

SACRAMENTO, CA  
SACRAMENTO OFFICE  
TEL: (916) 442-2415

LOS ANGELES, CA  
WESTWOOD OFFICE  
TEL: (310) 470-1869  
FAX: (310) 470-9648

DAMON M. RIBAKOFF  
(1970-2007)



5820 CANOGA AVENUE,  
SUITE 250  
WOODLAND HILLS, CA 91367  
TEL: (818) 992-9999  
FAX: (818) 992-9991

NICHOLAS P. ROXBOROUGH  
DREW E. POMERANCE  
GARY A. NYE  
MICHAEL B. ADREANI  
MARINA N. VITEK  
JOSEPH C. GJONOLA

DAVID R. GINSBURG  
BURTON E. FALK  
RYAN R. SALSIG  
DARON A. BARSAMIAN  
TREVOR R. WITT  
VINCE S. GANNUSICO  
DONNA M. LEUNG

March 25, 2020

Via Email and U.S. Post Office  
[gparisotto@dir.ca.gov](mailto:gparisotto@dir.ca.gov)

Mr. George Parisotto  
Administrative Director  
California Division of Workers' Compensation  
1515 Clay Street, 17th Floor  
Oakland, California 94612

Re: Ex Parte Notice of Application for TRO or injunctive relief to authorize telemedicine for QME evaluations and to authorize insurance payments

Dear Mr. Parisotto:

PLEASE TAKE NOTICE THAT the undersigned will appear in Department 85 of the Los Angeles Superior Court, located at 111 N. Hill Street, Los Angeles, CA 90012 at 8:30 a.m. on Tuesday, March 31, 2020 on behalf of California Medical Evaluators ("CME"), and injured workers and QME plaintiffs who will be identified later ("Plaintiffs") to make an *ex parte* application for immediate relief by way of a TRO and/or an expedited hearing on a motion for preliminary injunction to order the DWC to unconditionally authorize the immediate acceptance and implementation of remote QME evaluations, and to further order that insurers, employers and third party administrators may not object to or decline to pay for remote QME evaluations. Plaintiffs seek *ex parte* relief on the grounds that irreparable harm or immediate danger will occur before a standard motion for injunction can be heard, and the threatened harm outweighs the harm that may be caused to the DWC without notice.

Please advise the undersigned whether or not you will oppose this *ex parte* application. If we do not hear from you by noon on Monday, March 30, 2020, we will assume that you will appear at the *ex parte* hearing and oppose our *ex parte* request. Normal *ex parte* notice is only 24 hours. Due to the complications caused by the ongoing and growing Covid-19 pandemic, we are giving you 96 hours' notice. This is more than sufficient time for you to finally take decisive and overdue critical action in the face of a pandemic that threatens the health and safety of countless injured workers, and the very workers' compensation system itself.

## **Summary of Argument and Evidence**

Ever since news of the Covid-19 virus became known and dire predictions were made that it would turn into a catastrophic pandemic, a prediction that has exceeded all expectations each day, we and our clients in the QME community have made numerous requests that you take decisive action to protect injured workers, the QMEs themselves, and the workers' compensation system so that it does not crater prematurely or at all during this worldwide emergency of indeterminate duration, by authorizing remote evaluations, for QMEs. Thus far, all our requests have fallen on deaf ears. To briefly refresh your recollection:

- On March 17, 2020, you were asked to announce a formal policy to authorize remote QME evaluations, but failed to respond or take any action.
- On March 19, 2020, the same day that Governor Newsom ordered all of the state's 40 million residents to stay at home with exceptions for essential work or other needs, a story appeared in the trade journals entitled "QMEs Want Remote Evaluations During Pandemic; DIR Won't Say Whether They Can," which stated that a Southern California firm representing over 100 QMEs had "asked the Department of Industrial Relations to adopt an emergency policy change that would allow remote evaluations in response to the COVID-19 outbreak." That was my law firm. (We began asking the DWC for relief at least two weeks earlier.) You were reminded of this story by email. You gave no response and took no action.
- On March 20, 2020, Dr. Gabor Vari emailed you to request a brief call to discuss remote QME evaluations to stabilize the workers' compensation system, citing growing momentum for such a solution. Dr. Vari framed the critical requests for you and the DWC to act by (1) unconditionally authorizing remote QME evaluations for all specialties, and (2) Disallowing insurance carriers from denying reimbursement for remote QME evaluations. Hundreds of QME evaluations were cited as being cancelled daily. You never called Dr. Vari. Your only response was a noncommittal email stating that you were evaluating factors and hoped to issue more definitive guidelines "early next week." Dr. Vari quickly asked you three questions about issues you raised, which you never answered. You never issued any such definitive guidelines authorizing remote evaluations for QMEs even as the workers' compensation QME system had begun a death spiral.
- On March 20, 2020, the DIR issued a Newslines with the heading "DWC Provides Guidance on Medical Evaluations During State of Emergency Period," which stated that the DWC was exploring the feasibility of telemedicine for QME evaluations.<sup>1</sup> But the announcement also included a disruptive and destructive message that the coronavirus pandemic could be good cause for QMEs to cancel exams. Since there is a well-known shortage of QMEs in the workers' compensation system and QMEs are generally over 65

---

<sup>1</sup> We have obtained a document from the insurance industry that indicates you have requested their input for telemedicine evaluations. Your responsibility as the administrative director is to be concerned about the health and safety of the injured workers. However, as with the proposed adjustments to the medical-legal fee schedule, you consistently demonstrate an overly solicitous concern for insurer's interests over the well-being of injured workers. These are not mere optics, but an actual example of the evidence and testimony to be proffered to the Court in support of Plaintiff's *ex parte* application.

years of age, which makes them among the most vulnerable to contracting COVID-19, many QMEs took advantage of the DWC's "cover" to protect their health and cancelled many evaluations. This Newsline explicitly stated, "DWC is not authorizing any course of action."

Telemedicine has become the standard in the healthcare industry to protect the safety of injured workers and other patients, and the safety of our most precious resource in this pandemic, the QMEs and other physicians and healthcare workers who are on the frontlines fighting the pandemic and falling victim to it first. The DIR and DWC acknowledged this very fact on March 19, 2020, when they issued a Newsline and Press Release that acknowledged "the efforts of the workers' compensation community to provide care for injured workers during the COVID-19 pandemic" and encouraged "all parties to consider creative solutions appropriate to providing care to injured workers," including telemedicine, while also adhering to "all public health guidance and orders."

As noted above, a large portion of the QMEs are over 65 years of age, which puts them at higher risk for severe illness and possible death by COVID-19. There already is a QME shortage, causing backlogs in the current workers compensation case load.<sup>2</sup> Injured workers experience delays in receiving evaluations and the benefits that they are entitled to because of this shortage. The DWC shouldn't exacerbate the backlog by continuing to fail to authorize remote QME evaluations, resulting in harm to injured workers. At the federal level, Congress passed the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 earlier this month to allow medical providers to more easily provide medical services to patients remotely.

QMEs play a critical role in the workers' compensation system as impartial medical experts for both the applicant and the defendants to help resolve disputes between the parties by providing impartial medical opinions related to contested issues. The medical-legal report prepared by a QME is critical because the WCAB intends for the QMEs to "testify" by means of their reports, and the WCAB will not typically go forward to hear a case unless a medical-legal report has been provided. Injured workers cannot get essential medical care or benefits without QMEs and their reports. As workers' underlying medical conditions go untreated and become exacerbated, the workers become potential fatal victims of the COVID-19 pandemic and sacrificial lambs of your indecisiveness.

We have asked you repeatedly, and with greater urgency as the pandemic spreads, for two simple actions: First, immediately implement a policy change that would recognize and allow remote medical evaluations, for all specialties, to take place in response to the COVID-19 outbreak. This will help ensure that both physicians and injured workers minimize the possibility of spreading COVID-19. Second, insurance carriers should be precluded from withholding payment or objecting to an evaluation on the basis that an evaluation was conducted remotely. QMEs need to be assured that they will receive timely compensation from insurance carriers. It is imperative that we keep the workers compensation system operating during this crisis.

---

<sup>2</sup> See the November 2019 State Auditor's Report on the DIR entitled "Its Failure to Adequately Administer the Qualified Medical Evaluator Process May Delay Injured Workers' Access to Benefits." This Report dealt with issues such as the shortage of QMEs in the workers' compensation system and myriad issues reflecting poorly upon your administration of the QMEs. This too will be evidence for the Court.

Remote QME evaluations should be allowed in our technologically advanced state. The telemedicine technology has been around for years. Applications such as Zoom are HIPAA compliant and can be downloaded easily to mobile smartphones, computers and tablet devices. Just this week, a person I know had a telemedicine visit with a neurologist in order to treat his migraine headaches. The physician sent him a link via email that connected the physician and the patient via their respective phones. The physician was able to direct the patient to make certain eye movements, which she observed through the phone's camera. The patient was prescribed a new medication immediately. The neurologist was unwilling to see in person any patients over 60 years of age or any patients with flu-like symptoms, so without remote evaluation technology, the examination would never have taken place.

How can you continue to refuse to adapt to our current health crisis by not simply embracing well-established technology for remote QME evaluations, which will allow injured workers to receive both medical and financial benefits that you are required to ensure are delivered promptly and effectively? Please visualize yourself at a microphone announcing to all Californians that you refuse to help injured workers by making a policy decision consistent with the rest of world during this pandemic. The optics are horrible. The ramifications are worse. The legal consequences are obvious.

We see no regulatory impediment to the policy changes we have requested. The medical-legal fee schedule (8 CCR § 9795) mentions "face-to-face time" as a complexity factor. 8 CCR § 9793 does not define "face-to-face time" more specifically. Nothing in the language of § 9795 requires that QME evaluations in general or face-to-face time specifically must be conducted "in person." Remote evaluation technology satisfies a literal interpretation of "face-to-face time" because the physician and the patient can see and hear each other in real time. Therefore, the requested policy changes amount to recognition of the expansive language already included in 8 CCR § 9795. As my anecdote above about the neurologist examination indicates – indeed, as the proven history of remote evaluation technology in treating patients proves – physicians can direct the use of smartphones and other devices so as to observe gross motor skills as well as minute eye movements, in order to successfully treat and diagnosis patients. The same is irrefutably true for QME evaluations.

In the past, you have allowed the DWC to unsuccessfully promulgate underground regulations that imposed non-existent words into the medical-legal fee schedule ("MLFS") or twisted the existing words beyond reason. Now you have the opportunity to do the exact opposite, i.e., to interpret the MLFS and the words "face-to-face time" literally and, especially in light of the pandemic, to reasonably preserve the intent of the regulation. Further, if you feel you need authority to make the right decision, I am sure the Governor will support the DWC rather than have the DWC continue to swim upstream against the Governor's other life-saving orders and proclamations. A failure to act responsibly will be more than a mere embarrassment to the Governor. It will be a clear and present danger to the public on his watch as well as yours.

As for your concern about the insurance industry, I have obtained an executive memo issued by CWCI, a non-profit representing the interests of worker's compensation insurance carriers, which reveals insurers' support for remote QMEs evaluations during this pandemic

crisis.<sup>3</sup> Survey highlights include: (1) 69% of insurers believe the DWC should allow remote medical-legal evaluations during this crisis; (2) 81% of insurers believe QMEs should not be required to perform the evaluations at the physical location listed on the Panel, ostensibly to facilitate remote evaluations; and (3) only 30% of insurers feel they would not be able to provide injured workers with basic resources to participate in a remote evaluation. However, a June 2019 PEW research study revealed that 81% of Americans own smartphones, which is all that is required for telemedicine evaluations other than the QME sending a secured link for the injured worker to download and install an app on their smartphones. I am sure that you have this CWCI survey by now. This CWCI survey will also be evidence of the probability of success in our case and the *de minimis* harm (if any), on balance, to the DWC from issuance of a TRO or injunction.

It is now clear that the insurance carriers by and large support the use of remote evaluations for QME exams. It is also clear that injured workers (through CAAA) want this, the doctors (through CSIMS) want this, and the insurers (through CWCI) want this to happen. There is literally no reason that DWC shouldn't do this now that it's clear that every major stakeholder group wants QME telemedicine now in the face of this pandemic. There is no credible or substantial evidence that injured workers will be harmed by the policy recognition of remote evaluations going forward, especially not during exigent, emergency conditions created by a pandemic.

All of the above and much more clearly proves that Plaintiffs will suffer irreparable or immediate harm before a standard motion for injunction can be heard, and the threatened harm outweighs any potential harm to the DWC without notice. Plaintiffs' request for a TRO and/or an expedited hearing on a motion for injunctive relief will be granted because the Court will determine that Plaintiffs' likelihood of success on the merits and the relative harm to Plaintiffs if the TRO or injunctive relief is denied substantially outweighs that to the DWC if the relief is granted. All stakeholders, including the insurance industry, support remote QME evaluations, so there is no real opposition. You have a chance to make a historically good and right decision now, or be adjudged by a court of law for failing to take life-saving action in the face of an historic pandemic.

Please see : <https://mhealthintelligence.com/news/california-enacts-telehealth-payment-parity-boosts-asynchronous-care>. This has always been part of Governor Newsom's perspective on telehealth, even more so now with COVID-19. Just last session, Governor Newsom signed AB 744 which mandates that payers reimburse healthcare providers for telehealth services "on the same basis and to the same extent" as they cover in-person services. California becomes one of roughly a dozen states to require payment parity for these services. The concept has in the past been contested by some payers who preferred the freedom to negotiate specific coverage rates with healthcare providers, but insurers' viewpoints have evolved as rapidly as the pandemic, especially in light of Governor Newsom's actions and the actions of the rest of the world.

---

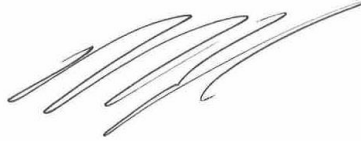
<sup>3</sup> It is telling that the document discloses that you requested this input from the insurance carriers. You did not request any input from the doctors that I am aware of. Similarly, you did not request any input from the injured workers that I am aware of. Injured workers and doctors need to keep banging on the door to be heard whereas you evidently "pick up the phone and call the insurers." There is clearly an unethical bias in terms of the DWC showing preference to insurance carriers. This will come out in your deposition, among others, as our case proceeds with a groundswell of support from all stakeholders. You have the power and authority to make the policy change to avoid a highly publicized lawsuit, which will be more than just embarrassing for your career.

George Parisotto  
March 25, 2020  
Page 6

We urge you to make the morally, ethically and legally correct decision now. I await your very prompt response in light of this *ex parte* notice. In the meantime, stay safe and help everyone else stay safe too, please.

Regards,

ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

A handwritten signature in black ink, consisting of several fluid, overlapping strokes that form the name Nicholas P. Roxborough.

NICHOLAS P. ROXBOROUGH

File: 18096.01  
cc: Burton E. Falk, Esq.  
Victoria Hassid