

# PROTECTING YOUR HARD EARNED QME CERTIFICATE

October 11, 2019

# BACKGROUND OF LITIGATION

## A. **Four to Five Years of Automatic Renewal and then came the Underground Regulations.**

1. Mid-2016, DWC denied QME applications for reappoint. w/o any notice or prior hearing.
2. DWC alleged overbilling mistakes in applying the complex medical-legal fee schedule in 8 CCR § 9795 (“MLFS”).
  - a. Ironically insurers almost never objected to the same QME bills.
3. DWC never alleged any “Billing/Insurance Fraud” under Sanctions Guidelines.

## B. **9 QMEs filed 2 lawsuits against DIR, DWC, Baker, Parisotto (Ad. Dir.) & Dr. Meister (Med. Dir.)**

1. Plaintiffs were 3 QMEs in Dr. Howard et al. and 6 QMEs in Dr. Botros et al. in two lawsuits before Judge Chalfant in LASC.

- C. **Pre- 2016, many years of automatic QME reappointment. But, in mid-2016: New employee Winslow West** (formerly w/ SCIF) applied 4 new “underground regulations,” (interpretations never officially adopted per the Administrative Procedure Act, Gov. Code § 11340 et seq. (“APA”)).
1. **Medical Research** – DWC rejected this complexity factor (“CF”) if the research was within the QME’s area of “specialty.” This limitation is not found in MLFS 103(3).
  2. **Medical Causation** – This CF only required “written request” of a party, but DWC now also required a “denied claim.” This limitation is not found in MLFS 103(6). DWC interpretation rejected by J. Chalfant (“[J]ust isn’t in the rule.”)
  3. **Psyche Evaluation**– DWC rejected this CF when Medical Causation CF already used b/c Psych Causation supposed to be the “primary focus” of evaluation. This limitation also not found in MLFS 103(8).
  4. **Report Preparation** – Billable per hour under all of MLFS 104(1)-(3), but DWC limited it only to ML 104(3) (prior agreement of parties [LOL] that “extraordinary circumstances” applied).
    - a. West exploited publishing error that obviously mistakenly combined last 2 paragraphs of ML 104 into one paragraph.
    - b. DWC interpretation rejected by J. Chalfant (“[P]etitioners have a very good argument that the line space issue in ML 104 does not make sense as interpreted by the DWC.”)

D. **Settlement of all cases, but DWC reinitiated a confrontation.**

1. **March 2018**, DWC agreed to omnibus settlement for all QME plaintiffs through mediation.
  - a. Six DWC lawyers (above W. West in DWC) present.
  - b. DWC agreed to interpret MLFS strictly by actual language.
  - c. “Underground regulations” disappeared for all QMEs.
2. **Christine Baker** resigned three weeks later. Why? Still no Director.
3. **Early May 2018, DWC strikes again** with proposed amendments to MLFS regulations that were oppressive to AMEs and QMEs.

E. **Assembled Coalition of QME Stakeholders Support QME Community.**

1. October, 2018 “pre-rulemaking meeting” against DWC’s proposed amendments.
2. Coalition inspired over 500 objections to DWC’s proposed amendments.
3. DWC’s proposed MLFS discarded by November, 2018.
4. DWC then solicited “specific, objective fee schedule proposal” from stakeholders.

F. **MARCH 2019, JLAC VOTED FOR STATE AUDITOR TO:**

1. Investigate DWC’s actions and dwindling number of QMEs.
2. Status? Next month – potentially embarrassing findings.

# WHAT ARE THE NEW REGULATIONS THAT ARE BEING PROPOSED?

## A. Background: December 2018: Coalition's and Sue Honor's Proposed MLFS

1. Submitted a specific objective hybrid flat and variable fee schedule proposal with input from the coalition and other stakeholders.

## B. June 2019: Coalition tried to correct lack of MLFS COLA increase since 2006

1. **Urged Legis. Counsel** to clarify that under LC § 5307.1, DWC's Ad. Dir. had authority to revise MLFS annually **to follow annual COLA** and Medicare increases to OMFS without going through the APA process.
2. **Legis. Counsel drafted revisions** to compel Ad. Dir. to make COLA and other increases to MLFS quarterly, and to raise conversion factor to increase the hourly QME rate (a pay raise of at least 50%).
3. Assembly members **Rudy Salas** and **Eloise Gomez Reyes** introduced this "Urgency" legislation as **AB 1832**.

C. **July 2019 – Key NEW proposed amendments by DWC to MLFS.**

1. **Complexity factors and hourly rates abolished** in favor of a "hybrid" fee schedule.
2. **Failed appointment fees** still not required to be reimbursed.
3. **Medical research time not** reimbursed.
4. **Flat fee** paid for:
  - a. Initial evaluations (\$1,650 non-psych, \$2,475 psych),
  - b. Follow-up evaluations (\$1,100 non-psych, \$1,650 psych),
  - c. Supplemental evaluations (\$275 non-psych)
  - d. PLUS variable fee for pages of medical records reviewed in excess of the first 400 pages (only \$2/page starting with page 401 for all specialties = only \$200/hr. for average of 100 pages read per hour)
5. **No COLA** adjustment for future years.

D. **Huge CHASM Amongst Stakeholders**

1. Stunned by seemingly pro-carrier proposed amendments.
2. PRA simple request: Per Govt. Code § 6250.
  - a. CWCI, Zenith and Schools Insurance Authority (2) Submitted proposals to DWC.

# COMPARISON OF DWC'S PROPOSAL AND CARRIER REQUEST

Service	DWC Fee Schedule Proposal	Insurance Company Recommendation	Sue Honor Recommendation
Initial Eval Flat Fee – non-psych	\$1,650	\$1,560 (pg. 8 of PDF, CWCI proposal), \$1,800 (pg. 24 of PDF, SIA proposal as “average” cost of initial eval)	\$2,200
Initial Eval Flat Fee – Psych	\$2,475	\$2,498 (pg. 8 of PDF, CWCI proposal), \$2,500 (pg. 24, SIA proposal)	\$3,850
Re-Eval Flat Fee – non-psych	\$1,100	\$625 - \$875 (p. 24, SIA proposal)	\$2,200
Re-Eval Flat Fee – Psych	\$1,650	\$1,500 (p. 24 SIA proposal)	\$3,850
Pages of Records Reviewed Included in Flat Fee	400	400 (pg. 8 of PDF, CWCI proposal), 100 (p. 25 of PDF, SIA proposal)	50
\$/page In Excess of Included Pages	\$2/page	\$2/page (pg. 26 of PDF, SIA proposal)	\$5.50/page
Supplemental Report Flat Fee	\$275	\$225 (pg. 10 of PDF, CWCI proposal), \$360 (p. 24 of PDF, SIA proposal)	\$1,000
Missed Appointment Fee	\$0	\$312 (pg. 9 of PDF, CWCI proposal), \$250 – 500 (pg. 24 of PDF, SIA proposal)	\$1,000
Hourly Deposition Rate	\$424	\$400/hour (pg. 24 of PDF, SIA proposal)	\$600

# WHEN SHOULD A QME START THE APPLICATION/RENEWAL PROCESS?

- A. Use **DWC Form 104** – “Reappointment Application.”
- B. **Apply 60-90 days early** b/c DWC takes approx. 45 days to process application and often says loses documents.
  - 1. Why?
- C. DWC often intentionally fails to reappoint until after deadline expires if they suspect overbilling, 3 or more late reports, etc.
- D. Be proactive and follow-up on applications with emails



# WHAT ARE THE DWC'S MOST RECENT AREAS OF AUDITING QMES

## A. NEW UNDERGROUND REGULATION RE "MEDICAL RESEARCH".

### 1. DWC disallows chiropractors and psychologists "medical research" outside specialty regarding:

- a. Side effects of RX and OTC meds b/c they can't prescribe them.
- b. Future medical care involving surgery b/c they can't perform it.
- c. This is flip-flop from DWC's prior position that QMEs can't do research within their specialty, and targets Chiropractors & Psychologists.

### 2. *See Ramirez v. Jaguar Farm Labor Contracting Inc.*, 2018 WL 4693847 (Cal.W.C.A.B.), 84 Cal. Comp. Cases 56 ("Nothing prevents a chiropractic QME from opining that evaluations or referrals for surgery or medications may be necessary as part of applicant's future medical care, but deferring determination of the medical necessity of those modalities to the appropriate physicians.")

## B. DWC counts reports as "late" if DWC's "Notices of Late Report" are not disputed in writing in a timely fashion.

1. So, always respond to such Notices in writing and timely.

## C. "Apportionment" CF only counts if I/W is P&S or MMI.

1. Apportionment CF may be used more than once only if there are changed circumstances.
2. All factors must be met under ML 103(7) - multiple employers, or multiple injuries relating to body multiple systems/regions.

## D. DWC demanding restitution based upon alleged billing violations w/o checking if insurers paid for your reports.

1. Always check your EORs and EOBs to determine if bill was paid in full, partly, or not at all.
2. DWC just recently started auditing EORs and EOBs even prior to alleging "overbilling."

# WHAT SHOULD THE QME'S FIRST RESPONSE BE, UPON RECEIPT OF AN AUDIT LETTER?

## A. HERE IS A TYPICAL DWC AUDIT LETTER:

Please be advised that pursuant to the authority vested in the Administrative Director of the Division of Workers' Compensation ("DWC") by Government Code § 1 1 180, the Medical Unit of the DWC is requesting that you comply with [an investigative audit](#) of your QME evaluations.

Also be advised that the DWC need [not establish good cause for this investigative action](#). See U.S. v Morton Salt Co. (1950) 338 US 632, 642 and Brovelli v Superior Court (1961) 56 C 2nd 524.

We request that you submit copies of your [last 15 initial medical-legal reports and bills](#) in chronological order for QME or Agreed Medical Evaluator (AME) evaluations. Please submit copies of the following for each of your medical-legal reports:

- QME Appointment Notification Form (Form 110)
- Qualified Medical Evaluator's Findings Summary Form (Form 1 1 1)
- Medical-legal evaluation and report
- AME or QME Declaration of Service of Medical-Legal Report (Form 122)
- Billing statement.
- Cover letter or other communication from the attorney or insurer stating the
- date/time/location of the evaluation and the medical issues you were charged with evaluating for the injured worker.
- Complete QME and AME appointment listing or calendar (electronic or physical) for (the last two Calendar quarters, in chronological order which indicates each QME and AME appointment scheduled.

To prevent delays, please mail copies of these documents to my attention at the above address. The DWC Medical Unit [must receive](#) the requested documents by August 30, 2018.

Your failure to comply with this request may result in [more intrusive investigative action](#) pursuant to Government Code § 11181; and could also result in [disciplinary action](#) against your QME certification pursuant to title 8, California Code of Regulations ("CCR") § 39.5 and § 60. Please be advised that a copy of this letter and its warnings will be submitted with any action by the DWC seeking to enforce these investigative endeavors through resort to the appropriate judicial authority.

If you have any questions regarding this investigation, you may contact the DWC Medical Unit at (800) 794-6900 and select the QME prompt.

- B. **Game Plan:** QME must retain knowledgeable counsel, make a record, and know his/her rights.
1. Promptly advise DWC in writing that you are retaining counsel who will respond for you.
  2. QME's have a due process right to a:
    - a. Pre-deprivation administrative hearing before determination of denial of reappointment.
    - b. Post-deprivation administrative hearing within 90 days of final determination of denial of reappointment.
  3. You have right to resign rather than face written "Accusation" alleging violation, which are reported to your Medical Board before any hearing on the merits and can lead to medical board discipline.
  4. Be aware: MLFS regulations (8 CCR§ 9795) - Complexity factors must be applied as written.
  5. Bottom line: Consult with counsel re: adopting the correct response/course of action.

# QUESTIONS



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