**STATE OF CALIFORNIA**

**DEPARTMENT OF INDUSTRIAL RELATIONS**

**DIVISION OF WORKERS’ COMPENSATION**

**INITIAL STATEMENT OF REASONS**

**Subject Matter of Regulations: Workers’ Compensation**

**Qualified Medical Evaluator Regulations**

**TITLE 8 CALIFORNIA CODE OF REGULATIONS**

**DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS**

**CHAPTER 1. DIVISION OF WORKERS’ COMPENSATION**

**QUALIFIED MEDICAL EVALUATOR REGULATIONS**

**ARTICLE 3, 4 and 10.5. Assignment of Qualified Medical Evaluators,**

**Evaluation Procedure**

**Sections 31.3, 31.5, 34 and 46.3 and Forms 31.5 108**

Amend section 31.3 Scheduling Appointment with Panel QME

Amend section 31.5 QME Replacement Requests and form

Amend section 34 Appointment Notification and Cancellation

Enact section 46.3 Remote Health Medical-Legal Evaluations

Amend section 108 Form 108

**BACKGROUND TO REGULATORY PROCEEDING**

In the California workers’ compensation system, the physicians who perform medical evaluation examinations and write comprehensive medical-legal reports that are used by injured employees and employers to resolve disputes over medical issues and other benefits in a workers’ compensation claim are called Agreed Medical Evaluators (AMEs) or Qualified Medical Evaluators (QMEs). Pursuant to the statutory authority granted by Labor Code section 139.2, the Administrative Director of the Division of Workers’ Compensation (“DWC”) is charged with overseeing the administration of the qualified medical evaluator program. The Administrative Director’s statutory scope of authority includes the implementation of regulations for the administration of the qualified medical evaluator program. This rulemaking involves an addition to the regulations that govern QMEs, and AMEs.

The proposed changes to these regulations are necessary to reduce delays and provide greater flexibility for injured workers, physicians and insurance carriers/employers in scheduling medical-legal evaluations.

**TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS OR DOCUMENTS**

DWC Oracle Database replacement panel for 2019 and 2021 data.

California State Audit Report 2019-102

**Specific technology or equipment required (if applicable)**

No specific technologies or equipment are required by these proposed regulations.

**Facts on which the agency relies in support of its initial determination that the regulations will not have a significant adverse impact on business.**

The Administrative Director has determined that the proposed regulations will not have a significant adverse impact on business. These regulations are amending current processes to better service the community, there is no additional specialized, cumbersome or expensive equipment needed to update the process of implementation of these regulations.

The adoption of regulation 46.3 and amendments to regulations 31.3, 31.5, 34 and forms 31.5 and 108 will not have a significant, statewide adverse economic impact directly affecting business because it merely offers an option for remote health and flexibility with office location evaluations and scheduling timeframes.

**Statement consistent with California Government Code section 11346.3(b):**

The Administrative Director has determined that the adoption of regulation 46.3 and amendments to regulations 31.3, 31.5, 34 and forms 31.5 and 108 will neither create nor eliminate jobs within the state. These regulations provides injured workers, physicians and insurance carriers/employers with greater flexibility in scheduling and locations of medical-legal evaluations therefore the current jobs that support this process will still be needed and the only change is providing greater flexibility to the existing system.

The Administrative Director has determined that the adoption of regulation 46.3 and amendments to regulations 31.3, 31.5, 34 and forms 31.5 and 108 would not create or eliminate business within the state. These regulations provide for scheduling flexibility they do not change the obligation of the business to continue to provide the same standard of services.

The Administrative Director has determined that the adoption of regulation 46.3 and amendments to regulations 31.3, 31.5, 34 and forms 31.5 and 108 would not expand the business of businesses currently within the state. These regulations would not result in an expansion of business as they only addresses the processes that govern the administration of the QME program and do not expand the program.

**SUMMARY OF PROPOSED CHANGES**

**Rulemaking Authority**

The Administrative Director’s rulemaking authority is found in Lab. Code §§ 53, 111(a), 133, 139.2 and 5307.3. These sections provide that the Administrative Director has the same rulemaking authority as the ‘head of a department’ as defined by Government Code §11150 et. seq., as well as specific rulemaking authority under Division 4 of the Labor Code. Labor Code section 53 provides, in pertinent part:

“Whenever in Section 1001 or in Part 1 (commencing with Section 11000) of Division 3 of Title 2 of the Government Code “head of the department” or similar designation occurs, the same shall, for the purposes of this code, mean the director, except that in respect to matters which by the express provisions of this code are committed to or retained under the jurisdiction of the Division of Workers’ Compensation….the designation shall mean the Division of Workers’ Compensation, the Administrative Director of the Division of Workers’ Compensation….as the case may be.”

Labor Code section 111(a) provides, in pertinent part:

“(a) The Workers’ Compensation Appeals Board, consisting of seven members, shall exercise all judicial powers vested in it under this code. In all other respects, the Division of the Workers’ Compensation is under the control of the administrative director and, except as to those duties, powers, jurisdiction, responsibilities, and purposes as are specifically vested in the appeals board, the Administrative Director shall exercise the powers of the head of a department within the meaning of Article 1 (commencing with Section 11150) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code)….”

Labor Code section 133 provides, in pertinent part:

“The Division of Workers’ Compensation, including the Administrative Director….shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code.”

Labor Code section 5307.3 provides, in pertinent part:

“The administrative director may adopt, amend, or repeal any rules and regulations that are reasonably necessary to enforce this division, except where this power is specifically reserved to the appeals board or the court administrator.”

**ARTICLE 3, 4 and 10.5. Assignment of Qualified Medical Evaluators,**

**Evaluation Procedure**

**Sections 31.3, 31.5, 34 and 46.3 and Forms 31.5 and 108**

**Specific Purpose:** To provide flexibility to the QME process. To increase the pool of available QMEs and reduce the number of replacement panels.

**Necessity:** TheCalifornia State Auditor found in a report dated November 19, 2019 that QMEs have become more frequently unavailable and opinioned that changes to the panel selection process were warranted[[1]](#footnote-1). In 2021 the DWC had in place emergency regulations that addressed several QME panel processes due to the COVID-19 pandemic. The amendments to regulations 31.3, 31.5, 34 and forms 31.5 and 108 and adoption of regulation 46.3 make permanent the majority of the emergency regulations that were in place in 2021. The DWC data shows that the 2019 number of replacement panel codes requested was 100,431; while in 2021 the replacement panel codes requests dropped to 57,986.[[2]](#footnote-2) The adoption of these amendments and enactment of regulation 46.3 is needed to increase the availability of physicians for medical-legal evaluations.

**Section 31.3. Scheduling Appointment with Panel QME**

**Subsection (e):** This section was amended to provide additional time to schedule an appointment with a QME from 60 days to 90 days and if agreed from 90 day to 120 days.

Specific Purpose:

The increased time to schedule an evaluation is intended to increase the availability of physicians with appointments within these timeframes.

Necessity:

This amendment is necessary to increase the availability of physicians. In 2021 when this regulation was in place we saw a decrease in replacement panel requests ostensibly because physicians had available appointments within these timeframes. In 2019 the DWC replaced 24,995 panel codes because a physician was not available in 60 days while in 2021, when the time for scheduling was 90 days, the DWC replaced only 10,267 panel codes for this reason.[[3]](#footnote-3)

**Subsection (f):** This section was amended toprovide that subdivision (e) of the regulation applies to both Comprehensive and Follow Up evaluations.

Specific Purpose:

To clarify the timeframe requirements set forth in subdivision (e) applies to all medical-legal evaluation appointments.

Necessity:

This section is necessary to provide clarity that section (e) timeframes apply to the Comprehensive and Follow Up evaluations.

Consideration of Alternatives**:**

The proposed amendment of regulation 31.3 provides improvements to the current system and there is no more effective alternative to this section, or equally effective and less burdensome alternative that has been identified by the Administrative Director.

In consideration of Government Code section 11346.5(a)(13) no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome on affected private persons than the proposed action, or would be more cost-effective and equally effective in implementing the statutory policy or other provisions of the law.

**§ 31.5. QME Replacement Requests.**

**Subsection (a)(2)** This section is amended to comply with the new timeframes set forth in regulation 31.3.

Specific Purpose:

Update the regulation to provide for the new timeframes for scheduling of an evaluation based on the amendments to regulation 31.3.

Necessity:

The amendment is necessary to provide consistency in the regulations.

Consideration of Alternatives**:**

The proposed amendment of regulation 31.5 provides improvements to the current system and there is no more effective alternative to this section, or equally effective and less burdensome alternative that has been identified by the Administrative Director.

The proposed amendment of regulation 31.5 provides improvements to the current system and in consideration of Government Code section 11346.5(a)(13) no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome on affected private persons than the proposed action, or would be more cost-effective and equally effective in implementing the statutory policy or other provisions of the law.

**§ 34. Appointment Notification and Cancellation**

**Subsection (a)** This section is amended to provide electronic service of the QME appointment Notification Form (Form 110).

Specific Purpose:

To allow electronic service of the form 110 consistent with regulation 36.7.

Necessity:

This amendment is needed to provide consistency in the regulations.

**Subsection (b)** This section is amended to provide that an initial evaluation can occur at any office listed with the medical Director if there is written agreement by the parties.

Specific Purpose:

To provide the injured worker and physician with flexibility in the selection of office location to avoid delays in scheduling of an evaluation.

Necessity:

To allow parties to make a determination on office location that is best for time availability and location availability.

**Subsection (d)** This section is amended to delete Agreed Panel QME.

Specific Purpose:

To be consistent with Labor Code section 4062.2(c) which was amended in 2012 for all panels issued after January 1, 2013, there is no longer a recognized designation of Agreed Panel Medical Evaluator.

Necessity:

To provide consistency with the Labor Code and regulations.

**Subsection (e) is** This section is deleted and renumbered. Subsection (e) and (f) were combined into one section which is now subsection (e) and provides that if an appointment is rescheduled for either a QME or an AME, that evaluation appointment shall occur within 60 calendar days of the date of cancellation.

Specific Purpose:

Allowing 60 days to reschedule a cancelled appointment is consistent with the amendments proposed in regulation 31.3 and therefore allows physicians more flexibility with respect to scheduling which will lead to more appointments being scheduled by the initially selected QME.

Necessity:

To provide the parties with flexibility and avoid delays of replacement panels and to be consistent with the amendments in regulation 31.3.

**Subsection (g) is renumbered to subsection (f)**: This section was amended to be consistent with numbering.

**Subsection (h) is renumbered to subsection (g):** This section was amendedto be consistent with numbering. This section was amended to delete Agreed Panel QME and added electronically served.

Specific Purpose:

Agreed Panel QME was deleted to be consistent with Labor Code section 4062.2(c) which was amended in 2012 for all panels issued after January 1, 2013 there is no longer a recognized designation of Agreed Panel Medical Evaluator.

Electronically served is added to be consistent with regulation 36.7.

Necessity:

To provide consistency in with the Labor Code and the Regulations.

**Subsection (i) is renumbered to subsection (h):** This section was amended to be consistent with numbering and the following language was added “or from the electronic proof of service, if electronically served”.

Specific Purpose:

Electronically served language is added to be consistent with regulation 36.7.

Necessity:

To provide consistency in with the Regulations.

Consideration of Alternatives**:**

The proposed amendments to regulation 34 provides improvements to the current system and there is no more effective alternative to this section, or equally effective and less burdensome alternative that has been identified by the Administrative Director.

In accordance with Government Code section 11346.5(a)(13) no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome on affected private persons than the proposed action, or would be more cost-effective and equally effective in implementing the statutory policy or other provisions of the law.

**Section 46.3 Remote Health Medical-Legal Evaluations**

Specific Purpose:

This new section sets forth an alternative process for medical-legal evaluations. This regulation provides flexibility for injured workers, physicians and insurance carriers/employers to agree to remote evaluations if certain criteria is met.

Necessity:

The adoption of remote health medical-legal evaluations is necessary to increase the availability and flexibility of medical-legal evaluations.

**Subsection (a)** This section provides that a remote health medical-legal evaluation may be utilized through the use of electronic means where both parties can visually see and hear each other and may not be at the same physical space or site.

Specific Purpose:

Provide that an examination can occur where both parties can visually see and hear each other from different locations if needed.

Necessity:

To provide clarity as to remote health evaluations and the structure of the evaluation.

**Subsection (a)(1)** This section defines the scope of remote health evaluations to be remote visits via video-conference, video-calling or similar technology that allows each party to see the other and have an audio connection. Provides that the evaluation must have the same standard of care as an in person examination.

Specific Purpose:

To define remote health evaluations.

Necessity:

To provide clarity of remote health evaluations and the requirements.

**Subsection (a)(2)** This sectionestablishes parameters for when a remote health medical-legal evaluation can be performed if a physical examination is not necessary. These parameters include 1) there is a medical issue in dispute involving AOE/COE, termination of indemnity benefits, or appropriate work restrictions; 2) there is agreement to the evaluation by remote health by all parties to the action; 3) remote health evaluation is consistent with appropriate and ethical medical practices and the AMA Guides 5th edition and 4) the physician attests that there is no need for a physical examination.

Specific Purpose:

To establish parameters as to when remote health medical-legal evaluations can occur.

Necessity:

This section insures that the remote health evaluations can occur if there is a specific dispute and there is an agreement to the remote health evaluation and the evaluation occurs with the same standards as an in person hands on evaluation.

**Subsection (b)** This sectionprovides for identification of the office location when a remote health evaluation occurs.

Specific Purpose:

Physicians are limited to 10 office locations and this section provides for identification of the office location when the physician and injured worker utilize remote health and are therefore not at the same location.

Necessity:

To comply with requirements of Labor Code section 4628(b) to identify the office location of the evaluation[[4]](#footnote-4) and that the evaluation can only occur at an office location with the medical director[[5]](#footnote-5).

Consideration of Alternatives**:**

The proposed adoption of regulation 46.3 provides improvements to the current system and there is no more effective alternative to this section, or equally effective and less burdensome alternative that has been identified by the Administrative Director.

In accordance with Government Code section 11346.5(a)(13) no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome on affected private persons than the proposed action, or would be more cost-effective and equally effective in implementing the statutory policy or other provisions of the law.

**Form 31.5**

**Page 2 section 31.5(a)(2)** This section is amended to delete sixty (60) days and change it to ninety (90) days and to change the existing ninety (90) days specification to one-hundred and twenty (120) days.

Specific Purpose:

To update the form to comply with the new amendments in regulation 31.5(a)(2)

Necessity:

For the regulations and instructions in the form to be consistent.

Consideration of Alternatives**:**

The proposed amendments to form 31.5 provides consistent information with the regulatory amendments and therefore offers improvements to the current system and there is no more effective alternative to this section, or equally effective and less burdensome alternative that has been identified by the Administrative Director.

In accordance with Government Code section 11346.5(a)(13) no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome on affected private persons than the proposed action, or would be more cost-effective and equally effective in implementing the statutory policy or other provisions of the law.

**Form 108**

The complete form was deleted and recreated to insure that the form is compliant to ADA standards. Updates may have been made to the website links for information. Specific updates and changes are as follows:

**Paragraph one:** The bold type was removed.

Specific Purpose:

To make it easier for the reader.

Necessity:

For the flow of the information to be informative and not distracting.

**Subsection 1):** Underline was removed and changed to bold. Wording of the paragraph was updated to clarify that the PTP cannot act as the QME and to direct injured workers to the website first then to the phone number.

Specific Purpose:

The underline was removed to make rulemaking easier and ADA compliant. The language and bolding was updated to provide clarity and direct injured workers to our website which has a vast amount of helpful information and lastly to direct injured workers to a phone line.

Necessity:

To help the injured workers better understand the QME selection process and available resources.

**Subsection 2):** Underline was removed and changed to bold. Removed bold “QME exam”. Language was added that an examination can occur by agreement at an office location listed with the medical director or by remote health in accordance with regulation section 46.3. Also changes sixty (60) days to ninety (90) days.

Specific Purpose:

The underline was removed to make rulemaking easier and ADA compliant. The removal of bold “QME exam” was to help the form flow more easily. The added language about the examination location and remote health is to inform the injured worker about these newly adopted regulations. Changing 60 days to 90 days is consistent with the newly amended 31.3.

Necessity:

To help injured workers better understand the QME process and options available. Provides consistency with the regulations.

**Subsection 2) a):** This section was amended to change ninety (90) days to one-hundred and twenty (120) days.

Specific Purpose:

To properly inform injured workers of the requirements under regulation 31.3.

Necessity:

To be consistent with regulation 31.3

**Subsection 2) b):** removed.

Specific Purpose:

The DWC medical unit no longer accepts phone calls for replacement panels.

Necessity:

To update the form to current information.

**Subsection 2) c):** renumbered to subsection 2) b)

Specific Purpose:

To maintain consistency in numbering as a result of the deletion of former 2) b).

Necessity:

To update the form to current numbering.

**Last Paragraph in Subsection 2):** This section was updated with additional information about how to request a replacement panel.

Specific Purpose:

To educate the injured worker on the best practice for seeking a replacement panel and provide updated links for the information needed.

Necessity:

To avoid delays or confusion about the replacement process.

**Subsection 4):** This section was amended by removal ofunderline language and updated to bold.

Specific Purpose:

The underline was removed to make rulemaking easier and ADA compliant and language was changed to bold to continue to emphasize the information.

Necessity:

To ensure compliance with accessibility standards.

**Subsection 5):** Underline was removed.

Specific Purpose:

The underline was removed to make rulemaking easier and ADA complaint.

Necessity:

To ensure compliance with accessibility standards.

**Subsection 12):** This section was amended by removing reference to articles “The Basics About Medical Care for Injured Workers” and “Getting Appropriate Medical Care for your injury”.

Specific Purpose:

To not reference information that is no longer utilized by the Division.

Necessity:

To provide injured workers with only the most relevant and up to date information and not reference information that is either no longer relevant or no longer available.

Consideration of Alternatives**:**

The proposed amendments to form 108 provide consistent information with the regulatory amendments and current QME processes and therefore offer improvements to the current system. There is no more effective alternative to this section, or equally effective and less burdensome alternative that has been identified by the Administrative Director.

In accordance with Government Code section 11346.5(a)(13) no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome on affected private persons than the proposed action, or would be more cost-effective and equally effective in implementing the statutory policy or other provisions of the law.

1. California State Audit 2019-102 dated November 19, 2019: Department of Industrial Relations “Its Failure to Adequately Administer the Qualified Medical Evaluator Process May Delay Injured Workers’ Access to Benefits” [↑](#footnote-ref-1)
2. DWC Replacement Code Totals for 2019 and 2021 Produced February 10, 2022 [↑](#footnote-ref-2)
3. DWC Replacement Code Totals for 2019 and 2021 Produced February 10, 2022 [↑](#footnote-ref-3)
4. Labor Code section 4628(b) [↑](#footnote-ref-4)
5. Labor Code section 139.2(h)(3)(B) [↑](#footnote-ref-5)