

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

PUBLIC HEARING

Tuesday, July 1, 2014
Elihu Harris State Office Building Auditorium
1515 Clay Street
Oakland, California

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INDEX

Medical Treatment Utilization Schedule

1		
2		
3	Ken Eichler	5
4	Steve Cattolica	9
5	Robert McLaughlin	10
6	Tim Madden	15
7	Bob Plank	16
8	Robert Kutzner	19
9	Patrick	25

Copy Service Fee Schedule

10		
11	Greg Webber	27
12	Robert McLaughlin	33
13	Jim Butler	37
14	Dan Jakle	39
15	Carl Barkensiek	41
16	Diann Cohen	43
17	Patty Waldeck	46
18	Dan Mora	48
19	Robert Santoyo	52
20	Mark Sektnan	54
21	Richard Meecham	56

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1 (Time Noted: 10:06 a.m.)

2 MS. OVERPECK: Good morning and thank you for coming
3 today. My name's Destie Overpeck and I am the Acting
4 Administrative Director for the Division of Workers'
5 Compensation.

6 Today's public hearing is for two different regulatory
7 packages that we have noticed. One is the Medical Treatment
8 Utilization Schedule, specifically the strength of evidence,
9 and the other is the Copy Service Fee Schedule.

10 What I'm going to do is first ask for commenters on
11 the Medical Treatment Utilization Schedule. We will have
12 everybody who is interested in testifying come up. We'll then
13 switch over to the Copy Service Fee Schedule, get all those
14 comments, and then we'll repeat until there's no one left who
15 has any comments.

16 Please make sure that you sign in the sign-in sheet
17 and indicate if you want to testify or not. If you change your
18 mind today and you said no and you want to, that's no problem.
19 You'll be able to come up and testify.

20 But by having your name, we will therefore be able to
21 make sure that any additional revisions we make, we will e-mail
22 those to you and you'll be kept in the loop on what's happening
23 with the regulations.

24 I'd like to introduce who is here with me today. This
25 is Maureen Gray who is our Regulations Coordinator. This is

1 John Cortes who is the attorney who has been working on the
2 Medical Treatment Utilization Schedule. Next to him is Dr.
3 Rupali Das who is, of course, also working on the Medical
4 Treatment Utilization Schedule. And we have Carol Finuliar who
5 has been working on the Copy Service Fee Schedule. Our court
6 reporters are Richard Parker and Julie Evans.

7 When you come up to testify, please give your business
8 card and who you're testifying on behalf of written on it and
9 present it to the court reporters.

10 If you have written testimony that you also want to
11 turn in this morning, please hand it to Maureen Gray.

12 Everything that you say will be taken down by the
13 court reporters, so especially if you're reading off a speech,
14 please speak slowly. We have a tendency to talk really fast
15 and then it's hard for the court reporters to capture
16 everything.

17 I will, as I said, be going through the sign-in list
18 and reading off the names of the people that come up to
19 testify.

20 If we start getting close to the lunch hour and it
21 looks like we have a lot more testimony, we'll take a break.
22 Otherwise, we'll see if we can just get it finished up before
23 lunch, and we can all go back to the rest of the things you
24 have to do today.

25 We will continue to accept written comments until 5:00

1 o'clock today. You can fax them in or e-mail them in or bring
2 them in person up to the 18th floor.

3 Everything that we get, both written and oral, is
4 given the same weight, and we will very carefully listen and
5 take a look at anything that you give us. We find your
6 comments extremely helpful when we're trying to do rulemaking.
7 So thank you for participating.

8 We won't be entering into discussions. We're
9 listening to what you have to say. We might ask a clarifying
10 question if you're talking.

11 And so with that, let's get started. So again, we're
12 going to start with the Medical Treatment Utilization Schedule
13 testimony. And so first I'd like Ken Eichler to come up.
14 Okay. Business cards to Maureen.

15 **KEN EICHLER**

16 I'm Ken Eichler. I am the Director of Regulatory
17 Affairs for Work Loss Data Institute who publishes the Official
18 Disability Guidelines known as ODG.

19 We'll be submitting full written comments on the
20 proposed regulations, but we do want to go on record at this
21 hearing as being in full support of the regulations.

22 We believe California is taking a very forward,
23 positive step, and we take that from a national overview
24 perspective, see what other jurisdictions are doing. We
25 believe that this gives an opportunity for the proper ranking

1 of evidence to be considered rather than locking in long term
2 to any one set of specific recommendations.

3 The proposed regs also allow for updating and
4 consideration of the dates of review which is very important.

5 One thing we would encourage the agency to -- the DWC
6 to do is to more specifically clarify exactly who is
7 responsible for ranking evidence and at what juncture in the
8 claims process the evidence should be ranked.

9 For illustration purposes, for example, if a treating
10 physician is submitting an RFA, a request for authorization,
11 the question is, does the physician have to take the time to
12 rank the evidence when they submit the RFA. We respectfully
13 suggest that the treating physician should not have to rank the
14 evidence on the first line. We think that will complicate
15 matters with the treating physicians. There will be
16 significant pushback from treating physicians and physicians
17 may threaten to leave the system if they are on the front line
18 required to rank the evidence when they submit it to the payors
19 for approval.

20 It then raises to the next level which would be the
21 next step in dispute resolution, utilization review process.
22 Whether or not the UR doctor is required to rank the evidence
23 of the treating physician and their own evidence and then
24 contrast the two evidence to determine who meets the higher
25 ranking of evidence.

1 We believe that once the ball's been lobbed over the
2 net however, that whether it's UR or IMR, that other side has
3 an equal burden of proof to respond and respond in full. So
4 that the record is clear, if anybody -- if the question needs
5 to go upstream, let's say to IMR or to whomever. But we do
6 want to compliment the Division and Dr. Das and the MEEAC for
7 recognizing that consensus has always been a major part of the
8 development of what evidence is.

9 We're going back now ten years to when ACOEM first
10 became part of the nomenclature. We recognize and counted --
11 in fact, we provided testimony at the time -- that well over
12 half the recommendations for or against a particular treatment
13 were based on consensus for the, quote, lowest rank of evidence
14 at the time. That hasn't changed. And so for the Division to
15 recognize that is a big step forward and we applaud that.

16 However, we're also convinced that without a --
17 without a significant new set of incentives for the utilization
18 review vendor and for the payors, a la what we were just
19 speaking about with respect to, you know, the transparency that
20 the Division mentions in its statement of reasons.

21 Without better incentives we're not sure that, despite
22 what might now be required of the treating physician to go
23 through the full scientific processes described in the
24 regulations, that the UR response is not going to be just as
25 cryptic as it seems to have been sometimes; check boxes,

1 references to diagnoses that don't apply and so on. So we're
2 hoping that the Division takes a closer look at what has been
3 proposed to be sure that the burden is -- of -- of full
4 communication is held equally.

5 And I'll just close very quickly with a specific that
6 has nothing to do with burden of proof or any of those things.
7 In 9792.20, the definition of -- letter F, you have modified
8 the definition for functional improvement and we -- we don't
9 have -- we have no issue with how it's been modified, but we
10 would like to, once again, as we have for a number of times
11 going back to the implementation of the chronic pain guidelines
12 some number of years ago, emphasize that there's a -- a huge
13 need for the Division to accept and to define functional
14 maintenance as a qualifying event for an injured worker with
15 respect to getting treatment.

16 There's absolutely no -- well.... And we've
17 elaborated a little bit more on that and I won't go into it
18 here. But it's seems to make a lot of sense that if I happen
19 to need something on an ongoing basis that doesn't necessarily
20 improve my performance per se but allows me to function at work
21 with limitations or accommodations, why shouldn't that
22 continue; but yet if I don't, quote, improve, I stand a chance
23 of having an ongoing treatment be denied. We don't think
24 that's the way it ought to go.

25 So without some kind of a mention or a firm definition

1 or including that possibility in the regulations we believe
2 that they're deficient.

3 So thank you for your time and we'll get those written
4 comments to you. Thank you.

5 MS. OVERPECK: Thank you, Steve.

6 Robert McLaughlin.

7 ROBERT McLAUGHLIN

8 Good morning. My name is Robert McLaughlin. I'm from
9 San Diego. I'm here representing myself. I am an Applicant's
10 attorney. I represent injured workers. And I'm also a member
11 of the California Applicants' Attorneys Association.

12 In preparing for my comments today, I remembered a
13 story about when I was a young teenager. And I grew up back
14 East. Huge New York Giants fan. Loved Lawrence Taylor. And I
15 remember a particular game we were playing against the Dallas
16 Cowboys, our hated enemy, and the running back was making a
17 play and Lawrence Taylor just hit him so hard his feet went up
18 in the air. He landed on his back and his helmet flew off.

19 And I remember stopping that morning and looking over
20 at my dad who had been a good athlete, and I said, "Dad, did
21 you ever think about playing football?" He stopped, looked up
22 from his paper and said, "Yeah, but one play and then I'd be
23 out for a month because I wouldn't be able to walk again."

24 The point of that story is how we treat one person has
25 to be not necessarily how we treat everyone. My father was 50

1 years old at the time, not in the best physical condition and
2 had been previously a smoker. For him it would have taken a
3 lot of care to get him to recover from that hit.

4 This running back got up, put his helmet back on, got
5 in the huddle and played the next play. So not everybody can
6 be put into a nice, little box of treatment.

7 And what I do like about regulations is 9792.20(e) has
8 incorporated the need for clinical expertise in the definition
9 of evidence-based medicine. And this is very important because
10 that's what allows the doctor to decide what treatment is
11 necessary for the 50-year-old man versus the 23-year-old
12 running back.

13 And as the California Applicants' Attorneys
14 Association has noted in an article they submitted called
15 "Evidence-Based Medicine: What It Is And What It Isn't" on
16 page 72 I think they have a very good quote that we should
17 emphasize and that is, quote, "Evidence-based medicine is not
18 cookbook medicine. Because it requires a bottom-up approach
19 that integrates the best external evidence with individual
20 clinical expertise and patients' choice, it cannot result in
21 slavish, cookbook approaches to individual patient care."

22 Now the reason I'm emphasizing that is because
23 regulation 9792.21(k) appears to be inconsistent with the
24 definition of evidence-based medicine in the regs and as
25 provided for in that article as it appears to eliminate

1 individualized clinical expert approach that's mandated by the
2 evidence-based medicine.

3 Also in that same article is another quote and it
4 says, quote, "Even excellent external evidence may be
5 inapplicable to or inappropriate for an individual patient."
6 My NFL example is a perfect example. I'm sure that running
7 back, he was probably hurting. He probably went after the
8 game, got ice, went to the whirlpool, got a few massages, and
9 he probably did that for a couple of days, and he was able to
10 go back to playing. Whereas, my 52-year-old dad would have
11 been, as he said, probably in the hospital for a month.

12 And this individualized approach is not just noted in
13 evidence-based medicine; it's also in other areas of workers'
14 compensation. Under the AMA Guides it states that the
15 physician should use his own clinical judgment, skill and
16 training with regards to that individual patient.

17 Also in permanent disability we note that we adjust
18 for age for the permanent disability. We give a higher
19 disability to those who are older because we do realize it is
20 not likely they are going to recover as quickly or as
21 efficiently from their injuries.

22 Another example where I see this come up a lot is with
23 my female clients in carpal tunnel syndrome. The federal
24 government's National Institute of Neurological Disorders and
25 Stroke has noted that women are three times more likely to

1 suffer from carpal tunnel syndrome than men.

2 Now the classic test for carpal tunnel is EMG and
3 nerve conduction studies. However, statistics have shown that
4 these studies are -- or produce false negatives at a rate of up
5 to 20 percent. This means that despite a test result
6 indicating no carpal tunnel syndrome, 20 percent of those
7 results are wrong and in fact the women does have carpal tunnel
8 syndrome.

9 This high rate of inaccuracy is also noted in the
10 ACOEM guidelines. They note that nerve conduction studies and
11 EMG may be normal in -- and I quote -- "early or mild cases of
12 carpal tunnel syndrome."

13 Therefore, in these cases the physician needs to base
14 his treatment recommendations for the woman on his or her
15 clinical expertise and not solely the negative EMG, nerve
16 conduction studies or any other guidelines that tell them not
17 to use his own judgment.

18 If the physician is not allowed to do so, then women
19 will be disparately impacted with respect to men in the
20 treatment of their carpal tunnel syndrome as women have a three
21 times higher rate of carpal tunnel syndrome and hence would
22 have a three times higher rate of having a false negative than
23 men. For this reason 9792.21(k) should be deleted.

24 I would like to address 9792.21(i) at this time. This
25 should be amended as there are not medical procedures for which

1 high-level medical evidence is available.

2 This fact is noted not only in many medical literature
3 but also in the ACOEM guidelines through their alphabet system
4 of a hierarchy. In many of those situations they indicate that
5 the treatment recommendations are insufficient for
6 irreconcilable evidence. This is also evidenced in my carpal
7 tunnel syndrome example. Therefore, a medical literature
8 search will not locate a higher level of medical evidence
9 because there isn't any. This, in turn, will hamper the
10 physician's ability to rebut the MTUS as authorized by Labor
11 Code Section 4604.5(a).

12 Thus 9792.21 subsection E should be amended in
13 accordance with the definition of evidence-based medicine in
14 the labor code to allow the physician to rebut the MTUS with
15 regard to specific medical treatment or testing. If the
16 recommendation is the same level of medical evidence, you
17 should support the MTUS recommendation. By doing this, it will
18 provide that women with carpal tunnel syndrome and other
19 injured workers will receive the care they need to get back to
20 work as quickly as possible.

21 Finally, one further comment on 9792.21 subsection J.
22 In order to avoid unnecessary requests of IMR, this should be
23 amended to include that the level of evidence supporting the
24 recommendation of UR be identified in the utilization review.
25 What this will do is to allow all parties to easily determine

1 whether the highest level of evidence has been used and we must
2 remember not everybody has counsel so therefore injured workers
3 would be much easier if they could understand this.

4 So prior to deciding whether to file an application
5 for IMR, it would be nice to know if we had the highest level
6 of evidence or if there is a higher level of evidence because
7 that will avoid many IMR requests.

8 Thank you.

9 MS. OVERPECK: Thank you.

10 Tim Madden.

11 **TIM MADDEN**

12 Good morning. Tim Madden representing the California
13 Occupational Medicine Physicians. We're a group of 20-plus
14 occupational clinics located here in California and our
15 concerns are consistent with the first two speakers in relation
16 to the confusion over the proposed regulations and there was a
17 fair amount of debate amongst our members on what exactly is
18 being required and why and, more importantly, when is the
19 hierarchy of evidence required.

20 Some of our folks were reading the proposed
21 regulations to say that even for an RFA, request for
22 authorization, that they would need to go through this approach
23 of doing a medical lit search and spending, in their view,
24 upwards of an hour trying to justify what treatment they're
25 trying to get for their patients.

1 think that you got it right basically.

2 At the same time we're concerned that the -- there
3 appears to be an additional burden of documentation that's
4 been -- that's being loaded onto the system. And incrementally
5 the system is becoming increasingly difficult to work with and
6 the time commitments needed for compliance is really becoming
7 quite difficult.

8 So we'd like to urge -- besides the fact that we
9 support the hierarchy itself -- that the DWC look at the
10 concerns that we have about the complexity of the system and
11 how it relates to day-to-day practice, particularly for small
12 practices, but it affects large practices as well.

13 And for instance, there are many times, in fact, the
14 Cochrane people themselves have estimated someplace in the
15 neighborhood of perhaps 80 or 90 percent of the time when
16 evidence-based medicine is either not applicable or very
17 difficult to apply because of differences in patient age,
18 co-morbidities, genetic predispositions, past medical history,
19 et cetera and the art of medicine needs to be applied.

20 And so in those instances we rather encourage that
21 treating physicians justify their requests in a logical manner
22 referring to the facts of the situation and that any reply to
23 that, either in UR or in IMR, be required to address the logic
24 of the physician's request and not merely say that it doesn't
25 comply with some cold standard, I guess is the best way to put

1 it.

2 So this is something that I think is -- it's very
3 frequent. It happens all day long in an active practice and
4 physicians are required to put their best foot forward. And I
5 think we would ask that, number one, please address some effort
6 at decreasing the complexity for day-to-day practice and,
7 number two, recognize that the logical arguments used in
8 justifying a request, if there's a denial from either IMR or
9 UR, that the denying reviewing physician must address the logic
10 of the situation and not merely refer to standards that perhaps
11 do not list that particular event.

12 We know that there's a balance, and we are very
13 appreciative of the balance between the need to control
14 unnecessary and possibly harmful treatments that are not based
15 in science versus the countervailing need to allow practice to
16 proceed along high-quality lines.

17 One of the attempts that was made to encourage that
18 was the MPN's and one of the things that we think would be
19 useful would be to look at improving the safe harbors for
20 MPN's -- excuse me -- for MPN's to police their own ranks and
21 improve the quality within an MPN in order to justify a lower
22 level of scrutiny of physicians who are practicing good
23 medicine.

24 Thank you very much.

25 MS. OVERPECK: Thank you. Anybody else? Yes, please.

1 in a timely fashion. The problem that we have is that doesn't
2 happen. And there are a few situations, like some of the
3 people have mentioned, that, you know, they're complicated
4 clinically, et cetera; you've got to try to figure it out. And
5 it's not easy.

6 But we've got a real problem going on here I think in
7 workman comp and the MTUS is an effort to correct that. The
8 MTUS was put together and to be administered in a timely,
9 integrated, multi-modal approach. The MTUS is intended to
10 provide the most current and effective medical care for workman
11 compensation patients.

12 And you have to keep in mind something. If I'm a pain
13 specialist treating a pain patient, and I walk next door, and I
14 take care of a patient -- a workman comp patient with a rotator
15 cuff tear, then I walk right next door to the next room, and I
16 see a regular pain patient that's not workman comp and he's got
17 a rotator cuff tear, that MTUS information bleeds over into my
18 practice.

19 So the standards that you create here have big,
20 long-reaching fingers. They affect the care throughout
21 California and I know personally many other states follow the
22 MTUS.

23 The MTUS makes statements like the providers are
24 required to follow it. It is the authority. And in fact, in
25 general, I think it's very good. It's spot-on.

1 The problem that we have -- here's the problems, at
2 least as far as I can see -- is insurance carriers are not
3 required to know or implement the MTUS. This is what I run
4 into every day. The State does not require insurance companies
5 to even acknowledge the MTUS. If you want -- if you're an
6 insurance company and you want to provide workman comp, then
7 you apply to the State. You get your certificate. But there's
8 nothing there saying that you at least even acknowledge or read
9 the MTUS. Providers that get on the MPN list for the insurance
10 companies, they are not required to read or even acknowledge
11 the MTUS.

12 I'm not talking about running around and policing
13 everybody, but last year the prescription overdose meeting that
14 they had formed up here, I came up here, and I talked and there
15 had to be four to 600 people there, including the board. And I
16 asked them all, insurance companies, representatives,
17 providers, et cetera, board members, leaders in the medical
18 field here in the state of California, and one person raised
19 his hand and said he knew about the MTUS. I run into this all
20 the time. Okay?

21 Third-party payors, same thing. They're not required
22 to even state that they've looked at or read or even know about
23 or acknowledge the MTUS.

24 This MTUS is simply not implemented to establish the
25 standard of care provided. It's not. But instead, it is used

1 to litigate care that's already been provided. It's a
2 retrospective. It's not setting up what it intended to do.

3 Anyway, the consequences of that is the workman comp
4 system has grown into a multi-billion dollar industry
5 frequently abused and misused, often fraudulently. Excuse me.

6 Insurance companies regularly refuse or deny provider
7 requests as a matter of course regardless if the request
8 follows the MTUS. I'll cut and paste the MTUS and send it in
9 as a request and they'll write back and say no. And instead of
10 doing it in five days, it will take them ten days and then it
11 will go to UR. And everything is fractionated. You can see
12 that. It's exactly what happens.

13 Utilization review and independent medical reviews,
14 they don't follow the MTUS. Seldom have I ever talked to --
15 I've talked to them and then they tell me straight up, "I don't
16 follow the MTUS. I follow ACOEM." It's a law. Why don't
17 they? Why don't they know? That's my question.

18 So what else happens because of that? Most providers
19 don't even know what the MTUS is nor are they expected to by
20 the insurance companies. In fact, it is financially probably
21 more profitable for them not to know the MTUS.

22 The MTUS will quickly -- as quickly as possible bring
23 a patient all the way to his P&S, most functional state. But
24 if I keep the patient for years, you know.... What's the
25 average time for a workman comp case in California? It's what,

1 one and a half years. The MTUS -- and just my simple logic, if
2 I broke my legs and I was fed yogurt, Mother Nature would heal
3 me in three months.

4 This is -- we've got a problem. And all these
5 fine-tunings, they're good. Everything you're doing is good,
6 but there's a bigger problem out there and that's that people
7 are not aware of their need to follow or be aware of the MTUS.
8 It's just that -- that simple.

9 Not requiring insurance companies and their providers
10 to follow the MTUS has divided, in my mind, the workman comp
11 industry, financially relegating each party to their formal
12 adversarial position. Insurance companies fight with doctors.
13 Doctors fight with insurance companies. There's UR. And
14 everybody is back and forth. And who gets hurt in this; the
15 state taxpayer and the patient.

16 Patients suffer more and longer. Disability claims
17 soar. Loss of production and decreased functionality ensues.
18 Costs rise, just from that simple fractionation.

19 Addiction, we all know about prescription overdoses;
20 the big, you know, household term these days. Addiction and
21 physical dependence is created in workman comp patients.
22 Patients are required to comply with workman comp rules so they
23 have to come see me once in while. And when I get delayed and
24 denied, I'm sitting in front of the patient. Next month I
25 can't do anything for them except give them narcotics, help him

1 with his pain. Either that -- because I'm a pretty cruel man.
2 Now you're out on the case a year and a half later and you
3 wonder why the person is addicted to narcotics. They're not
4 following what you guys have written. Nobody's talking about
5 it. We're not on the same page.

6 I believe the solution to this is not a gestapo
7 approach, not the -- not the government stepping in and shoving
8 medical care rules down our throats. That's not right. But
9 the MTUS is written by our peers and if anybody knows anything
10 about pain management, it's good. And this is not rocket
11 science here.

12 So why don't we, please? That's why I drove all the
13 way up here with a runny nose and cough, et cetera. Just to
14 ask you my one opportunity; please, just put a sentence in the
15 MTUS that says that doctors that want to be on a provider
16 network should have to acknowledge that they will follow the
17 MTUS. Simple.

18 Insurance carriers and TPA's that want to provide
19 workman comp, they should have to acknowledge that they will
20 follow the MTUS. Now you've taken that fractionation, and
21 you've put it together. Now, we have changed our perspective
22 and that we seek first to use the MTUS to establish the
23 standard of care we provide. Then, when necessary, we use it
24 as a measure of that care.

25 It's very simple. It's the law. You've written it.

1 And it works as intended if you get the providers and the
2 insurance companies to at least acknowledge that it exists.

3 Thank you.

4 MS. OVERPECK: Thank you. And I hope you feel better
5 soon.

6 Anybody else on the MTUS?

7 PATRICK

8 Hi, my name is Patrick and I'm -- I'm Joe Public. I'm
9 not a physician. I'm not in the insurance -- in the insurance
10 business. I'm just a good, old Californian that drove up here
11 to take advantage of the public forum to acknowledge the MTUS,
12 beautiful piece of -- piece of -- piece of work.

13 But I would like to plead to you and ask you to
14 implement some kind of process, some kind of check-the-box at
15 the end of this e-mail that will indicate that all insurance
16 providers and doctors in the workman comp program have
17 acknowledged the MTUS as a first step in its -- in its
18 regulation. Okay? So I wanted to get that statement out.

19 In regards to evidence based -- again, I'm no
20 physician, but, you know, sometimes, you know, good medicine
21 is -- is common sense. And I stumbled upon the MTUS as the
22 general public and it was a -- it was a good read. It -- it --
23 it made sense. I mean, multi-modality, multi-treatment, early
24 intervention, no narcotics, you know, if not necessary with
25 chronic pain kind of made sense.

1 And the gentleman that brought up the football injury,
2 well, I was a receiver at Cal Berkeley back in '85. And I
3 suffered a major shoulder injury. That's when they had that
4 astroturf. Did they wait 40 days? Did they wait five weeks?
5 No. They got me on to that cart, drove me in, took x-rays,
6 automatically put ice on it, started the stim.

7 The next morning, as much as I wanted to, you know,
8 sleep in, I had to get up in the morning, go to my physical
9 therapy, do the ice, do the massage, do the heat, do the
10 exercises, and the next thing you know, hey, ready to take some
11 more punishment the next couple of days.

12 So in regards to evidence based, you know, if you get
13 very complicated, but I think the essence of the MTUS makes
14 sense and it's good medicine and I think it will put more
15 workers back on the field, saving money, and increasing
16 productivity, and doing a great job for the State of
17 California.

18 MS. OVERPECK: Thank you. Anybody else on MTUS?

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1 (Whereupon the following proceedings are reported

2 by Julie A. Evans - Time Noted: 10:48 a.m.)

3 MS. OVERPECK: Okay. So we're gonna switch over to
4 the Copy Service Fee Schedule. And as I said before, we'll
5 come back at the end to make sure we didn't miss someone who
6 came in late, but --

7 I'll take this from you.

8 (Whereupon Ms. Gray hands a document to Ms. Overpeck.)

9 MS. OVERPECK: So Greg Webber, please.

10 GREG WEBBER

11 Good morning. My name is Greg Webber, and I'm the
12 CEO of Med-Legal. We're one of the leading applicant copy
13 services in California. It's my pleasure to testify today and
14 add my comments to the many that I'm sure the Division will
15 receive on this matter. I've also previously submitted my
16 written comments to the Division.

17 I'm certain that you'll hear from a wide range of
18 interests on this matter, some speaking to complexity and
19 others speaking to simplicity. The fact of the matter is,
20 what copy services do is both complex and simple. Yet, even
21 that bifurcation is understandable. Sometimes what we do is
22 complex, but it's important to note that usually that
23 complexity results from exceptional circumstances. Most of
24 what we do is predictable and routine. At the same time, I
25 urge the Division not to confuse complexity or simplicity with

1 value. In either case, the value is the same. The value is
2 in the discovery, the evidence, the facts and the records we
3 produce, that together inform the case and the facts in
4 dispute, ultimately speeding the path to settlement and
5 reducing costs in the workers' compensation system.

6 Whether complex or simple, it's not easy, though.
7 Significant capability, effort, expense, knowledge and
8 investment is required to identify, retrieve, maintain and
9 produce accurate records and information. With that in mind,
10 I'll focus my comments in just three areas. First, I'll talk
11 to the very issue of value and the importance of not confusing
12 either complexity or simplicity with value; second, I'll talk
13 to the importance of reducing the potential for and costs of
14 dispute; and third, I'll close out with the importance of
15 providing a clear -- a clear path to complete discovery.

16 Starting first with value. I believe the Division
17 has found a reasonable balance for the values prescribed,
18 probably finding values above those communicated as reasonable
19 by the payers and values below those as reasonable -- as those
20 communicated as reasonable by the providers. Further -- and I
21 think importantly -- by bundling the majority of activities
22 therein, the sources of dispute are dis -- are minimized. But
23 it's clear one area of possible dispute therein remains, the
24 bundling of the so-called release of information fees, quite
25 clearly an area of exposure to the providers. I believe the

1 Division is wise in bundling such fees. With such fees
2 bundled, the proraters will be economically motivated to best
3 manage, limit and control such fees within the bounds of their
4 statutory and regulatory control. Therefore, Med-Legal
5 strongly supports the Division's determination of a single,
6 mostly bundled, fixed-fee value.

7 That being said, the Division is reminded that in the
8 case of Med-Legal, the overall average across every record
9 retrievable -- such release of information fees average
10 approximately \$6, and it shouldn't. I'll also take note that
11 any legislative regulatory or statutory movement impactful to
12 the current limits, controls and provisions available to copy
13 services -- to best control such fees should require the
14 Division to revisit and appropriately adjust the bundled
15 fixed-fee value. Any adjustments thereof, whether presently
16 or in the future course of Division activity should be fully
17 informed, market specific and appropriately -- and
18 appropriately responsive to the overall averages.

19 Nonetheless, I'm sure you will hear many impassioned
20 pleas regarding exceptional circumstances or select
21 circumstances and the costs thereon, likely accompanied by
22 suggestions that the only reasonable path is to unbundle the
23 fee schedule value. I believe that is just the wrong course,
24 rather the bundle is based on an overall view containing both
25 the complex and the exceptional and the simple and the

1 routine. It is reasonable, it is fair, and it will reduce
2 dispute and costs. Over time, it even has the potential to
3 reduce the occurrence of exceptional circumstances and the
4 associated costs, as the providers will work to screen and
5 limit those occurrences. The Division should stay the course
6 on a bundled fee schedule value.

7 And I have a little analogy here. Can you imagine if
8 you pulled into a gas station for a gallon of gas, and as you
9 got the nozzle out to fill your car up a station attendant
10 rapidly approached and said, "Sir, today you're paying for the
11 oil that was retrieved from Saudi Arabia, brought here by
12 tanker with five miles under, went this far -- and by the way,
13 there was a storm so we had to take the long way around and it
14 had to go to another refinery" -- can you imagine if you had
15 to pay for that level of complexity when buying a gallon of
16 gas? The reality is, the company manages its business to
17 manage those overall costs. With the expense of oil, the cost
18 of retrieving it, returning it to the oil refinery, of
19 fracking those molecules, producing that gallon of gas, you're
20 paying a bundle value for that gallon. So I do urge that the
21 Division continue with the bundled approach.

22 But I think it's also important that the Division
23 deeply focus on reducing the potential for costs of dispute by
24 providing a clear set of written provisions that are
25 knowledgeable, informed and consistent with the real world

1 activity around copy and related services. Most important
2 will be starting with the clear definition of "copy and
3 related services." A solid, clear foundation here will make
4 the scope a requirement in the deliverable clear, both for the
5 provider and the payer, with lesser opportunity for dispute.

6 In my written comments I've proposed an update to the
7 definition proposed by the Divis -- by the Division. I
8 believe that definition is more deeply reflective of the real
9 world requirements we face. And also, while I believe that
10 specificity in billing is important, the Division should
11 provide more clarity relative to proposed billing codes.
12 Seemingly, two HCPHCS Level II codes are referenced but are
13 not specifically matched to the six allowable charges
14 specified in the fee schedule. At a minimum, if a specific
15 billing code is to be used, the Division must relay each of
16 the allowable categories and charges to a required and
17 specific billing code.

18 Finally, I noticed there was also some effort in the
19 proposed regulations to allow copy and related services to be
20 performed using authorization instead of subpoena. In the
21 case of the injured worker and their authorized
22 representative, it is inappropriate to request records under
23 authorization. Evidence Code 1158 is clear in its
24 prescription that such services can be done under
25 authorization only before the filing of any actions. These

1 provisions should be eliminated.

2 Taken together, I believe the Division should
3 carefully focus on providing clear, complete, specific
4 definitions, process and requirements, together finding the
5 balance between real world conditions and the economic and
6 functional limits necessary to provide the highest level of
7 benefit for the injured worker. In speaking to that injured
8 worker, I think it's important to protect that worker's right
9 to discovery. My comments and suggestions here are important
10 because some parties oftentimes seek to limit the discovery as
11 a means to reduce overall costs. But it's important to note
12 that such limits really have the potential to significantly
13 increase friction and dispute and, therefore, costs, even if
14 an unintended consequence.

15 Further, given the overall reduction in costs
16 associated with the fee schedule values proposed, I believe
17 such costs are specific, controllable and reasonable, even
18 when broader discovery is specifically allowed for and
19 provided hereunder. I strongly recommend that the Division
20 carefully balance a clear right to discovery, the reduced
21 costs thereon and the potential of increased costs, to the
22 degree opportunities for dispute might be newly opened by
23 steps, actions or provisions intending to set limits to
24 independent discovery. In particular, I recommend that the
25 Division craft a clear statement of allowable services perhaps

1 more simply than that currently represented in the proposed
2 regulations. And where the Division seeks to limit services,
3 especially around the 30-day rule, the Division should be more
4 direct and prescriptive in its limits. I've offered
5 suggestions for both in my comments.

6 To close, let me state clearly that I am supportive
7 of the Division's efforts to formally define a Copy Service
8 Fee Schedule and related regulations. I sincerely believe the
9 proposal represents a step forward by defining a bundled fee
10 schedule value. I support the bundle value. Second, I
11 recommend steps to reduce the potential for dispute by further
12 defining the regulations. And finally, with the costs of
13 discovery reduced, I believe the Division can further reduce
14 dispute by providing a clear path to discovery for all
15 parties.

16 MS. OVERPECK: Thank you.

17 MR. WEBBER: Thank you.

18 MS. OVERPECK: Robert McLaughlin.

19 ROBERT MCLAUGHLIN

20 Good morning again. In looking at some of the copy
21 service regulations, there's a few things that I have some
22 issues with, one being 9982(c). I believe this needs to be
23 amended, as it does not address situations in which partial or
24 no records are produced but additional records are believed to
25 exist. I would like to give you two examples in my own

1 practice that occurred within the last six months.

2 In one situation, I subpoenaed the records of a
3 physician. I got back a certificate saying "No records." My
4 client insisted he had been to this physician. I then sent
5 out another subpoena, and I got one medical report. My client
6 said, "There's a whole stack of medical records," so I set the
7 doctor's deposition under a notice of subpoena and asked for a
8 production of records. In response to that, we got a whole
9 stack of records. Now, this was not only beneficial to the
10 applicant but also to the defendant, who was trying to prove
11 apportionment. We knew the records were there, we just didn't
12 know why we weren't getting them.

13 When I took the doctor's deposition, his staff
14 informed me that my client's name was Juan Jose Gonzales and
15 they got confused with another Gonzales, and I didn't realize
16 it until he kept insisting that there were records there and
17 they realized that they had misfiled them. This is not an
18 uncommon practice, unfortunately, in workers' compensation.
19 And I don't mean that in a bad sense, but we are, for the most
20 part, a volume-oriented practice, whether it be physicians or
21 attorneys, and these are the kind of volume types of accidents
22 that occur. But my client, not being able to get those
23 records -- his due process rights and the defendant's due
24 process rights probably would have been violated.

25 Let me give you another example. I subpoenaed a

1 personnel file on a case where the issue was good faith
2 termination defense. When I subpoenaed records, I once again
3 got back a certificate of no records. At the time of the
4 hearing the defendant showed up with a personnel file that was
5 about two inches thick. My initial reaction was "Where did
6 that come from? There's no statement under penalty of perjury
7 that these are all the records." So I asked for and got
8 another subpoena of records and yet, this time, even more
9 records showed up. So in each of those scenarios, especially
10 with my first one where some records showed up the first time
11 but then more the third time, and then what showed up the
12 second time was also in the third group, the copy service may
13 not be reimbursed and that may have impact on the due process
14 rights of all the parties.

15 Now, I also would be remiss in not noting that I
16 realize there's been some abuses by certain attorneys just
17 sending out subpoenas every 45 days, whether they need it or
18 not. What I think should be done is that it should be more
19 like a Federal Rules of Civil Procedure or Federal Rules of
20 Conduct, which is the attorneys should have to be enforced to
21 sign something over and above what we sign for a subpoena,
22 indicating they have a good faith belief that there are
23 additional records. I don't feel the injured worker should be
24 denied due process, but I do feel the attorneys should be
25 responsible of their just willingly sending out documents

1 without a true good faith. I believe this would be a fair
2 balance that handles both of those situations. Keep in mind
3 also the attorney, if he were to constantly do this, would
4 also be possibly opened up to a BAR review, so I think that
5 might be a better compromise. It's for those same reasons
6 that I think 9982(f)(1) needs to be amended.

7 One other section I would like to talk about is
8 9984(a) and (b). I believe this needs to be amended to
9 include not just records produced by an authorization, but all
10 records produced, whether under Section 10608 or by subpoena.
11 This would require us to make sure that we have gotten all the
12 records and it, again, provides us some protections.

13 I would like to give you two quick examples that have
14 occurred both in the last week regarding Utilization Reviews.
15 I'm getting Utilization Reviews that say, "Medical records and
16 administrative records reviewed." Well, I can see the medical
17 records, but what are the administrative records? So I make a
18 request, and I didn't get them until the day of the actual
19 trial. Now, they weren't noted as administrative records;
20 they were noted as an intake form. I had no way of confirming
21 that that was the same document that was reviewed by the
22 Utilization Review. So, again, for my client's due process
23 rights, these things need to be put on a declaration, under
24 penalty of perjury, that we are getting the documents and the
25 true and accurate documents.

1 to pursue discovery are severely limited by what will get paid
2 for under the fee schedule. By contrast, the defendant can
3 enter into contract -- contracts whereby they can obtain
4 services outside of the regulations at a lower cost. The
5 injured worker cannot do this. Therefore, a different fee
6 schedule is being applied to defendants by these regulations.

7 The second regulation is 9982(c). This section will
8 work only in cases where the defendant claims the
9 Administration or workers' compensation insurer failed to
10 provide any records within 30 days from the employee's
11 request. But what happens if only partial records are
12 produced? The injured worker or their attorney will believe
13 that there are additional records but be unable to prove who
14 is in possession of the missing records. If a subpoena issues
15 for the additional records and duplicative records are sent,
16 then the injured worker and their attorney must pay for the
17 cost of the records.

18 We understand that Labor Code Section 53 -- 5307.9
19 provides that the Copy Service Fee Schedule will not allow for
20 payment for records that are produced within 30 days from an
21 employee's request through an employer, but the regulations
22 must address the situation where partial records are produced.
23 Therefore, we recommend that the following language be added
24 to subdivision (c): "If only partial records are provided
25 within 30 days, this fee schedule applies to obtaining the

1 additional records in the employer's or insurer's possession
2 which were requested by the injured worker. If duplicative
3 records are included in the records requested after 30 days,
4 this fee schedule shall also apply to those records as the
5 employer claims administrator or workers' compensation insurer
6 should bear the burden of identifying what was previously
7 produced within 30 days of the initial request."

8 Thirdly, and perhaps most importantly, we see a
9 problem with 9982(f)(1). This section should be amended to
10 read: "... duplicative records are previously obtained" --
11 excuse me -- "... duplicative records previously obtained and
12 timely served on the opposing party from the same source."
13 It's too often records are not served, and the injured worker
14 or their attorney should not be charged with having to
15 complete a declaration to accompany the subpoena when they
16 have no knowledge that there are any records in the possession
17 of defendant.

18 Thank you.

19 MS. OVERPECK: Thank you.

20 Dan Jakle?

21 DAN JAKLE

22 Hi, my name is Dan Jakle. I represent ARS. We are a
23 major copy service in California, and there was a couple of
24 specific items in the regulations I wanted to address.

25 The first one has been addressed, I think, by Jim

1 Butler regarding 9982(f)(1) on duplicative records. We feel
2 that the -- that this particular regulation, the way it's
3 written, severely impacts the applicant attorney's right to
4 discovery, and -- and that just should not be. We're limited
5 here to the fact that the -- the records provided would likely
6 be edited by the defense, and they'd be the only records
7 available.

8 The second one is 9981, which is the bills for copy
9 services, and I think that Greg Webber identified this. The
10 HIPAA codes that are currently in place -- there's only two of
11 them, and there's not sufficient codes to allow for all six of
12 the charges that the copy services can make.

13 The third item is Regulation 9982(e)(1). And,
14 basically, the item -- what I wanted to say about that one is
15 that it needs to be more specific. If an applicant copy
16 service allows the 30 days, plus five for mailing, for the
17 defense to provide records, then on the 36th day the applicant
18 copy service should be able to subpoena those records and go
19 out and get them, irrespective of the fact that the defense
20 might provide them on the 38th or the 40th day after their
21 time limit has expired.

22 Those are my comments. I've also submitted my
23 comments electronically.

24 MS. OVERPECK: Thank you.

25 Carl Brakensiek.

1 CARL BRAKENSIEK

2 Good morning. Carl Brakensiek on behalf of the
3 California Workers' Compensation Services Association.

4 First of all, I'd like to congratulate you and your
5 staff for your efforts on this fee schedule. It's been a long
6 process and you've put a lot of time and effort into this, but
7 I think it's not quite ready for prime time. It needs more
8 work. We have heard a lot of testimony already this morning,
9 we have provided our written comments that go into great
10 detail, so I'd like to give just a couple of general comments
11 on the fee schedule.

12 For those of us who have worked in and were involved
13 with SB863, we know a strong message that that legislation
14 conveyed was that the legislature wants to make workers'
15 compensation more efficient and reduce frictional costs.
16 Secondly, we have laws that we must live with. Both the
17 California Constitution and the Federal Constitution mandate
18 due process of law for all parties.

19 In this case, the applicant copy services work for
20 the injured worker, and their job is to participate in
21 process, to make sure that injured workers receive due process
22 of law. They have the burden of proof. If they are not
23 entitled to get all the evidence they need to prove their
24 case, they lose. And so when we put together a fee schedule
25 for copy services, we must keep that in mind, that our overall

1 objective is to ensure due process of law for injured workers.

2 In the case of copy service fees, there is presently
3 a very high incidence of disputes with -- regarding the bills.
4 Most of the -- the bills the copy services submit for
5 reimbursement are objected to, and so there's a -- there's a
6 big incidence of friction that exists, and we see very little
7 in these regs that will reduce that amount of friction. We
8 still think that there are going to be disputes, which with
9 more detailed regulations could -- could help them reduce.

10 Secondly, we're concerned that the -- the structure
11 of the proposed fee schedule ought to be revisited and
12 considered in light of the comments that have been made by the
13 various parties to -- to basically promote independent
14 discovery. Again, the burden is on the injured worker, and we
15 should not be imposing any restraints on their ability to
16 prove their case.

17 One particular area that I want to touch on is the --
18 the ROI fees that are -- that are mentioned in the regulation.
19 But in your Regulation 9983(a)(3), you basically say that ROI
20 fees are subject to Evidence Code Section 1563. In my
21 opinion, that mere statement is not adequate. Those fees are
22 often out of hand. And even though the Evidence Code attempts
23 to put a cap on them, that -- that limit in the Evidence Code
24 is widely ignored, and you have regulations that do not appear
25 to -- to have any mechanism for addressing that issue, and

1 that's a common issue.

2 ROI fees impact employers, they impact injured
3 workers, they impact their attorneys, they impact the copy
4 services. And I think that we need to consider that if there
5 is a situation where the custodian is attempting to extort
6 more than the statutory fees permitted by the Evidence Code, I
7 think there ought to be a mechanism to address that. We
8 believe that you have the power to -- to regulate those fees.
9 And at a minimum, there may be additional costs imposed on the
10 WCAB, perhaps in handling expedited hearings, requests for
11 orders to compel production, et cetera. And so we would urge
12 that you consider those if you're going to revise these
13 regulations.

14 I guess I just want to conclude by saying there are
15 -- we've made a good start with these regulations, but there
16 are more fine-tuning that needs to be done. And we certainly
17 look forward to continuing to work with you to -- to improve
18 these regulations.

19 Thank you.

20 MS. OVERPECK: Thank you.

21 Diann Cohen.

22 DIANN COHEN

23 Good afternoon, everyone. MacroPro and myself have
24 been proponents of the reform. And we really believe that
25 employers should pay what's fair and what's reasonable, and

1 that's what we have been thumping along for the last three
2 years. And we do appreciate the predictability, simplicity in
3 reducing the issues that cause liens in the reforms. However,
4 we believe that the pendulum has swung a little too far.

5 First -- our first concern is that when developing
6 this new fee schedule, there was no data based on the type of
7 business we provide or the services we provide that was
8 considered. Data from other states and the federal government
9 was used for medical, for interpreting and court reporters,
10 for their reforms, but none for the document retrieval
11 services that we provide. Obtaining x-rays or films from the
12 custodian -- we're allowed now \$5.26. That's just
13 unrealistic. The industry standard is \$15. If we say to
14 them, "But we're going to pay you \$5.20," they're going to
15 say, "Then you're not gonna get records." And that's just the
16 way it is, so it's unrealistic. So the copy service would
17 then have to lose \$9.74 for every x-ray that they produce on
18 behalf of the injured worker, and that's -- that doesn't make
19 sense, that you would legislate a loss automatically.

20 These regulations also cause concern because there is
21 a lack of the cost of living increases. And notably, the
22 doctors and -- and the California Workers' Compensation has
23 been -- insurance has been -- just been granted an increase of
24 more than what COLA would have provided, and yet there's
25 nothing built in for our industry.

1 It is important to note that when this process
2 originally occurred, it had nothing -- it had nothing to do
3 with passing on the fees of the custodians. It had to do with
4 billing practices. These regulations do address the billing
5 practices. However, the State only provided a Band-aid on the
6 regulations when it comes to the huge issue that is plaguing
7 the workers' comp system, which is unregulated custodians.
8 Sadly, the State is unwilling or refuses to figure out how to
9 control the costs from these custodians and to regulate them.
10 What they did was they transferred -- they simply transferred
11 the responsibility of who was going to pay for these fees.

12 I had meetings with the State, and I sat in the
13 meeting and I asked "How is it reasonable that you're
14 transferring the responsibilities of the custodial fees from
15 the benefiting party to a company that is merely making the
16 records available to be used in their research and their
17 discovery?" And Lach Taylor looked me straight in the face
18 and said, "Diann, if you can figure out how to control their
19 cost, we would reverse our decision."

20 All we're doing is transferring it. It's not fair to
21 those companies, and a lot of small companies will go out of
22 business because of it. The custodian fees are the elephant
23 in the room. And unless they are rela -- unless they are
24 regulated, the State is merely transferring who is writing
25 that check.

1 And lastly, the DIR increase their own fees for
2 copying records. Is it reasonable that they would regulate
3 and object to a company charging \$1 per page, but then allow
4 themselves the same \$1 per page? Theirs is a one-step
5 process. They go, they copy the records, and it's done, \$1
6 per page. Copy services have a 19-step process, and they are
7 being asked to do it for ten times less than what the DIR is
8 now allowing themselves. I don't know if that's quite that
9 reasonable, but in the same bill I think it is something that
10 we should ponder.

11 Thank you.

12 MS. OVERPECK: Thank you.

13 Patty Walpeck (sic)?

14 PATTY WALDECK

15 Good morning. My name is Patty Waldeck. I'm the
16 founder and president of MacroPro, a defense-only copy
17 service. I think I need my glasses.

18 I don't want to go over what Diann already talked
19 about, but I would like to talk about the fact that I do also
20 feel that the new regs prevent the injured worker from getting
21 the evidence they need to prove their case. I think where
22 you're talking about the films and the ROI's and the fact that
23 those charges are not the responsibility of the copy service,
24 because we are not a party to the case, we have no claim,
25 we're just a pipeline, if you will, to pre -- to get the

1 records and give them to whoever should have them, that they
2 -- the injured worker is not going to be able to get their
3 records because it won't be paid for if there's an ROI.

4 Now, the ROI's we haven't talked about, out of state,
5 have no regulations that prevent them from charging us \$1 a
6 page, plus other charges. So how would the injured worker,
7 who -- who's -- who needs to get those records, but the copy
8 service can only charge \$180 -- how is that gonna happen? I
9 don't think that will happen. The same goes for x-rays. When
10 it's \$5.26 a page, we were told that we should tell the
11 doctors that we won't pay them any more than that and they'll
12 have to give us the x-rays. Unfortunately, they don't have
13 to. They'll just tell us to take a walk. I sent Lach Taylor
14 and also Destie, and others, the note we got from a doctor's
15 office up here in San Jose where he -- we had objected to a
16 50-dollar ROI. And he said, "Take it or leave it. The longer
17 you say 'no,' the longer it will take you to get the records."

18 So it really isn't up to us to enforce this. It's
19 really up to the DIR, the WCAB, whoever wants to fight the
20 fight. And if you think that they will pay attention to the
21 -- the Code of Civil Procedure where it says that they can
22 only charge 10 cents a page and \$24 an hour, sorry. There's
23 nobody watching those people at all. And we can't do anything
24 because we're not a party, and we're not an injured party
25 because we're a neutral party.

1 I thank you for listening. I hope that you guys will
2 really look over this again. And I agree with Diann about
3 giving us some way to increase pricing, not us. We do
4 defense, and I'm not terribly as concerned about us as I am
5 about the injured worker. WCIRB approved amended filing for
6 the insurance industry of 9.6 percent this year, and the
7 physicians' costs were approved for an increase of 7.3 a year.
8 What we're asking for is a way to let the businesses who have
9 been started by entrepreneurs, who are in the public sector,
10 to have a way to be able to increase their fees as the State
11 increases workers' hourly pay and other in -- increases go up.

12 Thank you so much.

13 MS. OVERPECK: Thank you.

14 Dan Mori. Mora. Sorry.

15 DAN MORA

16 Good morning. My name is Dan Mora. I represent --
17 I'm the CEO and founder of Gemini Duplication. I also am a
18 member of CWCSA and the former immediate past president.
19 Thank you for the opportunity. I think that it's -- I think
20 it's great that we can have this opportunity, so I appreciate
21 that. I hope that we -- we all listen in the room.

22 I have done a diagram here, and you guys should all
23 have -- or you will eventually have -- a copy of it. It is
24 the -- it's a simple flow chart of the effected portion of the
25 copy service process, and I would like to walk you through

1 that, starting with the first block. It's an injured -- the
2 interview of the injured worker, followed by the letter of
3 representation. And those two light -- lighter highlighted
4 boxes are the new process that we're looking at. I'm gonna
5 kind of skip that, but I do want to point out that the current
6 state in this process includes the letter. At least most
7 applicant attorneys send a demand letter via the authority of
8 Regulation 10608 with their letter of representation, so those
9 are usually in one box. But I want to point out also that
10 that 10608 is optional, if you read it. There's a big "if" in
11 there.

12 Let's see. The next block is the request for records
13 via copy service and subpoena duces tecum, a.k.a. copy-related
14 services. And then this second -- or the next box is the --
15 the -- what we are all here for really, is to set the ground
16 rules to accomplish the administrative -- Administration's
17 goals to decrease the amount of dispute. That block says,
18 "Respond to Objections and/or Motion to Quash." I put a nice
19 little burst next to that that says if this process doesn't
20 receive -- receive attention via these regulations, unintended
21 consequences are imminent. To the degree we fail to be
22 specific enough in the regulations, that would correspond to
23 the degree of dispute.

24 I put a nice red line to the likely consequence, and
25 that points to an alternate process in discovery. You have --

1 you can obtain records through subpoena duces tecum, but you
2 also have the option to depose. Instead of the standard form
3 of discovery, likely copy serve -- through copy services, the
4 applicants and applicants' attorneys must achieve medical
5 evidence reimbursable under law through deposition. I should
6 additionally point out that discovery can be conducted, again,
7 in many ways in a deposition. For example, parties may
8 request the services of a deposition officer to perform
9 copy-related services at the deposition, a service that copy
10 services are uniquely and specifically qualified for.

11 The next piece I'd like to draw your attention to,
12 again, is those -- those lighter highlighted boxes surrounding
13 the Regulation 10608 demand letter and Labor Code 5307.9, the
14 30-day waiting period. And I need to point this out. This
15 was in our last meeting with the Chief Counsel -- the former
16 Chief Counsel to the DIR, Kathy Zalewski, validated this for
17 me, which I was glad. This 30-day waiting period,
18 unfortunately, the way it's worded, can be bypassed. The
19 10608, or at least the 30-day waiting period, starting on --
20 is triggered by Regulation -- or the invocation of Regulation
21 10608, which is specifically optional. Without clarification,
22 again, dispute is likely.

23 I want to speak quickly on price and where we are
24 there. The Labor Code 5307.9 prescribes that it shall require
25 specif -- specificity in billing for these services. I just

1 want to point out that in CWCSA regulations that were
2 submitted to the Administration, it separates out into blocks,
3 or bundles, the actual work that's being accomplished. I
4 think that's really important to understand because the work
5 that's actually being accomplished can be verified, and it
6 should be ver -- or it can be verified, should be verified, by
7 the judges if there's a question about the discovery process,
8 et cetera.

9 I'd like to also speak -- you know, the funda --
10 fundamental origination of dispute -- these regulations cannot
11 -- cannot -- cannot fix that. To bridge this gap, trust needs
12 to be reestablished, specific policy needs to be deliberate,
13 and enforcement must be held accountable. I will also submit
14 and I will be e-mailing later on today a white paper on the
15 understanding of discovery. As you look over that, please --
16 I want to echo my -- everyone else discussing the right for
17 the injured worker under the constitution for independent
18 discovery and right to -- to that.

19 Finally, please seriously consider subject matter
20 expert input. Our motives are -- are pure in that we want to
21 reduce dispute, period. It's a cost to the system, it's a
22 cost to us that just has to be eliminated. We only desire
23 stability and fairness. All are available through these
24 regulations if you choose.

25 Thank you for your attention.

1 MS. OVERPECK: Thank you, Dan.

2 Robert Santoyo?

3 ROBERT SANTOYO

4 Hello, my name is Robert Santoyo. I'm the owner of
5 United Document Imaging. First, I'd like to thank the
6 Administration and the staff here for the countless hours you
7 put into, of course, the regulations.

8 I'm gonna keep it short and sweet. I'm gonna agree
9 with my colleagues here but also disagree with one, and that
10 would be with Med-Legal compared -- concerning the ROI fees.
11 The ROI fees are running ramped. They're not regulated, and
12 I'm gonna give you two examples right off the bat, last week.
13 Since they're brazen in doing it, I'm just gonna go say this.
14 An imaging center for MRI's -- we subpoenaed the records,
15 followed all the rules, waited 30 days, and they send me an
16 invoice for -- let's just jump to the future. Let's say this
17 is all in place -- \$150. So \$150 for what? No explanation,
18 no invoice, just an invoice that says "\$150." I don't know if
19 it's records, I don't know -- I don't know what it is. When I
20 called them and asked, they said, well, my cost is my cost:
21 "If you want 'em, get 'em. Go ahead and file a motion if you
22 want." I just ask to be reimbursed at that time.

23 This is the kind of reaction we're getting from many
24 of these doctors now. There's even entities which are not
25 entitled to ROI fees which are actually asking for them. I

1 had a copy service send me a bill from a carrier, a carrier
2 file. Carriers are party to the case. It's clear -- it's
3 clear in 1158 that they're not entitled to these fees.
4 They're charging me \$80 to turn around and pay me back with my
5 own money. It makes no sense.

6 I think we just -- I'm not gonna sit here and beat up
7 the whole thing. I think it does have holes in it. I think
8 it's a work in progress. It's great. I do feel that the ROI
9 fees are what we should concentrate on. We should regulate
10 the ROI companies. We do make exception with the WCAB, where
11 they charge certain fees, but -- unless it is the injured
12 worker and they're charged a different fee, 10 cents a page,
13 other things like this.

14 Compared to Med-Legal, I'm a mom-and-pop shop. This
15 great nation is made on entrepreneurs. It's gonna put -- this
16 is a job killer. The ROI fees being implemented are a job
17 killer. I don't want to have to close down. I'm sure there's
18 a lot of other small businesses that don't want to close down.
19 I don't want to put single mothers, fathers or college
20 students out of work. I'm not gonna do that. I'm sure we'll
21 all be fine. We'll find a way to build our business model and
22 survive. But let's put the cost where it belongs, not on the
23 provider. We have no recourse. We have to wait 'til the end
24 of the case before we become a party, to turn around and file
25 a 150-dollar lien to try to get a 180-dollar bill, and it

1 makes no sense.

2 We need to take that out. We need to be sensitive to
3 the needs of the injured worker because they're not going to
4 get their records. They're just not going to. It's gonna
5 inundate the courts with motions to compel and produce
6 records. It's going to. It's already happened. I have many
7 of my clients that are saying, "It's okay, Robert. Don't
8 worry about it. We're gonna go ahead and file a motion to
9 compel and produce, we're gonna take up a judge's time in a
10 courtroom to do what we could have easily done."

11 I do want to say, please be sensitive and understand
12 that the ROI fees do not belong bundled up. Do I support the
13 bundle? I think it's a great way to go, it's -- it's
14 transparency, it's just -- it's -- it's simple. But the ROI
15 fees need to be removed and made a -- a reimbursable by a
16 proof of an invoice and a cancelled check from the bank, as a
17 -- as a reimbursable commodity, something of that nature. It
18 can be fixed if we work together.

19 Thank you for your time.

20 MS. OVERPECK: Thank you.

21 Mark Sektnan.

22 MARK SEKTNAN

23 Good morning. I'm Mark Sektnan on behalf of the
24 Association of California Insurance Companies. I'm also here
25 on behalf of a large employer insurer coalition, including the

1 California Chamber of Commerce and the California Coalition of
2 Workers' Comp.

3 I just want to highlight a couple of things. And we
4 will, of course, have a more detailed letter in later. First
5 of all, I want to thank the Division for the work they've done
6 on this. You know, the problem with SB863 is in the
7 implementation and in the fee schedules and development and
8 predictabilities that we all need that makes the system work,
9 and we think this goes a long way. Even though we have some
10 concerns about the 180, it's higher than the study done by the
11 Commission on Health and Safety and Workers' Comp, we
12 appreciate the Division's effort to try and hit that sweet
13 spot between a reasonable return for the payment for the
14 services and reasonable and predictable costs for payers. We
15 appreciate that.

16 There are a couple things that I do want to highlight
17 in -- in here. We have two things that I want to bring up.
18 One is, a lot -- there's been a lot of talk about the subpoena
19 issue. We all have some language in our letter that deals
20 with trying to -- we feel that subpoenas are often just thrown
21 out there just for the sake of throwing them out, even though
22 there's no intent that the records actually be produced. And
23 the cancellation fee -- we feel that should also be shared
24 with the people introducing the -- the subpoena.

25 Also, the definition has come up -- in 9983(1), we

1 think you should add the term "but not limited to." One of
2 the concerns we have and have always seen in workers' comp --
3 and we know this comes up -- is that if you're not specific in
4 the statute, there are those out there in the system who will
5 find a way around it and try and find a way outside of the fee
6 schedule. That's why we keep coming back here. You know,
7 we've done it with drugs, and we did -- we started with
8 repackaging and then compound, and now we see it with -- we
9 want to make sure it doesn't happen with -- it's happening
10 with -- happens with copy fee services. So we'll provide more
11 detailed comments later.

12 Thanks.

13 MS. OVERPECK: Thank you.

14 Patrick Godinas?

15 Bob Link?

16 We're losing our audience. So that's everybody I
17 have checked. Are there any other people in the audience who
18 would like to come up and testify regarding the Copy Service
19 Fee Schedule?

20 RICHARD MEECHAM

21 Hi, I'm Rick Meecham. I'm an applicant's attorney.

22 Your study identified the problem with the cost of
23 copy services as being billed without getting paid and the
24 copy services having to wait. I don't see that being
25 identified or addressed or providing the copy services with a

1 way to get paid. Instead, what I'm seeing is more
2 regulations. And when we have regulations, regulations become
3 a reason to say no.

4 After these regulations go out, you will see letters
5 from insurance companies that list all these reasons to say no
6 in their denials for paying these bills, and the copy services
7 will continue to wait to get paid. The regulations need to
8 provide a way for the insurance companies to say yes. If --
9 if the copy services follow procedure, then they need to get
10 paid. The burden needs to shift to the insurance carriers to
11 pay, and I don't think the Regs have done that and I think
12 they need to.

13 Thank you.

14 MS. OVERPECK: Okay. Thank you.

15 Anybody else who'd like to testify on the Copy
16 Service Fee Schedule?

17 Okay. I see no one raising their hand, so we will
18 close the testimony for the copy service fee schedule. Please
19 remember that if you have any written comments that you would
20 like to send in, to do it before 5:00 o'clock today. And make
21 sure we get it either upstairs on the 18th floor or e-mail or
22 fax it in.

23 So now I'm gonna turn back over to the MTUS
24 regulations. Is there anyone in the audience who wanted any
25 more testimony on those regulations?

1 Okay. No one's raised their hand on that either. So
2 like the Copy Service Fee Regulations, you have until 5:00
3 o'clock p.m. today to send in any written comments that you
4 would like us to take a look at and address.

5 Thank you all very much for your participation. We
6 will go back to the office, we'll get the written transcripts
7 which, by the way, we will post on the DWC web page. We will
8 look at every comment and read every comment and make a
9 determination whether or not we want to make revisions for
10 another 15-day comment period. That comment period would be
11 only written comments. And as I said, as long as you've
12 signed up today, you will get notification for the next step
13 that we'll be doing with the regulations.

14 And thank you, everyone.

15 (Time End: 11:44 a.m.)

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R E P O R T E R ' S C E R T I F I C A T E

I, Richard H. Parker, Official Hearing Reporter for the State of California, Department of Industrial Relations, Division of Workers' Compensation, do hereby certify that the foregoing matter is a full, true and correct transcript of the proceedings taken by me (pages 1 through 26) in shorthand, and with the aid of audio backup recording, on the date and in the matter described on the first page hereof.

Richard H. Parker

RICHARD H. PARKER,
Official Hearing Reporter
of the State of California,
Workers' Compensation Appeals Board

Dated: July 8, 2014
Fresno, California
/s/