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TO WHOM IT MAY CONCERN:

My name is Phil Walker. I am a workers' compensation defense attorney and expert in California workers' compensation and the *AMA Guides, Fifth Edition*. I testify as an expert witness in workers' compensation cases throughout California. I am the author of *The AMA Guides Made Simple (Fifth Edition)*.

Many claims adjusters have asked me about the burgeoning field of telemedicine and whether or not the use of telemedicine for medical treatment and/or medical-legal examinations in California workers' compensation is legal. The answers: yes and unclear.

As many who will review this may be new to the expanding world of telemedicine, I would like to provide some background on telemedicine and legal developments in this area.

**What is Telemedicine?**

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The Texas Department of Workers Compensation defined telemedicine as the delivery of medical care and information via a telecommunications network.

California defines "telemedicine" as ... "the practice of health care delivery, diagnosis, consultation, treatment, transfer of medical data, and education using interactive audio, video, or data communications." *Bus. & Prof. Code Sec. 2290.5* (eff. 2007). Specifically excluded for this definition in California are telephone conversations and/or emails between a health care practitioner and a patient.

This means that a patient undergoes an appointment with a physician for "healthcare services" while the patient is in one location and the doctor is in another (the same way you would do a Skype call). The doctor is usually able to observe the patient on camera, although this may not be necessary in treatment areas such as psychological counseling.

Believe it or not, Telemedicine has been around for 40 years. It is on track to be the second fastest growing industry in the U.S. Amazon is going into it--that's all you need to know. Go online to [www.newsmax.com](http://www.newsmax.com) and search for "Amazon Exploring Taking Healthcare Digital" from 7/26/17.

### **Benefits of Telemedicine:**

1. Access to medical care for patients located at significant distances from medical treatment facilities.
2. Decreased wait times to see a physician or licensed healthcare professional.
3. Fast non-emergency care.
4. Improved cost efficiency by reducing non-emergency care delivered by hospitals
5. Reduction in travel time by triaging an injury for medical severity and then referring of the patient to the most appropriate level of care.
6. Help in dealing with the developing physician shortage in the US.

7. Estimate: Savings of \$6 billion in health care savings per year.
8. Quick referral, scheduling, and completion of a second opinion.
9. Gathering information regarding the subject injury as soon as possible after the injury occurs.
10. Less cost for early intervention than by going to an Emergency Room or Urgent Care Facility
11. Ability of people who travel frequently for work (for example: truck drivers and flight attendants) to get medical treatment wherever they are and, possibly, by the same physician or medical group.
12. Ability to keep injured workers "working" rather than taken off work waiting for medical evaluations to produce medical clearance.

**Can treatment in a California workers' compensation case be delivered by telemedicine, either inside or outside of California? Answer: Yes and yes.**

In *Oranje v. Crestwood Behavioral Health*, 2014 Cal.Wrk.Comp. P.D. LEXIS 602, the WCAB permitted a California workers' comp claimant to have either face-to-face or "telephonic therapy" with a marriage and family therapist. She was permitted this because she had moved to Nevada, and the therapist was located in California. This was consistent with the California Telemedicine Development Act which permitted licensed California physicians to deliver telemedicine to a remote patient. What about the location of the patient? It does not matter. The Court said that a California licensed healthcare provider may provide telehealth services while he or she is located in California, whether or not the patient is located in California." *See Bus. & Prof. Code Secs. 686 and 2290.5.*

On 6/16/17, Harbor Health Systems, a One Call Care Management company, announced that it received approval from the California Department of Workers Compensation to offer telemedicine through its medical provider networks.

On June 14, 2017, it was reported that Concentra, the nation's largest occupation medicine company, is going into telemedicine. California is the

first state in Concentra's rollout. Patients will be seen from 7 am. to 11 p.m. initially. Triage will occur 24/7. Telemedicine will incorporate Physical Therapy and second opinions.

There are now a number of apps which provide telemedicine round the clock, 7 days a week, anywhere in the US: Teladoc, Doctor on Demand, MDLIVE, American Well (the app being used by Concentra), and MeMd.

The key benefit to telemedicine for the patient is that the medical appointment now adapts to the patient's schedule. In the old days, a patient had to disrupt his life to go see the doctor at his office. Now, the patient can fit the doctor visit in when it works for the patient since he is doing it by telemedicine.. Through apps, a doctor can peer into your throat and ears, listen to your breath and heartbeat, and then prescribe some medications. For psychiatric or psychological treatment, televisits can also reduce the stigma of being seen in a psychiatrist's or psychologist's office.

Some call this Uber for medical treatment. It is likely to be just as disruptive.

**Can California workers' comp medical-legal evaluations be done by telemedicine? Answer: Most likely "yes" under the California Telemedicine Act; unclear under WCAB ruling in *Gonzales*, below.**

First, the California Telemedicine Act says that a California licensed physician can provide health services through telemedicine. That should cover medical-legal evaluations.

Second, there is only one WCAB case on this issue: *Gonzales v. ABM Industries; ESIS*, 2016 Cal.Wrk.Comp. P.D. LEXIS \_\_\_\_\_. In that case, a WCAB panel of Commissioners Lowe, Brass, and Zalewski noted that Panel QME Dr. Emad was approved to perform Panel QME's by telemedicine by the Medical Director. [NOTE: This is because Dr. Emad is disabled. Apparently, neither the WCJ nor the WCAB Panel knew this.] Dr. Emad supervises a "designee" through the exam, the designee has a chiropractic license (which would make him a licensed California healthcare provider under the Telemedicine Act), and the designee had a QME certification. Unfortunately, in Dr. Emad's listing for the panel it was only indicated that the evaluation would be conducted by telemedicine. Dr. Emad did not indicate that the "designee" was a California licensed chiropractor with

QME certification. The WCJ asked how the parties could make a knowing decision on the panel list without such information.

The WCJ further felt that Dr. Emad might not be on the live video feed (there was no evidence admitted to support this) and that the designee violated California Labor Code Sec. 4628 (a) which provides that no person, other than the physician who signs the report...shall examine the injured employee...."

The facts of this case are so unique that it cannot act as a guide on whether or not California medical-legal evaluations can be done by telemedicine. The California Telemedicine Act says that "healthcare services" can be rendered by telemedicine. Is a medical-legal evaluation a "healthcare service" involving diagnosis, consultation, and treatment under Bus. and Prof. Code Sec. 2290.5? Yes.

Since both the designee and Dr. Emad were QME's, could not both sign the report and therefore satisfy the requirement that the "physician" who signs the report examined the patient. In California, chiropractors fall under the definition of "physician." Many California workers' compensation doctors have physical therapists perform range of motion measurements in work comp evaluations. Does this constitute an examination?

In order to address all of these questions, the telemedicine work comp medical-legal evaluation we perform involve the following: 1) each individual in the examination process is a California licensed healthcare professional providing healthcare services as required by the California Telemedicine Act; 2) all individuals involved in the medical-legal evaluation participate in the live feed; and 3) the only person who examines the patient is the physician who signs the report (individuals such as physical therapists do not examine the patient but may perform measurements under the supervision of the examining physician).

Therefore, all of the stumbling blocks of the *Gonzales* decision have been met. As a 35-year California workers compensation legal counsel, I believe that these actions meet the statutory rules and requirements for valid medical-legal evaluations under the California Telemedicine Act, the California Labor Code, and the regulations related thereto.

#### **FURTHER LEGAL ANALYSIS:**

1. In 2011, California Governor Jerry Brown signed Assembly Bill 415, the Telehealth Advancement Act of 2011. The purpose of such act was to expand dramatically the provision of telehealth services in California. There were literally NO opposing votes in the California Legislature to this act. This Act expanded the initial California Telemedicine Development Act of 1996 to permit telemedicine by all licensed healthcare professionals.

2. Business and Profession Code Sections 686 and 2290.5 allow California healthcare practitioners to provide "real time" telehealth services from their location (distant site) to the location of the patient (originating site) even if the patient resides out of state. **Therefore, under both of these sections, the physician is permitted to provide telehealth services to patients.**

According to the WCAB, if telehealth services are provided in accordance with Business and Professions Code Section 2290.5, California law **precludes a health insurer or health care service plan from limiting the type of setting for where and how telehealth services are provided.** Therefore, I believe California case law, including the decisions of the WCAB, would support a position that an MPN may not refuse to include a physician within the MPN because he provides telehealth services or limit, in any way, the type of setting for where and how telehealth services can be provided. I believe that a Court would likely find such action an illegal restraint of trade under California law in that it prevented a licensed health care professional from providing telehealth services specifically permitted under California law.

3. Bus. and Professions Code Section 2290.5 became effective in 2007 and provides:

(a)(1) For the purposes of this section, "telemedicine" means the practice of health care delivery, diagnosis, consultation, treatment, transfer of medical data, and education using interactive audio, video, or data communications. Neither a telephone conversation nor an electronic mail message between a health care practitioner and patient constitutes "telemedicine" for purposes of this section.

**[NOTE: IT WOULD CLEARLY APPEAR THAT A MEDICAL-LEGAL EVALUATION WOULD FALL UNDER THE DEFINITION**

**OF "TELEMEDICINE" ABOVE AS "HEALTHCARE DELIVERY, DIAGNOSIS, CONSULTATION, TREATMENT...."]**

(2) For purposes of this section, “interactive” means an audio, video, or data communication involving a real time (synchronous) or near real time (asynchronous) two-way transfer of medical data and information.

(b) For the purposes of this section, “health care practitioner” has the same meaning as “licentiate” as defined in paragraph (2) of subdivision (a) of Section 805 and also includes a person licensed as an optometrist pursuant to Chapter 7 (commencing with Section 3000).

(c) Prior to the delivery of health care via telemedicine, the health care practitioner who has ultimate authority over the care or primary diagnosis of the patient shall obtain verbal and written informed consent from the patient or the patient’s legal representative. The informed consent procedure shall ensure that at least all of the following information is given to the patient or the patient’s legal representative verbally and in writing:

(1) The patient or the patient’s legal representative retains the option to withhold or withdraw consent at any time without affecting the right to future care or treatment nor risking the loss or withdrawal of any program benefits to which the patient or the patient’s legal representative would otherwise be entitled.

(2) A description of the potential risks, consequences, and benefits of telemedicine.

(3) All existing confidentiality protections apply.

(4) All existing laws regarding patient access to medical information and copies of medical records apply.

(5) Dissemination of any patient identifiable images or information from the telemedicine interaction to researchers or other entities shall not occur without the consent of the patient.

(d) A patient or the patient’s legal representative shall sign a written statement prior to the delivery of health care via telemedicine, indicating that the patient or the patient’s legal representative understands the written

information provided pursuant to subdivision (a), and that this information has been discussed with the health care practitioner, or his or her designee.

(e) The written consent statement signed by the patient or the patient's legal representative shall become part of the patient's medical record.

(f) The failure of a health care practitioner to comply with this section shall constitute unprofessional conduct. Section 2314 shall not apply to this section.

(g) All existing laws regarding surrogate decision-making shall apply. For purposes of this section, "surrogate decision-making" means any decision made in the practice of medicine by a parent or legal representative for a minor or an incapacitated or incompetent individual.

(h) Except as provided in paragraph (3) of subdivision (c), this section shall not apply when the patient is not directly involved in the telemedicine interaction, for example when one health care practitioner consults with another health care practitioner.

(i) This section shall not apply in an emergency situation in which a patient is unable to give informed consent and the representative of that patient is not available in a timely manner.

(j) This section shall not apply to a patient under the jurisdiction of the Department of Corrections or any other correctional facility.

(k) This section shall not be construed to alter the scope of practice of any health care provider or authorize the delivery of health care services in a setting, or in a manner, not otherwise authorized by law.

5. In *Oranje*, the WCAB recognized that, under the Bus. and Prof. Code Sec. 2290.5 and Labor Code Section 3600.5, telehealth sessions can occur, are reimburseable, and do not run afoul of HIPAA or the California Medical Information Privacy Act, Civ. Code Sec 56, et seq.

Thank you for asking for my legal opinion in this regard. If you require further assistance, please do not hesitate to contact me.

Cordially,

*Phil Walker*

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