

DEPARTMENT OF LABOR AND EMPLOYMENT

Division of Workers' Compensation 7 CCR 1101-3

WORKERS' COMPENSATION RULES OF PROCEDURE

PERTINENT SECTIONS OF RULE 8 REGARDING AUDIO-RECORDING OF NON-DIVISION IMEs

8-8 INDEPENDENT MEDICAL EXAMINATIONS

The following rules apply when the employer or insurer causes an independent medical examination to be conducted pursuant to section 8-43-404. Prior to each such examination the employer or insurer shall ensure that the examining physician is provided written notice that describes the requirements relating to recording the examination as set out in statute and these rules.

8-9 NOTICE TO CLAIMANT

- (A) Prior to commencing the examination the injured worker must review and sign a form issued by the Division that contains information regarding the independent medical examination process. A language interpreter may provide assistance if necessary. This form may be presented by the examining physician or by the employer, insurer or third-party administrator anytime prior to the examination. The injured worker shall sign the form to reflect receipt of the information. The injured worker, examining physician and all parties are entitled to a copy of the signed form. The examination shall not take place unless the injured worker has signed the form. Refusing to sign the form shall constitute refusal to submit to the independent medical examination.
- (B) Immediately prior to the examination, the examining physician shall verbally notify the injured worker that the examination will be audio recorded.

8-10 AUDIO RECORDING AND FEES

- (A) The examining physician shall not alter the recording.
- (B) The required audio recording shall be saved in a digital format. The examining physician shall retain the original recording.
- (C) The examining physician shall be compensated for conducting the examination pursuant to the medical fee schedule, Rule 18-6(G)(4)-Special Reports. In addition, the examining physician may add a \$30 charge for all recorded examinations. The physician shall be entitled to charge \$20.00 for each copy of the recording that is provided.
- (D) If a party requests a copy of the audio recording, regardless of which party makes the initial request the first copy of the recording is provided only to the injured worker. If the injured worker makes the initial request for a copy of the recording, he/she shall be responsible for the cost of the copy. If the employer/insurer makes the initial request for a copy of the recording, it shall be responsible for the cost of the copy provided to the injured worker. The physician may require payment prior to releasing a copy of the recording.

examining physician, explaining that no allegation was made by the injured worker and a copy of the recording may be released to the employer/insurer. A \$20 payment to the examining physician shall be included with this request. The examining physician shall provide a copy of the recording within fifteen (15) calendar days of the date the written request is received.

- (J) If the injured worker alleges that the recording contains confidential medical information as set out in paragraph (F) of this rule, the employer/insurer shall not request a copy of the recording until the allegation is resolved.
- (K) If the Division receives an allegation pursuant to paragraph (F), the Division will submit the recording, a copy of the written medical report, the injured worker's allegation and any response from the employer/insurer to an Administrative Law Judge either in the Prehearing Unit or the Office of Administrative Courts.
- (L) An Administrative Law Judge shall consider the injured workers' allegations and any response, listen to the recording in camera if necessary, and determine if the recording contains confidential medical information not relevant to the claim.
- (M) If an Administrative Law Judge determines that the recording does not contain confidential medical information, the Administrative Law Judge will issue an appropriate order and return the recording to the injured worker. The employer/insurer may then request a copy of the recording within twenty (20) days of the date the order was issued by providing a written request, along with \$20 payment to the examining physician. The examining physician shall provide a copy of the recording to the employer/insurer within fifteen (15) days calendar days of the date the written request is received.
- (N) If an Administrative Law Judge determines that the recording contains confidential medical information, the Administrative Law Judge shall issue an order to the parties and the examining physician. The Administrative Law Judge shall then produce, or cause to be produced, a copy of the recording with the confidential medical information redacted. An order to redact information does not constitute a final decision as to the relevancy of that information in any future proceeding. The Administrative Law Judge will provide the original recording and the redacted recording to the Division's Customer Service Unit. The Division will maintain the copy of the original and redacted recording until the claim is closed. Either party may obtain a copy of the redacted recording by providing a written request, along with payment of \$10, to the Division.
- (O) If paragraph (N) applies and for any reason the Administrative Law Judge is unable to redact the recording, the Administrative Law Judge will issue an order that copies of the recording may not be released and will provide the copy of the original recording to the Division's Customer Service Unit. If necessary an Administrative Law Judge may thereafter review the recording in camera to assist in resolving factual disputes that may arise.

8-12 MAINTENANCE OF THE RECORDINGS

- (A) Absent an order to the contrary, the examining physician may destroy the recording twelve (12) months after the date the examining physician's written report was issued.
- (B) Any recording in the possession of the Division may be destroyed once the claim is closed.

**Colorado Division of Workers' Compensation
A Physician's Guide to Division Rule 8-8, et seq.
Audio-Recording of IMEs – FAQ's and Instructions
(As Amended April 2010)**

Q. When is this new Rule effective?

A. The Rule went into effect on August 5, 2009.

Q. Does it apply to all Independent Medical Exams that I might be asked to do?

A. Only when both of the following apply:

(1) The IME is requested directly by an insurer or employer (the "respondent"). It does NOT apply to Division IMEs (the "DIME" program) or other IMEs that are essentially requested through the Division, such as IMEs under C.R.S. 8-43-502 (those generally come through the DIME unit). It also does NOT apply to IMEs that are requested directly by a claimant or claimant's representative.

(2) This Audio-Recording requirement applies to all IMEs (subject to (1), above) regardless of the date of injury or the date the claim was filed. *This change, eliminating the original 8/5/09 date "trigger," was made pursuant to new legislation passed and signed by the governor on March 31, 2010. (Senate Bill 10-163) The Rule at Section 8-8 will be amended to eliminate the date restriction. Meanwhile, the statutory change takes precedence over the rule.*

Q. When the claimant arrives for his/her appointment, will they know that the appointment is supposed to be audio-recorded?

A. They may or they may not. Hopefully the insurer who set up the exam will have informed the claimant about this. However, consistent with the language in the statute the new Rule states at 8-9(B), "Immediately prior to the exam, *the examining physician shall verbally notify the injured worker that the examination will be audio recorded.*"

Q. Will the injured worker get anything in writing?

A. Yes. There is a Division form, Form WC 36, which discloses that the exam will be recorded and which the claimant must sign to give such consent. It is possible, but not guaranteed, that the insurer may have provided this form to the claimant ahead of time. If the form was not provided, you should give the claimant the form and have it signed. If the claimant does not sign, the exam cannot go forward.

It is recommended that your office keep a set of these forms on-hand. They may be found on the Division's website at www.colorado.gov/cdle/dwc. Click on the menu item "Official Forms." You may also contact the Division's Customer Service, 303-318-8700, or our office, 303-318-8763, for assistance in obtaining this form.

Q. What about the recording equipment? Does the Division require any specific type?

A. The Rule at 8-10 covers "Audio Recording and Fees." You are urged to review this section, in general. There is no specific recommendation regarding the recording

Q. Do I still need to provide a written report?

A. **Yes.** Your written report is still considered the main work-product of this process, and should be completed and sent to both parties as per standard protocols. Also be aware that, in the same legislation that created the audio-recording, the following language was added to the statute (at C.R.S. 8-43-404(2)): "After any examination conducted under this section, the examiner shall prepare a written report giving a description of the examination performed, the written documents or any other materials reviewed, and all findings or conclusions of the examiner." These requirements for a complete written report are essentially no different from what was and is generally expected. However, those protocols are now in the statute.

Q. Why do I need to save and store the recording?

A. Under the new law and Rule, any party to the workers' comp claim has a right to request a copy of the recorded exam, but this does not mean they will *routinely* do so.

Q. Therefore, my office must provide the copy of the recording? Can I charge for this?

A. Yes. You should keep the original recording but make a copy (or you may have an electronics vendor make a copy) when it is requested. You may charge a party \$20 for each copy of the recording. (Bill with a Z-code under Fee Schedule Sec. 18-6(G)(4).) Note that there *are* certain *required* protocols to follow for providing these copies, as discussed below.

Q. Can't I just automatically give the two parties a copy of the recording when it's done?

A. **NO.** You must hold on to it until it is requested (or until 12 months passes, and you receive no such request—at which time you may destroy it).

Q. What do I (or my office) need to do when someone wants a copy of the recorded exam?

A. **The sequence here is very critical.** Either party to the case must make a written request to you for the recording. This must be done within 20 days of the date from when you issue your written report. The written request should include the address to which the copy of the recording (on a CD-ROM, etc.) shall be sent, and a check to your office for \$20. They are also to provide a copy of their written request to the other side. Under Rule 8-10(D) and (E), regardless of which party is making the request, you must send the first (and so far, the only) copy to the claimant only, even if the respondent is making the request. Do not send a copy to the insurer, at least not yet. This is because the claimant has the right in the first instance to listen to the recording and determine whether there are any matters discussed with you during the exam that are not related to the work injury and may be otherwise confidential. Those matters may not be disclosed to the insurer or employer.

COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF WORKERS' COMPENSATION

INFORMATION REGARDING INDEPENDENT MEDICAL EXAMINATION

- I understand that I will be going to an independent medical examination (IME).
- I understand that the IME will be done by a doctor who is not giving me treatment or care, and that I will not have a patient/doctor relationship with this doctor. The doctor doing the IME is being paid by the employer or the insurer in my workers' compensation claim. The doctor will write a report about the exam, and I will get a copy of the report.
- I understand that the doctor will ask me questions about my condition and/or medical history, and may also look at my medical records.
- I understand that the doctor is required by law to make an audio (voice) recording of this examination. Therefore, what the doctor says and what I say may be heard by others at a later date and I should not have an expectation of privacy about things that are related to my workers' compensation claim.
- I understand that anyone involved in my claim, including me, can request a copy of the recording, and that if anybody makes a request the recording will first be given to me. I understand that if I say something during the examination that I believe is private and not related to my claim, there is a way for me to try to have that part of the recording erased.
- I understand that I have 20 days after the report is sent to me to ask, in writing, for a copy of the audio recording. I understand that the doctor is allowed to charge me \$20 for this copy. If I believe that part of the recording should be erased, I have to say it in writing within 15 days of when the recording was sent to me. I understand that information about the process is available by contacting the Division of Workers' Compensation and/or looking at its website. Anything that is mentioned in the doctor's written report will not be erased.
- I understand that I must be given this form, and that I must sign this form, according to a Division of Workers' Compensation Rule. I understand that refusing to sign this form may be determined to be a refusal to submit to an independent medical examination, and that such refusal could possibly impact my receipt of benefits.
- I understand that this form is intended to provide specific and limited information regarding the IME. I can seek additional information and/or legal advice if I so choose. I can also call the Division at 303-318-8700 or 888-390-7936 for additional information regarding Rule 8 requirements.

Signature

Print name

Date

For use by a language interpreter, if necessary

I, _____ (print name of interpreter) affirm that on this _____ day of _____, 20____, I read this document in its entirety to the individual whose name appears above in that person's native language, and that the person indicated an understanding of each and every provision contained on this form.

Signature