reasonable and necessary pursuant to Labor Code section 4064(a). The additional wording is unnecessary since the need for a consultation would be determined by the QME as long as it was reasonable and necessary. The wording being deleted carries the unintended consequence of allowing a claims administrator, or if none an employer, to request the QME to obtain a consultation simply on the basis of agreeing to pay the cost, rather than being limited to those times that the consultation would be reasonable and necessary.

Subdivision 32(d) is newly added wording that specifies that the referring QME evaluator who determines a consultation is necessary and the physician selected as the consulting physician has been chosen by the QME, not the parties from a QME panel, the referring QME must arrange the appointment with the consulting physician and advise the parties of the time, date and place on QME Form 110.

Subdivision 32(e) is newly added wording that specifies that the consulting physician must serve his or her report on the referring QME, and the referring QME must review the consulting report, incorporate it by reference into a medical-legal report by the referring QME, and comment on the consulting physicians findings and conclusions in the referring QME’s report.

Subdivision 32(f) is newly added wording that specifies that the referring evaluator who refers to a consulting physician must still file his or her medical-legal report timely, and if the consulting physician’s report is not yet available, to file a supplemental medical-legal report once the consulting physician’s report is received. This is necessary to clarify that other statutes and regulations governing the time in which a medical-legal report must be filed are not tolled when the consulting physician’s report creates a delay.

Subdivision 32(g) is newly added wording that specifies that the parties must communicate with the consulting physician only through the referring QME first. This is necessary to be consistent with the limitations on ex parte communication in Labor Code section 4062.3 and Title 8, Cal. Code Regs., section 35.

These new subdivisions are necessary to clarify for the regulated evaluators and the parties (injured employee and claims administrator or employer) who will be responsible for arranging

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consultations, consultation reports and how those reports become part of the medical-legal reports of a selected evaluator.

§ 32.6. Additional QME Evaluations Ordered by the Appeals Board

Section 32.6 is amended to add wording about listing zip codes and to add the phrase “and specify who shall select a new specialty in the event there are too few QMEs in the specialty initially selected to issue a panel in accordance with section 31(d) of Title 8 of the California Code of Regulations”, when a WCALJ issues an order for a QME panel. This information is needed by the Medical Director to comply with the WCALJ’s order consistent with Labor Code section 139.2.

§ 33. Unavailability of QME

Subdivision 33(f) is amended to delete the words “the change” and replace them with “the period the evaluator becomes available” for clarity.

§ 34. Appointment Notification and Cancellation

Subdivision 34(a) has been amended to add the phrase “if known” after the words “attorney who represents each party” for clarity.

Subdivisions 34(d), (e), (f) and (g) have been added to read:

“(d) An evaluator, whether an AME, Agreed Panel QME or QME, shall not cancel a scheduled appointment less than six (6) business days prior to the appointment date, except for good cause. Whenever an evaluator cancels a scheduled appointment, the evaluator shall advise the parties in writing of the reason for the cancellation. The Appeals Board shall retain jurisdiction to resolve disputes among the parties regarding whether an appointment cancellation pursuant to this subdivision was for good cause. The Administrative Director shall retain jurisdiction to take appropriate disciplinary action against any Agreed Panel QME or QME for violations of this section.”

“(e) An Agreed Panel QME or a QME who cancels a scheduled appointment shall reschedule the appointment to a date within thirty (30) calendar days of the date of cancellation. The re-scheduled appointment date may not be more than sixty (60) calendar days from the date of the initial request for an appointment, unless the parties agree in writing to accept the date beyond the sixty (60) day limit. “

“(f) An Agreed Medical Evaluator who cancels a scheduled appointment shall reschedule the appointment within sixty (60) calendar days of the date of the cancellation.”

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“(g) Failure to receive relevant medical records, as provided in section 35 of Title 8 of the California Code of Regulations and section 4062.3 of the Labor Code, prior to a scheduled appointment shall not constitute good cause under this section for the evaluator to cancel the appointment.”

Subdivision 34(h) has been reworded to provide:

“(h) An appointment scheduled with an evaluator, whether an AME, Agreed Panel QME or QME shall not be cancelled or rescheduled by a party or the party’s attorney less than six (6) business days before the appointment date, except for good cause. Whenever the claims administrator, or if none the employer, or the injured worker, or either party’s attorney, cancels an appointment scheduled by an evaluator, the cancellation shall be made in writing, state the reason for the cancellation and be served on the opposing party. Oral cancellations shall be followed with a written confirming letter that is faxed or mailed by first class U.S. mail within twenty four hours of the verbal cancellation and that complies with this section. An injured worker shall not be liable for any missed appointment fee whenever an appointment is cancelled for good cause. The Appeals Board shall retain jurisdiction to resolve disputes regarding whether an appointment cancellation by a party pursuant to this subdivision was for good cause.”

Subdivision 34(i) has been added to provide:

(i) The date of cancellation shall be determined from the date of postmark, if mailed, or from the facsimile receipt date as shown on the recipient’s fax copy.

The text proposed in each of the subdivisions in section 34 above is added to clarify for the evaluators and for the parties the conditions under which the evaluator may cancel an appointment (34(d)), the evaluator must reschedule a cancelled appointment (34(e)), the time limit within which an Agreed Medical Evaluator must reschedule a cancelled appointment (34(f)), that non-receipt of medical records does not provide a reason for canceling appointments (34(g)), the conditions under which the party may cancel appointments (34(h)), and how the date of cancellation shall be determined (34(i)).

§ 35. Exchange of Information and Ex Parte communications

Subdivisions 35(a), 35(a)(3), 35(b)(1), 35(b)(2), 35(c), 35(i), 35(j), and 35(k) have been reworded for clarity.

Subdivision 35(e) has been amended to read:

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“(e) In no event shall any party forward to the evaluator : (1) any medical/legal report which has been rejected by a party as untimely pursuant to Labor Code section 4062.5; (2) any evaluation or consulting report written by any physician other than a treating physician, the primary treating physician or secondary physician, or an evaluator through the medical-legal process in Labor Code sections 4060 through 4062, that addresses permanent impairment, permanent disability or apportionment under California workers’ compensation laws, unless that physician’s report has first been ruled admissible by a Workers’ Compensation Administrative Law Judge ; or (3) any medical report or record or other information or thing which has been stricken, or found inadequate or inadmissible, by a Workers’ Compensation Administrative Law Judge, or which otherwise-has been deemed inadmissible to the evaluator as a matter of law.”

Subdivision 35(l) has been amended and re-worded to read:

“(l) In claims involving a date of injury prior to 1/1/2005 where the injured worker is represented by an attorney and the parties have decided to each select a separate Qualified Medical Evaluator, the provisions of this section shall not apply to the communications between a party and the QME selected by that party.”

§ 35.5. Compliance by AMEs and QMEs with Administrative Director Evaluation and Reporting Guidelines

Section 35.5(c) has minor wording amendments for clarity.

Subdivision 35.5(d) is added and provides:

“(d) At the evaluator’s earliest opportunity and no later than the date the report is served, the evaluator shall advise the parties in writing of any disputed medical issues outside of the evaluator’s scope of practice and area of clinical competency in order that the parties may initiate the process for obtaining an additional evaluation pursuant to section 4062.1 or 4062.2 of the Labor Code and these regulations in another specialty. In the case of an Agreed Panel QME or a panel QME, the evaluator shall send a copy of the written notification provided to the parties to the Medical Director at the same time. However, only a party’s request for an additional panel, with the evaluator’s written notice under this section attached, or an order by a Workers’ Compensation Administrative Law Judge, will be acted upon by the Medical Director to issue a new QME panel in another specialty in the claim.”

This subdivision is necessary to specify the steps an evaluator must take to advise the parties in writing when the evaluator determines that there are disputed issues beyond the scope of practice

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or clinical competence of the evaluator, in order that the parties may obtain an additional QME panel to address those disputed issues.

Subdivision 35.5(f) is amended to read:

“(f) Unless the Appeals Board or a Workers’ Compensation Administrative Law Judge orders otherwise or the parties agree otherwise, whenever a party is legally entitled to depose the evaluator, the evaluator shall, upon the request of either party, make himself or herself available for deposition within at least one hundred twenty (120) days of the notice of deposition and, whenever consistent with Labor Code section 5710, the deposition shall be held at the location at which the evaluation examination was performed.”

In addition, the Reference notation under this section has been amended to add “5710” before Labor Code.

These changes are necessary to be consistent with provisions of Labor Code section 5710, current case law and the Administrative Director’s jurisdiction to regulate the conduct of QMEs. The language is necessary due to abuses reported by claims administrators and injured employees by evaluators who refuse to make themselves available within a reasonable period of time for a deposition. The Administrative Director has also received complaints of injured employees being required to travel long distances to attend the deposition of an evaluator.

Labor Code section 5710(a) provides, in pertinent part, that:

“(a) The appeals board, a workers’ compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the appeals board, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure.”

Further, the Workers’ Compensation Appeals Board has explained certain rules and limitations on the parties regarding the procedures to be followed, depending on whether the application for adjudication has been filed. (See, *Yee-Sanchez v. Permanente Medical Group et al.* (2003) 68 Cal. Comp. Cas 637.

As proposed the language allows either party to request that the deposition be held at the location at which the medical-legal evaluation examination occurred unless that location is inconsistent with the distance provisions that may apply due to the relevant Code of Civil Procedure sections,

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and requires the evaluator to make him or herself available at least within 120 days of the notice of deposition. The proposed language also allows the parties to agree to another location or to a different time frame. As amended, the rule also is consistent with the Workers' Compensation Appeals Board's jurisdiction once an application for adjudication has been filed, to direct the time and place of a deposition noticed under its jurisdiction.

§ 36. Service of Comprehensive Medical-Legal Evaluation Reports by Medical Evaluators Including Reports Under Labor Code section 4061

Subdivisions 36 (a), (b) and (c) have been deleted and re-worded and replaced as follows, for clarity:

“(a) Whenever an injured worker is represented by an attorney, the evaluator shall serve each comprehensive medical-legal evaluation report, follow-up comprehensive medical-legal evaluation report and supplemental evaluation report on the injured worker, his or her attorney and on the claims administrator, or if none the employer, by completing QME Form 122 (AME or QME Declaration of Service of Medical-Legal Report Form)(See, 8 Cal. Code Regs.§ 122) and attaching QME Form 122 to the report, unless section 36.5 of Title 8 of the California Code of Regulations applies. If applicable in a claim involving disputed injury to the psyche, the evaluator shall comply with the requirements of section 36.5 of Title 8 of the California Code of Regulations (Service of Comprehensive Medical-Legal Report in Claims of Injury to the Psyche)(See, 8 Cal. Code Regs.§§ 36.5, 120 and 121).

(b) Whenever an injured worker is not represented by an attorney, the Qualified Medical Evaluator shall serve each comprehensive medical-legal evaluation report, follow-up evaluation report or supplemental report that addresses only disputed issues outside of the scope Labor Code section 4061, by completing the questions and declaration of service on the QME Form 111 (QME Findings Summary Form) (See, 8 Cal. Code Regs. § 111), and by serving the report with the QME Form 111 attached, on the injured worker and the claims administrator, or if none on the employer, unless section 36.5 of Title 8 of the California Code of Regulations applies. If applicable in a claim involving disputed injury to the psyche, the evaluator shall comply with the requirements of section 36.5 of Title 8 of the California Code of Regulations (Service of Comprehensive Medical-Legal Report in Claims of Injury to the Psyche)(See, 8 Cal. Code Regs.§§ 36.5, 120 and 121.)

(c) Whenever the evaluator is serving a medical-legal evaluation report that addresses or describes findings and conclusions pertaining to permanent impairment, permanent disability or apportionment of an unrepresented injured worker, the evaluator shall serve the evaluation report, the completed QME Form 111 (QME Findings Summary Form)

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(See, 8 Cal. Code Regs. § 111), DWC-AD form 100 (DEU) (Employee's Disability Questionnaire)(See, 8 Cal. Code Regs. §§ 10160 and 10161) and DWC-AD form 101 (DEU) (Request for Summary Rating Determination of Qualified Medical Evaluator's Report)(See, 8 Cal. Code Regs. §§10160 and 10161) on the local DEU office, the claims administrator, or if none the employer, and on the unrepresented employee within the time frames specified in section 38 of Title 8 of the California Code of Regulations, unless section 36.5 of Title 8 of the California Code of Regulations applies. If applicable, in cases involving disputed injury to the psyche, the evaluator shall follow the procedures described in section 36.5 of Title 8 of the California Code of Regulations (Service of Comprehensive Medical-Legal Report in Claims of Injury to the Psyche)(See, 8 Cal. Code Regs. §§ 36.5, 120 and 121)."

Other minor wording changes have also been made in the remaining subdivisions of section 36 but do not change the meaning or obligations under those subdivisions.

§ 36.5 Service of Comprehensive Medical/Legal Report in Claims of Injury to the Psyche

Subdivision 36.5(a) has been added to this section, and the remaining subdivisions re-lettered, and it provides:

“(a) At the beginning of any evaluation involving a claimed or disputed injury to the psyche, the injured worker shall be advised by the evaluator that the comprehensive medical-legal report, and any follow up or supplemental reports, from the evaluation may be served either directly on the injured worker or instead on a physician designated in writing by the injured worker prior to leaving the evaluator's office, for the purpose of reviewing and discussing the evaluation report with the injured worker. The evaluator shall explain that the designated physician need not be the injured worker's primary treating physician in the workers' compensation claim and that the employer will pay for one office visit with the designated physician for this purpose.”

This subdivision is added to clarify the procedures for evaluators to use when performing a medical-legal evaluation involving a disputed injury to the psyche.

Subdivision 36.5 (b) has been amended to delete all references to primary treating physicians who might make a determination under Health and Safety Code section 123115(b). Subdivision 36.5(b)(2) has been amended to delete the reference to a health care provider as defined in Health and Safety Code 123105, since the Administrative Director has determined that the employee should be limited to designating a physician within the definition of physician under Labor Code section 3209.3 to be the physician designated to review the evaluation report with the injured employee.

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Subdivisions 36.5(b)(6) through 36.5(b)(8) have been amended to clarify the documents to be served by the evaluator.

Subdivisions 36.5(d), (e), (f), (g), (h), (i) and (j) have been amended for clarity.

Subdivision 36.5(k) has been added and provides:

“(k) In the event the injured worker declines or refuses to designate any physician in writing to be listed on either QME Form 120 or QME Form 121, the evaluator’s report shall be served as appropriate under section 36, and within the time periods under section 38, of Title 8 of the California Code of Regulations. It is recommended that the evaluator serve the medical-legal evaluation report with an authorization for release of medical information signed by the injured worker. A non-mandatory Authorization for Release of Medical Information form is available as QME Form 125 (Authorization for Release of Medical Information). (See, 8 Cal. Code Regs. Section 125.)”

§ 38. Medical Evaluation Time Frames; Extensions for QMEs and AMEs

Subdivision 38(a) has been amended to add “Agreed Panel QME” and “signing and returning to the Medical Director” for clarity.

Subdivision 38(h) has been amended to add, after the words “An extension of the sixty (60) day...”:

“time frame for completing the supplemental report, of no more than thirty (30) days, may be allowed without the need to request an extension from the Medical Director, as long as the evaluator contacts both parties at least fourteen (14) calendar days prior to the end of the sixty (60) day time frame and within seven (7) calendar days of being contacted, both parties agree to the extension in writing which is sent to the evaluator. Each party may send the evaluator their written agreement to the extension separately. However, if either party objects to the extension or if either party fails to respond to the evaluator at least seven (7) calendar days prior to the end of the sixty (60) day time frame, the evaluator must request the extension from the Medical Director by completing and submitting QME Form 112 (See, 8 Cal. Code Regs. § 112). The evaluator shall mail the completed QME Form 112 to the Medical Director no later than five (5) calendar days before the end of the sixty (60) day time frame above.”

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This text is added by the Administrative Director as required by Labor Code section 139.2(j)(1)(C).

Subdivision 38(j) as previously proposed has been deleted.

§ 41. Ethical Requirements

Subdivision 41(a)(8) has been amended to replace “14 calendar days” with “six (6) calendar days” to conform to the time frames in section 34.

Subdivision 41(a)(7) has been amended to delete the requirement that the consulting physician sign his or her report under penalty of perjury in compliance with Labor Code section 4628. The Administrative Director was concerned that errors by physicians who are not QMEs or AMEs in the workers' compensation system who are familiar with these requirements could lead to unnecessary litigation and delays. By simply requiring that the consulting physician's report be incorporated by reference and commented on by the referring evaluator who arranged the consultation, the requirements in the Labor Code to protect against ghost writing and fraud should be met.

§ 60. Discipline

Minor capitalization corrections were made in subdivision (d).

§ 65. Sanction Guidelines for Qualified Medical Evaluators

Numbering and lettering has been added to aid in clarity. As proposed the section headings will read:

- I. PART ONE – OVERVIEW
 - A. Factors to be Considered in Determining Disciplinary Penalties
 - B. Mitigating Evidence
 - C. Terms of Probation – Standard Conditions
 - D. Terms of Probation – Optional Sanctions and Conditions of Probation
- II. PART TWO – VIOLATIONS AND SANCTIONS
 - A. Maximum Sanctions
 - B. Violations of Material Statutory/Administrative Duties Which May Result in Alternative Sanctions

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1. Sexual Misconduct
2. Abuse of Drugs or Alcohol and/or Intoxication While Evaluating or Treating Patients
3. Billing/Insurance Fraud or Submitting False Documents
4. False Statements Made Under Penalty of Perjury on QME Application Forms or Other QME or DWC Documents
5. Advertising Violations
6. Soliciting or Providing Treatment in Course of QME Evaluation
7. Self Interested Referral
8. Ex Parte Communication
9. Violations of QME Ethical and/or other Regulations
10. False Statements in Medical/Legal Report
11. Failure to Spend Required Face-to-Face Time
12. Knowing Misrepresentation or Intentional - Failure to Disclose Roles of Others Assisting with Medical/Legal Evaluation or Report or Interference or Obstruction of an Investigation by the Medical Director into a Complaint Against a QME
13. Performing Unnecessary Medical Tests in Capacity as QME or AME
14. Late Reports
15. Failure to Follow AD Evaluation Guidelines
16. Report Deficiencies
17. Report Deficiencies Affecting Admissibility
18. Violation of Probation

III. PART THREE – SAMPLE MODEL DISCIPLINARY ORDERS

The changes involved:

- 1) Adding roman numeral “I” to “PART ONE”;
- 2) Moving the subheading “Standard Conditions” into the section title for section C. Terms of Probation;
- 3) Adding “D. Terms of Probation” to the section title reading Optional Sanctions and Conditions of Probation;
- 4) Adding roman numeral “II” to “PART TWO” and adding the words to the title “VIOLATIONS AND SANCTIONS”;
- 5) Adding roman numeral “III” and rephrasing the section heading to be “PART THREE - SAMPLE MODEL DISCIPLINARY ORDERS”

These changes are non-substantive changes made to improve clarity and reference to various parts of the sanction guideline text.

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§ 105. The Request for Qualified Medical Evaluator Panel - Unrepresented ~~Instruction~~ Form and Attachment to Form 105 (How to Request a QME If You Do Not Have an Attorney).

This form has been revised to add new questions, including has any body part in this claim been accepted, has this claim been denied, did notice to the injured employee state employer requests an evaluation to determine compensability. The descriptions of the reasons for requesting a panel, as stated on the form, have been reworded to separate and distinguish the choices allowed an injured worker seeking an evaluation under Labor Code section 4062 and the choices allowed a claims administrator, or if none the employer, under Labor Code section 4062, in light of the California Supreme Court in State Compensation Insurance Fund v. Workers' Compensation Appeals Board and Brice Sandhagen (2008) 44 Cal. 4th 230, 186 P. 3d 535; 79 Cal.Rptr. 171; 73 Cal.Comp.Cases 981 (hereafter, Sandhagen).

In that decision, the Court held, in pertinent part, that the Legislature intended for the utilization review process under Labor Code section 4610 to be the employer's only avenue for reviewing and resolving an employee's request for medical treatment, that Labor Code section 4062 is not available to an employer as an alternative avenue for disputing an employee's request for medical treatment, and that only an employee, and not the employer, may obtain a medical-legal evaluation under Labor Code section 4062 to address a dispute regarding medical treatment.

Other formatting changes have been made to the form to make it more compatible with EAMS requirements for electronic scanning and filing.

No changes have been made to the lists of medical specialties except to delete that wording shown for deletion during the last public comment period.

In addition, wording in the attachment to QME Form 105 has been changed to address the changes in the form.

The form, the list of medical specialties and the attachment, as shown in their entirety, are the current proposed version of these documents.

§ 106. The Request for Qualified Medical Evaluator Panel – Represented Form and Attachment to Form 106 (How to Request a QME in a Represented Case)

This form has been revised to add new questions, including has any body part in this claim been accepted, and has this claim been denied. A reminder to attach a copy of the earliest written AME offer that identifies disputed issue and names one or more physicians has also been added.

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The descriptions of the reasons for requesting a panel, as stated on the form, have been reworded to separate and distinguish the choices allowed an injured worker seeking an evaluation under Labor Code section 4062 and the choices allowed a claims administrator, or if none the employer, under Labor Code section 4062 in light of the California Supreme Court in State Compensation Insurance Fund v. Workers' Compensation Appeals Board and Brice Sandhagen (2008) 44 Cal. 4th 230, 186 P. 3d 535; 79 Cal.Rptr. 171; 73 Cal.Comp.Cases 981 (hereafter, Sandhagen), as discussed above regarding QME Form 105. In that decision, the Court held that only an employee, and not the employer, may obtain a medical-legal evaluation under Labor Code section 4062 to address a dispute regarding medical treatment.

Other formatting changes have been made to the form to make it more compatible with EAMS requirements for electronic scanning and filing.

No changes have been made to the lists of medical specialties except to delete that wording shown for deletion during the last public comment period.

In addition, wording in the attachment to QME Form 106 has been changed to address the changes in the form.

The form, the list of medical specialties and the attachment, as shown in their entirety, are the current proposed version of these documents.

§ 107. The Qualified Medical Evaluator Panel Selection Form.

The words "Ins. Adj/Agency" was deleted and replaced with "Claims Administrator". The revision date on the form was changed.

§ 108. The Qualified Medical Evaluator Panel Selection Instruction Form.

The wording in the choices under item 2, regarding when the injured employee may wait beyond 60 days for the evaluator to have an available appointment, has been changed to be consistent with the wording in section 34 of Title 8 of the California Code of Regulations and Labor Code section 139.2(j)(1)(C). Also, the order of the choices was changed. The word "adjuster" was replaced with "administrator" in item 4.

Item 6, a sentence was added that provides: "You may send the QME a letter listing the disputed medial issues you believe the evaluator should address in your claim." This is allowed under section 35 of Title 8 of the California Code of Regulations and Labor Code section 4062.3.

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Item 8, a sentence was added: “The panel is assigned and mailed on the same date, which is shown as the ‘Date Mailed’ on the top right side of the QME panel letter, QME Form 107 (See, 8 Cal. Code Regs. 107).”

The revision date on the form was changed.

§ 110. The Appointment Notification Form.

Text was added to the instructions paragraph addressed to the evaluator, consistent with the applicable regulations, that provides:

“You also must use this form if you refer the injured worker for a consultation to advise the parties of the date and time of the appointment with the consulting physician (See, 8 Cal. Code Regs. Section 32). You may not cancel the appointment less than six (6) calendar days prior to the appointment date, except for good cause (See, Cal. Code Regs. Section 34). If you reschedule an appointment, review regulation 34 and the ethical rules in regulation 41 (See, Cal. Code Regs. Sections 34 and 41(a)(7) and (a)(8)).”

The revision date on the form was changed.

§ 111. The Qualified Medical Evaluator’s Findings Summary Form.

Under Basis for Conclusions, questions 16, new text was added as follows:

“(For non-psyche injuries)”

“(For psyche injuries) the GAF and 2005 PD Schedule?”

This new text was needed to distinguish between the basis for permanent impairment ratings, depending on nature of the injury, as provided in the Labor Code and the permanent disability rating schedule adopted by the Administrative Director effective January 1, 2005.

In addition, text was added to parts of the instruction page for clarity, to be consistent with the applicable regulations in Title 8.

The revision date on the form was changed.

§ 112. The QME/AME Time Frame Extension Request Form.

A check box was added for “Request extension for supplemental report.”

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A reference was added in the instructions paragraph to section 34(h) of Title 8 of the California Code of Regulations regarding extensions of supplemental reports.

The revision date on the form was changed.

§ 113. Notice of Denial of Request for Time Extension Form.

The words “Agreed Panel QME” and “AME” were added as needed for clarity. The revision date on the form was changed.

§ 116. Notice of Late QME/AME Report – No Extension Requested Form.

The words “Agreed Panel QME” and “AME” were added as needed for clarity. The revision date on the form was changed.

§ 120. Voluntary Directive for Alternate Service of Medical-Legal Evaluation Report on Disputed Injury to Psyche.

The word “name” was added to one of the choices. Other minor wording edits and additions were made for clarity.

The revision date on the form was changed.

§ 121. Declaration Regarding Protection of Mental Health Record.

A heading naming this agency was added to the form. Other minor wording edits were made for clarity.

The revision date on the form was changed.

§ 122. AME or QME Declaration of Service of Medical-Legal Report.

A heading naming this agency was added to the form. Other minor wording edits were made for clarity. The revision date on the form was changed.

§ 125. Authorization for Release of Medical Information.

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Section 125 is added as a new section and a new, non-mandatory form for use by evaluators performing evaluations involving injuries to the psyche, as provided in section 36.5(k) of Title 8 of the California Code of Regulations, discussed above. It provides:

“The use of this form by an Agreed Medical Evaluator, Agreed Panel QME or Qualified Medical Evaluator is optional, as provided in section 36.5 of Title 8 of the California Code of Regulations.

NOTE: Form is 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.

Note: Authority cited: Sections 53, 133, 139.2 and 5307.3, Labor Code.

Reference: Sections 56 through 56.37, Civil Code; Sections 4060, 4061, 4062, 4062.1, 4062.2, 4064, 4067, Labor Code.”

As section 36.5(k) states, use of this form by evaluators is not mandatory, although it is recommended in circumstances described in that subdivision, when the injured worker wants the evaluation report to be served directly on the injured worker and declines or refuses to designate a physician upon whom to serve the report for the purpose of discussing and reviewing its contents with the injured worker.

The Administrative Director believes this section will assist evaluators to address the complex medical issues that may arise in connection with a medical-legal evaluation of a disputed injury to the psyche. The language in subdivision 36.5(k) and the form proposed in section 125 enable the injured worker's preference regarding service of the report to be fulfilled. The form provides the evaluator with an authorization for release of medical information which may be signed by the injured employee for the content of the evaluation report. For those cases in which the injured employee declines the alternate methods of serving the report, which would permit its contents to be reviewed, explained and discussed by the injured employee with another physician selected by the employee, the signed release may assist the evaluator in avoiding litigation initiated by the employee for alleged violations of the Confidentiality of Medical Information Act (Civ. Code sections 56 *et seq*). At the current time, there remain disputed legal interpretations about whether all medical reports created in a workers' compensation claim would be exempt from this Act when an evaluator does not obtain such a signed authorization for release of medical information.

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**II. NOTICE OF ADDITION OF DOCUMENTS AND INFORMATION TO THE
RULEMAKING FILE**

(Government Code § 11347.1)

The Administrative Director of the Division of Workers' Compensation hereby gives notice, pursuant to Government Code sections 11346.8(d), 11246.9(a)(1), and 11347.1, that the following documents and other information which the agency has relied upon in adopting the proposed changes to sections 1 – 159 of Title 8 of the California Code of Regulations, have been added to the rulemaking file and are available for public inspection and comment:

July 3, 2008 Decision of California Supreme Court in State Compensation Insurance Fund v. Workers' Compensation Appeals Board and Brice Sandhagen (2008) 44 Cal. 4th 230, 186 P. 3d 535; 79 Cal.Rptr. 171; 73 Cal.Comp.Cases 981 (hereafter, Sandhagen)

These documents are available for public inspection at the Division's Legal Unit office located at 1515 Clay Street, 18th floor, Oakland, CA 94612, from **October 22, 2008** through **November 6th, 2008**, during normal business hours between 8:00 A.M. and 5 P.M. If you have any written comments regarding the documents and other information, written comments must be submitted by 5: P.M. on November 6th to:

Maureen Gray, Regulations Coordinator
Division of Workers' Compensation, Legal Unit
P.O. Box 420603
San Francisco, CA 94142
OR
By fax to (510) 286-0657
OR
By e-mail to: dwcrules@dir.ca.gov.

All written comments received by 5 P.M. on November 6th, 2008, pertaining to the above listed documents and other information will be reviewed and responded to by the Administrative Director as part of the rulemaking file.