FINDING OF EMERGENCY

OF THE

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF WORKERS’ COMPENSATION

REGARDING THE CALIFORNIA LABOR CODE

TITLE 8, CALIFORNIA CODE OF REGULATIONS

DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS

CHAPTER 1, DIVISION OF WORKERS’ COMPENSATION

Article 4, PRACTICE PARAMETERS

Section 46.3 QME Emergency Regulation in Response to COVID-19.

Government Code Section 11346.1 requires a finding of emergency to include a written statement with the information required by paragraphs (2), (3), (4), (5) and (6) of subsection (a) of Section 11346.5 and a description of the specific facts showing the need for immediate action.

The Division of Workers Compensation requests that the initial, updated Finding of Emergency and first re-adopted Finding of Emergency under OAL File No. 2022-0105-02E be incorporated by this reference.

The Administrative Director has determined that these proposed amendments to the regulations are not inconsistent or incompatible with existing regulations.

The Administrative Director of the Division of Workers’ Compensation (DWC) finds that the adoption of this regulation is necessary for the immediate preservation of the public peace, health and safety, or general welfare, as follows:

# FINDING OF EMERGENCY

**Basis for the Finding of Emergency**

* DWC is in compliance with Government Code Sections 11346.1(h). On September 30, 2022 the Office of Administrative Law filed the Notice of Rulemaking After Emergency Adoption to adopt as permanent title 8 California Code of Regulation section 46.3 as well as amendments to regulations 31.3, 31.5, 34 and forms 31.5 and 108 with the Secretary of State.
* On September 30, 2022 the DWC posted a Newsline and announced the permanent rulemaking of title 8 California Code of Regulations section 46.3; and amendments to regulation sections 31.3, 31.5, 34 and forms 31.5 and 108.
* On September 30, 2022 the DWC opened public comment period and posted notice for a public hearing regarding the Notice of Rulemaking After Emergency Adoption. A public hearing will be held on November 15, 2022 at 1515 Clay Street Oakland.
* While COVID-19 has slowed there are signs that new variants will emerge and that there will once again by an upswing in cases[[1]](#footnote-1). The re-adoption of this regulation is needed to continue to allow for response to upswings in COVID-19 and restrictions that will arise as a result. Allowing office flexibility and telehealth minimizes exposure to COVID-19 and allows physicians and injured workers to make decisions related to best practices at the time of the evaluation.
* The DWC has monitored the implementation of these regulations and has determined that they are beneficial to health, safety and welfare of California as they provide flexibility and efficiency to the regulatory process. Allowing these regulations to remain in place while permanent regulatory adoption process occurs is necessary for the health, safety and welfare of California’s workers’ compensation system.

# Background

* The DWC develops regulations to implement, interpret, and make specific the California Labor Code.
* Qualified Medical Evaluators (QMEs) provide medical-legal evaluations of injured workers to resolve medical issues in dispute between parties to a claim or litigation regarding workers’ compensation. Prior to the COVID-19 pandemic, these evaluations included a physical examination of the injured worker for specified periods of face-to-face time where the physician and injured worker were in the physical presence of each other as required by California Code of Regulations, title 8 sections 49-49.9.
* In response to Executive Orders and to protect the safety of QMEs and injured workers, the Division of Workers’ Compensation adopted in May of 2020 an emergency regulation allowing the use of telehealth or telemedicine for medical-legal examinations. The regulation, found at California Code of Regulations, title 8, section 46.2, was readopted in March and October of 2021. Regulation 46.2 expired on January 10, 2022.
* The DWC adopted emergency regulation 46.3 in January of 2022 due to the rise at that time of the Delta and Omicron variants.[[2]](#footnote-2) Since the adoption of emergency regulation 46.3 the Division has been working with stakeholders and internally to begin official rulemaking to make this regulation permanent.
* As recognized by Governor Newsom in Executive Order N-16-21 (September 27, 2021), the use of telehealth or telemedicine during the COVID-19 medical crisis is an effective means of providing continued healthcare and observing social distancing as well as limiting exposure to the virus.
* As also recognized in Executive Order N-16-21 (September 27, 2021), the use of telehealth is necessary at this stage in the pandemic to protect healthcare workers and ensure access to healthcare services during surges in COVID-19 cases. Action is necessary in order to implement, on an emergency basis, the ability of physicians in California’s workers’ compensation system to continue to provide telehealth medical-legal evaluations when COVID-19 cases surge due to the Delta and Omicron variants.
* Various medical-legal evaluations can be performed effectively without the need of a physical examination. An emergency regulation is necessary to facilitate the performance of these evaluations.
* The DWC began permanent rulemaking on this emergency regulation on September 30, 2022.

# AUTHORITY AND REFERENCE

The Administrative Director of the Division of Workers’ Compensation, pursuant to the authority vested in him by Labor Code sections 59, 111, 133, 139.2, 4603.5, 5307.3 and 5307, proposes to reestablish Subchapter 1 (Article 4) of Chapter 4.5, of Title 8 California Code of Regulations, and adopt section 46.3.

# INFORMATIVE DIGEST

Summary of Existing Laws

**Labor Code section 139.2** is the enabling statute enacted to establish the Qualified Medical Evaluator Program in the California workers’ compensation system. Subsection (j)(1)(C)(2) empowers the Administrative Director to develop procedures to be followed by all physicians in evaluating the existence and extent of permanent impairment and limitations resulting from an injury. Subsection (j)(5)(A) directs the Administrative Director to establish minimum times for patient contact for any medical-legal evaluations that are not valued pursuant to Labor Code section 5307.6.

**Labor Code section 4628** is an anti-ghostwriting statue enacted to govern the responsibilities of a reporting physician and requirements for a medical-legal report. An examination of the injured worker is one of the requirements enumerated in this statute.

**Labor Code section 5307.6** is the enabling statute directing the Administrative Director to adopt and revise a fee schedule for medical-legal expenses. Subsection (a) mandates that the procedure codes and relative values used in producing fees shall recognize the amount of time spent by the physician in direct contact with the patient.

# TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS RELIED UPON

Los Angeles Times/MSN – “California enjoying ‘good COVID weather’ now. But a tougher winter would be coming” by Rong-Gong Lin II, Luke Money September 27, 2022

Department of Industrial Relations Rulemaking: [www.dir.ca.gov/Rulemaking/DIRProposed.html](http://www.dir.ca.gov/Rulemaking/DIRProposed.html)

Department of Industrial Relations – Division of Workers’ Compensation News and Announcements

www.dir.ca.gov/dwc/dwc\_newsline.html

* Governor Gavin Newsom - EXECUTIVE ORDER N-16-21, September 27, 2021

<https://www.gov.ca.gov/wp-content/uploads/2021/09/9.27.21-Telehealth-EO.pdf>

* Tracking COVID-19 in California

<https://covid19.ca.gov/state-dashboard/#todays-update>

CDC, Delta Variant: What We Know About the Science (updated Aug. 26, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html?s_cid=11512:covid%20delta:sem.ga:p:RG:GM:gen:PTN:FY21>; CDC, Potential Rapid Increase of Omicron Variant Infections in the United States (Dec. 20, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html.

# SUMMARY OF PROPOSED REGULATIONS

The Administrative Director adopts an administrative regulation governing the provision of telehealth medical-legal evaluations and office location flexibility during the pendency of the COVID-19 medical crisis. This regulation implements, interprets, and makes specific Labor Code sections 139.2, 4628, and 5307.6 during the pendency of the COVID-19 medical crisis and while the Division completes the permanent rule making process as follows:

**Section 46.3 QME Emergency Regulations in Response to COVID-19**

This section sets forth the process that addresses the ongoing need for medical-legal evaluations and to prevent a backlog of medical-legal evaluations resulting from the stay-at-home order and the anticipated surges during upswings in Covid 19 cases. This regulation will help injured workers and employers continue to move their workers’ compensation claims towards a resolution and avoid additional or undue delay.

1. **Subsection (a)** defines a telehealth medical-legal evaluation when injured worker and physician are not in the same physical space or site during the evaluation.
2. **Subsection (a)(1)** defines a telehealth medical-legal evaluation and establishes parameters for when a telehealth 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 telehealth by all parties to the action; 3) telehealth evaluation is consistent with appropriate and ethical medical practices and 4) the physician attests that there is no need for a physical examination.
3. **Subsection (a)(2)** defines the scope of telehealth 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.
4. **Subsection (b)(1)** allows the initial QME evaluation to take place at any office that is certified for qualified medical evaluations as long as there is agreement to this arrangement by all of the parties to the action.
5. **Subsection (b)(2)** provides for identification of the office location when a telehealth evaluation occurs.

# DETERMINATION OF SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Physicians who provide medical-legal evaluations will be able to provide services through use of telehealth in order to reduce exposure to COVID-19 during the pendency of the COVID-19 medical crisis and while DWC completes the permanent rule making process.

The Department of Industrial Relations, Division of Workers’ Compensation, has made an initial determination that the adoption of this regulation will not have a significant, statewide adverse economic impact directly affecting business because it merely offers an option for telehealth and flexibility with office location evaluations. The Division of Workers’ Compensation has not considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submission may include the following considerations: (i) consolidation or simplification of reporting requirements for qualified medical evaluators; and (ii) the use of performance standards rather than telehealth.

# POLICY STATEMENT OVERVIEW

The objective of the proposed emergency regulation is to implement the provision of telehealth medical-legal evaluations during the pendency of the COVID-19 medical crisis and while the Department completes the permanent rulemaking process, and to clarify the interpretation of the relevant statutes and regulations by way of the proposed emergency regulation in a manner that allows for the above referenced actions.

**MATTERS PRESCRIBED BY STATUTE APPLICABLE TO THE AGENCY OR TO ANY SPECIFIC REGULATION OR CLASS OF REGULATIONS**

NONE

**MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS**

The Department of Industrial Relations, Division of Workers’ Compensation has determined that this proposed regulatory action would not impose a mandate on local agencies or school districts.

**FISCAL IMPACT STATEMENT**

A. Cost or Savings to any state agency: NONE

B. Cost to any local agency required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4: NONE

C. Cost to any school district required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4: NONE

D. Other nondiscretionary cost or savings imposed on local agencies: NONE

E. Cost or savings in federal funding to the state: NONE

**STATEMENT OF CONFIRMATION OF**

**MAILING OF FIVE-DAY EMERGENCY NOTICE**

(Title 1, CCR section 50(a)(5)(A))

The Division of Workers’ Compensation sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulations to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).

1. Los Angeles Times, “California enjoying ‘good COVID weather’ now. But a tougher winter would be coming” (September 27, 2022) by Rong-Gong Lin II, Luke Money [↑](#footnote-ref-1)
2. See CDC, Delta Variant: What We Know About the Science (updated Aug. 26, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html?s_cid=11512:covid%20delta:sem.ga:p:RG:GM:gen:PTN:FY21>; CDC, Potential Rapid Increase of Omicron Variant Infections in the United States (Dec. 20, 2021), available at https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html. [↑](#footnote-ref-2)