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DECLARATION OF CARLYLE R. BRAKENSIEK

I, Carlyle R. Brakensiek, declare:

1. I am, and at all times since January 15, 1970, have been an attorney licensed to practice law before all of the courts of the State of California. I have personal knowledge of the facts set forth herein and can competently testify thereto if called as a witness.

2. I am, and at all times since March 1981, have been the Executive Vice President of the California Society of Industrial Medicine and Surgery ("CSIMS").

3. CSIMS is a not-for-profit professional association incorporated in 1980 and registered pursuant to Section 501(c)(6) of the Internal Revenue Code that represents more than 300 physicians and other medical providers practicing occupational medicine in California. Over the years, CSIMS, through its representatives, has appeared as *amicus curiae* before the California Courts of Appeal and Supreme Court in the matters of: *Valdez v. WCAB* (2013) 57 Cal. 4th 1231; *Milpitas Unified School District v. W.C.A.B.* (Guzman) (2010) 187 Cal.App.4th 808; *State Comp. Insurance Fund v. W.C.A.B. (Almaraz)* (2011) Cal.App.5th ___, *review denied*; *State Compensation Insurance Fund v. W.C.A.B. (Sandhagen)* (2008) 44 Cal.4th 230; *Facundo-Guerrero v. W.C.A.B.* (2008) 163 Cal. App. 4th 640; *Palm Medical Group, Inc. v. State Compensation Insurance Fund* (2008) 161 Cal.App.4th 206; *Sierra Pacific Industries v. W.C.A.B. (Chatman)* (2006) 140 Cal.App.4th 1498; *Wal-Mart Stores, Inc. v. W.C.A.B. (Garcia)* (2003) 112 Cal.App.4th 1435; *Lockheed Martin v. W.C.A.B. (McCullough)* (2002) 96 Cal.App.4th 1237; *Vacanti v. S.C.I.F.* (2001) 24 Cal.4th 800; *Boehm & Associates v. W.C.A.B. (Lopez)* (1999) 76 Cal.App.4th 513; *Christian v. W.C.A.B.*, (1997) 15 Cal.4th 505; *American Psychometric Consultants, Inc. v. W.C.A.B.* (1995) 36 Cal.App.4th 1626; *Beverly Hills Multispecialty Group, Inc. v. W.C.A.B.* (1994) 26 Cal.App.4th 789. CSIMS also appeared as *amicus curiae* before the United States Supreme Court in *Angelotti Chiropractic, Inc., et al. v. Christine Baker, et al.* (2016) [Case No. 15-873, *cert. denied*].

4. As Executive Vice President of CSIMS, I am the executive officer of the organization, responsible for day-to-day operations, organizational management, and legislative and administrative agency advocacy. In this capacity, I have daily contact with CSIMS' members, often

1 fielding several dozen inquiries from members each week concerning matters affecting their
2 professional practices.

3 5. Beginning around June, 2016, I began receiving an inordinate number of telephonic
4 and emailed messages from members concerning delays in the renewal of their Qualified Medical
5 Evaluator (“QME”) certifications. Upon further inquiry, I learned from CSIMS’s complaining
6 members that the Division of Workers’ Compensation (“DWC”) was systematically delaying
7 renewals of QME licenses when QMEs applied for reappointment every two years, as required by
8 law. I saw examples of letters that QMEs received from the DWC stating that the DWC was not
9 going to reappoint the QMEs as of their reappointment deadline until the DWC completed its
10 investigation of apparent billing errors or violations. The delays in renewing the QMEs’
11 reappointments were often based on allegations of minor, technical billing errors under the Medical-
12 Legal Fee Schedule set forth at 8 CCR § 9795 (“fee schedule”). This was the first time in the more
13 than 35 years that I have represented physicians that the DWC had been so aggressive in its conduct
14 regarding alleged QME billing mistakes under the fee schedule. I immediately became concerned
15 because the DWC was no longer following the Administrative Procedures Act, Government Code
16 § 11340 et seq. (“APA”), by filing an “accusation” to commence the disciplinary process during the
17 QMEs’ two-year terms of appointment. This APA accusation procedure culminates in a due process
18 hearing prior to any disciplinary action, including a denial of reappointment. Instead, the DWC was
19 sitting on evidence of alleged billing violations under the fee schedule until each physician came up
20 for renewal of his or her QME certificate every two years, and then delaying renewal of their QME
21 certificates until the DWC could complete its “investigation” of the matter. In many cases, the
22 DWC was not renewing QME licenses before they expired, despite the QMEs’ timely applications
23 for reappointment made weeks or months before the QMEs’ two-year terms expired.

24 6. Since QMEs must have a valid certificate to perform their evaluations, once a
25 renewal of the certificate is held up, the QME is effectively and immediately out of business until he
26 or she is reinstated. This is what I call a *de facto* denial because just by delaying approval of QME
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1 applications for reappointment, the DWC effectively strips QMEs of their license to practice in the
2 workers' compensation medical-legal arena for lengthy periods of time. Every month a renewal is
3 delayed, it costs physicians thousands of dollars in income. The alleged "investigation" or other
4 delay excuse gives the DWC tremendous leverage to coerce physicians to "settle" what may have
5 been an invalid disciplinary accusation about mere billing mistakes.

6 7. On several occasions after speaking with individual QMEs whose reappointment was
7 held up by the DWC, and after reviewing the correspondence the QMEs received from the DWC, it
8 became clear that the DWC was applying different rules than those stated in the fee schedule, which
9 were even contrary to instructional fee schedule billing tutorial video that posted on the DWC's web
10 site, which I have personally seen. The video was created by Sue Honor, a former DWC Manager
11 in its Medical Unit.

12 8. For example, the DWC Enforcement Unit has taken the position that a physician
13 using the medical-legal ("ML") 104 billing code may not charge for report preparation time unless
14 there is "a prior agreement between the parties that the evaluation involves extraordinary
15 circumstances." This position is erroneous. I traveled to the DWC headquarters in Oakland, CA,
16 and reviewed all the rule-making files for the fee schedule over the years. It is clear that a
17 formatting error made by a DWC employee or a publisher working for the DWC, in 2006 when the
18 fee schedule was revised, has caused the DWC to apply an erroneous new requirement for all QMEs
19 and AMEs. When I provided documentation of this error in a face-to-face meeting with DWC
20 Counsel Winslow West on August 24, 2017, his response was: "You have your interpretation and I
21 have mine. Until some judge tells me I'm wrong, I'm going to enforce my interpretation of the
22 law." But the DWC's "prior agreement" rule is no mere interpretation – it is a different rule that
23 was never submitted for public scrutiny and comment under the APA. There is nothing in the rule-
24 making file to support DWC's interpretation of the ML 104 billing code.

25 9. I am personally familiar with all of the above as well as the publicity surrounding
26 Mr. West's erroneous application of different ML-104 billing code rules, which has caused many
27 QMEs to under-bill for their services for fear that if they bill properly, they may be investigated,
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1 disciplined, or have their QME certificate renewals delayed, resulting in *de facto* denials of
2 reappointment, for substantial periods of time.

3 10. The workers' compensation community in California is relatively small and word of
4 the DWC's aggressive disciplinary accusation tactics spreads quickly. The DWC's posture of
5 enhanced enforcement through mere accusations set forth in letters, rather than physician education,
6 has started to have, in terms of my observations, a deleterious effect on medical providers. Among
7 these effects are:

8 A. Physicians are uncertain what the billing regulations really require and the
9 DWC has made no effort to implement its new regulations through the APA procedures. In
10 the physicians' and my view, the DWC's actions are unlawful "underground regulations"
11 pertaining to the fee schedule.

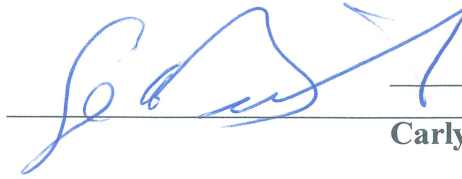
12 B. Physicians have begun under-billing for fear of being prosecuted for billing the
13 proper amounts authorized by the language and the intent of the fee schedule regulations as
14 actually drafted.

15 C. Some physicians have voluntarily dropped their QME reappointment
16 applications so as to avoid the possibility of costly litigation with the DWC.

17 D. The hostile environment created by DWC against QMEs is discouraging
18 qualified physicians from becoming QMEs. The number of physicians sitting for the QME
19 examination has dropped precipitously in recent years.

20 E. Causing individuals to resign as QMEs, and discouraging individuals from
21 becoming QMEs in the first place, negatively impacts the workers' compensation system by
22 making it more difficult to obtain impartial medical analyses of applicants' claims regarding
23 their industrial injuries, thereby: (a) delaying compensation for applicants who are entitled to
24 it; (b) increasing employers' workers' compensation costs; and (c) delaying the resolution of
25 claims on their merits.
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1 I declare, under penalty of perjury under the laws of the State of California, that the
2 foregoing is true and correct, and that this declaration was executed at Sacramento, California, on
3 October 16, 2017.
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6 A handwritten signature in blue ink, appearing to read 'C. Brakensiek', is written over a horizontal line.

Carlyle R. Brakensiek