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The California Applicants' Attorneys Association ("CAAA") offers the following comments for the Medical Legal Fee Schedule stakeholder meeting on October 17, 2018.

Substantial medical evidence is the foundation of the workers compensation system.

A medical opinion is not substantial evidence if it is based on facts no longer germane, an inadequate medical history, an inadequate medical examination, incorrect legal theories, surmise, speculation, conjecture or guess. *Hegglin v. WCAB* (1971) 4 Cal.3d 162, 36 Cal. Comp. Cases 93; *Place v. WCAB* (1970) 3 Cal.3d 372, 35 Cal. Comp. Cases 525; *Zemke v. WCAB* (1968) 68 Cal.2d 794, 33 Cal. Comp. Cases 358.

A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. *Granado v. WCAB* (1968) 69 Cal.2d 399, 33 Cal. Comp. Cases 647.

The chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus the opinion of an expert is no better than the reasons upon which it is based. *People v. Bassett* (1968) 69 Cal.2d 122, 70 Cal. Rptr. 193.

A glaring problem in California's current workers compensation system is medical legal reporting which contains "analysis" but conveys little understanding of the facts of a particular case or an accurate medical history of a worker but then offers an opinion that is both speculative and conclusionary.

The basic reality is that there simply are not enough physicians that know how to write good, soundly supported medical reports, let alone solid, rateable, permanent and stationary reports.

The consequence of any anticipated plan to reduce fees payable under the current medical legal fee schedule would be to aggravate an already difficult problem experienced by parties to a case obtaining substantial medical evidence to move a case forward to a satisfactory conclusion. Further, any such proposed changes would reduce the already limited number and availability of QMEs and drive down the quality and completeness of reports. It is in the best interests of all parties, the injured worker, applicant and defense representatives, and of course the employer and insurer, to support high quality, efficient, and fair QME evaluators, who are adequately paid for their work.

Regulation section 10606 provides that the favored method of taking medical testimony is via medical reports. This places the burden on the physician to ensure that the report itself can withstand evidentiary scrutiny.

Medical reports must comply with specific elements to be considered a medical legal report. In addition, there is the more amorphous rule that a medical report must stand the test of weight; i.e. that the report is sufficiently substantial to enable a trier of fact to rely on the opinion in the face of opposing opinions. While the technical requirements of 10606 may be met, there must be sufficient reasoning, supported by sound medical science, for the conclusions of the report to be supported. Failure to follow the specific evaluation protocol may make the report inadmissible before the WCAB.

Writing a medical legal report that constitutes substantial medical evidence takes a significant amount of time to accomplish particularly on complex cases in light of the large amounts of records that can be associated with any given case.

Without a fee schedule that fairly compensates physicians, they will likely stop taking on QME cases, further burdening the system and creating a challenging environment for injured workers.

In the alternative, poor quality reports will always require supplemental reports and depositions, costing more in the long run.

In addition to the above, the current medical legal fee schedule needs to be amended to provide for an express inclusion regarding payment for med-legal reports from primary treating physicians. There is no question med legal reports

are allowed from treating physicians under certain circumstances and there is a continued mis- reading of the rules which allow primary treating physicians to provide med legal reports.

If you take away the ability for doctors to write adequate substantial evidence reports to support medical treatment, access to medical treatment will be restricted or outright eliminated for injured workers.

A comprehensive medical-legal evaluation is defined as an evaluation of an employee which results in the preparation of a narrative medical report prepared and attested to in accordance with LC § 4628, any applicable procedures promulgated under LC § 139.2, and the requirements of CCR § 10606 and is either: 1) performed by a Qualified Medical Evaluator pursuant to LC § 139.2 (h), (a panel QME) or 2) performed by a QME, Agreed Medical Evaluator (AME), or the primary treating physician (PTP) for the purpose of proving or disproving a contested claim, and which meets the criteria found under the definition of "medical-legal expense".

"Disputed medical fact" is defined as a dispute involving 1) the employee's medical condition 2) the cause of the employee's medical condition 3) treatment for the employee's medical condition 4) the existence, nature, duration or extent of temporary or permanent disability caused by the employee's medical condition or 5) the employee's medical eligibility for vocational rehabilitation services.

California has a workers' compensation system based on a complex evidence based medicine standard to assist all parties, in getting accurate evaluations of work impairment, apportionment, and causation which serves to reduce frictional costs. This requires the medical experts who provide these evaluations to prepare reports with a thorough analysis of medical history, and application of AMA rating guidelines, so that the reports constitute substantial medical evidence. Doctors must be adequately paid for this level of expertise and time involved to properly prepare reports on complex claims.

Based on a recent CWCI study citing decreased QME access, the DWC should be focusing on improving QME access and not reducing fees.

Given the large number of frictional cost drivers in the CA WC system, it's surprising that the monies spent on med-legal evaluations have not tripled in recent years; rather, the cost of med-legal evaluations has stayed nearly constant.

While the med-legal evaluation process and associated billing practices are not without flaw, a review of the cost metrics associated with medical legal evaluations demonstrate that the issues are relatively minor in comparison to the many frictional cost drivers that plague California's workers compensation system.

What are some of the recent studies telling us?

The June 26, 2018 WCIRB "Report on 2017 California Workers' Compensation Losses and Expenses" lists Medical-Legal evaluations as paid losses of $0.37 billion in CY 2016 (out of $4.8 billion in overall paid medical expenses) and $0.32 billion in CY 2017(out of $4.7 billion in overall paid medical expenses). Exhibit 1.4 to that WCIRB report notes that Med-Legal evaluation payments for CY 2016 were 7.7% of total medical costs paid, and in CY 2017 decreased to 6.8% of total medical costs paid.

The WCIRB "2018 State of the System" report includes a different metric. In that report it is noted that as a percentage of "2017 Paid Frictional Costs", Med-Legal costs were 9% of the overall frictional cost pie (compared with 25% for defense attorney expenses, 13% for medical cost containment, 12% for applicant attorney fees, 15% for other allocated loss expense and 26% for unallocated loss expenses).

Also in the mix of studies on QMEs was the February 2018 CWCI study, "Changes in the QME Population and Medical-Legal Trends in California Workers' Compensation". Findings of that study included that the total number of QME providers dropped by 20 percent between January 2012 and September 2017. Of those, 82.8% voluntarily non-renewed their QME certifications.

An earlier report, prepared by UC Berkeley researcher Frank Neuhauser for CHSWC in 2010, had noted that between 2005 and 2010 there had been a 45% reduction in the number of active QMEs. In a 2017 update to his 2010 study, Neuhauser claimed a 17% drop in the number of QMEs between 2007 and 2016.

As far as the costs of reports, Jones of CWCI noted that "After increasing for seven consecutive years, the number of comprehensive (ML104) medical-legal

evaluations-the most detailed and expensive reports-began to level off in 2015." Jones noted that ML 104 reports as a percentage of total med-legal service declined since 2014 (from 34.6% in 2014 to 33.6% in 2015, 31.4% in 2016, and 25.8% as of mid-2017).

The average paid per med-legal service was basically flat between 2014, 2015 and 2016 and declined somewhat in 2017 (per Exhibit 2.1 chart in the WCIRB report).

The available data shows no crisis sufficient to justify rushing into changes to the current medical legal fee schedule.

Medical-legal fees must be sufficient to attract qualified physicians to provide quality evaluations as QMEs and AMEs. As stated above, in the last five years the availability of physicians to conduct medical-legal evaluations in the State of California has decreased dramatically by 20% (See CWCI report on changes in QME population and Medical Legal Trends, February 2018). In some medical specialties there are not even five physicians certified in the requested specialty to issue a Panel QME list. In other medical specialties, the injured worker is provided a list of physicians ranging geographically from San Francisco to Santa Ana to Sacramento while the injured worker resides in San Diego. In more rural areas, injured workers have to drive more than four hours to attend an evaluation. In addition, as noted in other recent studies there has been a 'graying' of currently available QMEs who upon retirement are not being replaced. This will contribute to a further decrease in available QMEs in the next five years.

The DWC should be focusing on improving QME access. They should also be focusing on improving quality QME reporting which has been identified as a significant problem. Cutting payments to evaluating physicians is an extremely misplaced priority, especially in light of the unprecedented cost savings to carriers in the last 5 years from the passage of SB 863.