STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

AGENCY:	DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF WORKERS COMPENSATION	DECISION OF DISAPPROVAL OF EMERGENCY REGULATORY ACTION
ACTION:	Adopt section 9783.1, Amend sections 9780, 9780.1, 9781 and 9783, and repeal sections 9780.2 and 9784 of Title 8 of the California Code of Regulations	(Gov. Code, sec. 11349.6) OAL File No. 05-0922-01 E

DECISION SUMMARY

This proposed emergency regulatory action deals with the predesignation of a personal physician for purposes of injuries falling under the Workers Compensation system. This proposed regulation stems from exhaustive reforms of the workers compensation system, Senate Bill 899 (Chapter 34, stats. of 2004, effective April 19, 2004). Senate Bill 899 included and amended several provisions designated to control workers' compensation costs including Labor Code section 4600 which provides, in part, for the predesignation of a personal physician.

On September 22, 2005, the Division of Workers Compensation (the Division) submitted to the Office of Administrative Law (OAL) the proposed emergency action which would have adopted the process and requirements for the predesignation of a personal physician. On October 3, 2005, OAL notified the Department that OAL disapproved the emergency regulatory action because, for reasons explained below, OAL concluded that the proposed regulation is not necessary for the immediate preservation of the public peace, health and safety, or general welfare. The situation to which this regulation responds is not an "emergency" under the statutory provisions of, and case law interpreting, the Administrative Procedure Act (APA).

DISCUSSION

STATUTORY REQUIREMENTS GOVERNING OAL REVIEW

The regulation adopted by the Division dealing with the predesignation of a personal physician must be adopted pursuant to the APA unless a statute expressly exempts or excludes it from APA requirements. (Government Code[1] sections 11340.5 and 11346). No express statutory

1 Unless stated otherwise, all California Code references are to the Government Code.

exemption applies to this emergency regulation. Thus, before it may become effective, it must be reviewed and approved by OAL for compliance with the APA. Compliance requires satisfaction both of the substantive requirements of section11349.1, and the emergency standard of section 11349.6.

The adoption of an emergency regulation by the Department must satisfy requirements established by section 11346.1, which provides in part:

> "(b) [I]f a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal. Any finding of an emergency shall include a written statement which contains . . . a description of the specific facts showing the need for immediate action. . . ."

Section 11349.6 governs OAL's review of emergency regulations. It provides in part:

> "(b) Emergency regulations adopted pursuant to subdivision (b) of Section 11346.1 shall be reviewed by the office within 10 calendar days after their submittal to the office. The office shall not file the emergency regulations with the Secretary of State if it determines that the regulation is not necessary for the immediate preservation of the public peace, health and safety, or general welfare, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1 . . . ."

In the emergency filing submitted to OAL, the Division's description of specific facts did not demonstrate that the proposed changes were immediately necessary to protect the public peace, health and safety, or general welfare. The Division's Finding of Emergency contained information on the benefit of adopting the predesignation regulations and established that regulations will have to be adopted to ensure proper administration of the program, but provided no data, documentation or other credible evidence establishing that the regulation was necessary for the immediate preservation of the public peace, health and safety, or general welfare.

Emergency regulations are disfavored under the APA. They must meet an additional level of justification, since the use of emergency regulations violates one of the key purposes of the APA – public participation in the rulemaking process. Since the adoption of emergency regulations requires the regulated public to obey rules that it had little opportunity to regulate, the APA limits emergency regulations only to defined, justified circumstances. In the absence of persuasive evidence that the regulation is necessary for the immediate preservation of public peace, health and safety, or general welfare, OAL will disapprove the proposed emergency

regulation.

THE FINDING OF EMERGENCY

The Division submitted a Finding of Emergency and, at OAL's request, prepared and submitted two supplemental Addenda to the original Finding. The original Finding of Emergency based the emergency on the costs associated with the workers compensation system and the need to contain those costs. It demonstrated, in summary, that the predesignation regulations are part of a larger legislative scheme to make major changes to the workers compensation system. When fully implemented, SB 899 will save the state a significant amount of money.

OAL asked for further information to explain why the regulations had not been adopted during the 17 months since SB 899 was enacted. In the First Addendum to the Finding of Emergency the Division laid out the steps the Division had taken since Labor Code 4600(d) was enacted. The Division included more information on its workload and the regulatory actions stemming from SB 899. The First Addendum demonstrated that, because of workload issues, the Division was required to prioritize the necessary regulatory packages. The Division held workshops with the affected public to ensure public participation. Although the Division has been diligent in implementation of SB 899, it was unable to address the predesignation issue any sooner than it did.

OAL also requested additional information concerning the specific harm that would be caused by failure to adopt the regulation immediately. The Division prepared and submitted the Second Addendum to the Finding of Emergency in response to this request. The Second Addendum demonstrates that without standard procedures for predesignating a personal physician, each individual employer will adopt its own procedures, which may be more onerous that the proposed emergency regulations. The result could be that a worker will not predesignate a personal physician. If an injured worker is not able to see his or her own personal physician, he or she will not have the benefit of seeing a doctor who knows his or her medical history.

OAL REVIEW OF THE ISSUE OF EMERGENCY

OAL does not evaluate the wisdom of regulations. In fact, OAL is expressly prohibited from "substitut[ing] its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations" (section 11340.1) OAL's disapproval of this regulation does not, in any way, reflect a judgment upon the benefits or advisability of the proposed rule.

With respect to determining whether or not a regulation may be appropriately adopted as

an emergency, OAL makes a separate and independent determination. The rulemaking agency is required, pursuant to section 11346.1, to make its determination that the proposed regulation is "necessary for the immediate preservation of the public peace, health and safety, or general welfare." OAL applies the same legal standard pursuant to section 11349.6, but the OAL's determination on this issue is separate and independent. Under section 11349.6 the OAL is directed that it "shall not file the emergency regulations with the Secretary of State if it determines that the regulation is not necessary for the immediate preservation of the public peace, health and safety, or general welfare."

Although the only statutory direction to OAL under section 11349.6 is to "not file" a disapproved emergency regulation, by necessity and practice OAL also issues a formal Notice of Disapproval and Decision of Disapproval in the manner used for nonemergency regulations pursuant to section 11349.3.

RELEVANT CASE LAW

The statutory standards for determining whether or not an emergency exists, discussed above, are fairly vague and subjective. While some cases may clearly be "necessary for the immediate preservation of public peace, health and safety, or general welfare," others are far from clear. The statutory law alone does not provide adequate objective guidance to yield unambiguous application in all cases. Court cases evaluating this issue provide additional guidance. Unfortunately, there is not a great deal of case law on this issue. Even so, a review of the relevant cases yields useful guidance.

Prior to the 1979 amendments of the APA[2] the determination that an emergency did or did not exist was mostly a matter of agency discretion. In *Schenley Affiliated Brands V. Kirby* (1971) 21 Cal.App.3d 177, 98 Cal.Rptr. 609, the court said that "[w]hat constitutes an emergency is primarily a matter for the agency's discretion". In practice, this amounts to a presumption that a finding of emergency is valid. However, even then the agency's determination was not conclusive. In *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, for the first time, the court clarified that an emergency was required to "reflect a crisis situation, emergent or actual." (Id. at 942.) In *Poschman*, the board of trustees of the California state colleges adopted an emergency regulation which allowed the Chancellor to amend employment grievance procedures. (Id. at 937.) In the statement of reasons setting out the emergency, the trustees contended that the regulation was necessary to avoid confusion in personnel practices. (Ibid.) On review, the court found the trustee's reasoning in support of the emergency did not reflect a crisis situation. The court held that an emergency had to reflect a "crisis situation, emergent or actual," not merely a

2 Chapter 537, Statutes of 1979 (AB 1111, McCarthy)

declaration of sound policy (Id. at 942). This is the first elucidation of the court's understanding of what qualifies for an emergency under the APA.

Several years after *Schenley* and *Poschman,* the Legislature enacted AB 1111, which amended the APA by, among many other changes, creating OAL and giving it authority to make an independent determination as to whether an agency's emergency regulations comply with the statutory standard.

Neither OAL nor the courts are required to defer to the judgment of the agency in the determination of whether an emergency exists. Each is required under the APA to evaluate this question separately. In the two leading cases that followed *Schenley* and interpreted this provision of the APA, the Court of Appeals upheld the finding of emergency in one case (*Doe v. Wilson* (1998) 31 Cal.App.3d 932, 107 Cal.Rptr. 596) and overturned the finding in the other (*Poschman v. Dumke, supra*).

The most recent appellate decision on this specific issue is *Doe v. Wilson* (*supra*). *Doe* describes an emergency as "an unforeseen situation calling for immediate action." (*Doe v. Wilson* (1997) 57 Cal.App.4th 296, 306.) In *Doe v. Wilson* the court borrowed the reasoning of the court in *Sonoma County Organization of Public/Private Employees, Local 707, SEIU, AFL/CIO v. County Of Sonoma* (1991) 1 Cal.App.4th 267, 276-277, 1 Cal.Rptr.2d 850.

Sonoma County provides the most comprehensive discussion of what constitutes an emergency to be found in case law. In addition to the language identifying it as "an unforeseen situation calling for immediate action", it contains an extensive discussion of the factors that characterize an emergency under the APA (*Sonoma County, supra,* 277-278). Although *Sonoma County* examined a local emergency ordinance and did not interpret the APA, its discussion of the meaning of the "word 'emergency' as used in legislative enactments" is illuminating and its citation in *Doe v. Wilson* demonstrates that the same principles apply to emergency regulations adopted pursuant to the APA.

According to *Sonoma County*:

> It is a considerably harder task to specify identifying characteristics of an emergency, given that "[t]he term depends greatly upon the special circumstances of each case." (*Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 356 [291 P. 839, 71 A.L.R. 161].) Not only must urgency be present, the magnitude of the exigency must factor. We agree with the trial court that an emergency may well be evidenced by an imminent and substantial threat to public health or safety. (… *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 586, 592 [214 Cal.Rptr. 424, 699 P.2d

The considerations in evaluating a purported emergency identified by the *Poschman*, *Sonoma County*, and *Doe* courts may be summarized as:

1. The magnitude of the potential harm.
2. The existence of a crisis situation, emergent or actual.
3. The immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken.
4. Whether the anticipation that harm has a basis firmer than simple speculation.
5. Whether the basis for believing that an emergency exists is simply expediency, convenience, best interests, or a general public need.
6. Whether the situation is of grave character and serious moment.
7. Whether the situation is unforeseen.

The case law is instructive, but the ultimate test must be based upon the statute. The considerations identified in the case law, therefore, cannot properly be viewed as tests or requirements. Rather, they serve as guidelines and evidence for agencies and OAL to use in determining whether a regulation is necessary for the immediate preservation of public peace, health and safety, or general welfare.

For example, although *Doe* described an emergency as "an unforeseen situation calling for immediate action," it is certainly possible for a situation to have been foreseen but still be necessary for immediate preservation of health and safety. The fact that a situation was foreseen – that the rulemaking agency knew about the situation but did not

adopt regulations to address it – may be evidence that the situation does not justify emergency regulation, but it does not determine the final outcome.

The existence of all or many of the factors identified in the case law provides strong evidence that the use of emergency regulations is justified. The existence of few or none of these factors is strong evidence that emergency regulations are not justified. Ultimately, however, the rulemaking agency in evaluating its proposed rulemaking and OAL in its independent review of the file, must use case law as an evidentiary tool in applying the statutory standard rather than as a set of tests that must be met to justify adoption of a rule as an emergency regulation.

ANALYSIS OF FINDING OF EMERGENCY

OAL is cognizant of the enormity of the Division's task in implementing SB 899. We have worked closely with the Division to review and approve emergency regulations implementing various pieces of SB 899. OAL also agrees that the predesignation of a personal physician is important to both the injured worker and the Workers Compensation system as a whole. We accept the facts presented in the Finding of Emergency as being accurate.

OAL, however, must use its independent judgment to determine whether or not the regulations meet the statutory standard of section 11349.1. OAL bases this determination primarily upon review the facts provided by the Division. Based upon this review, OAL concludes that the regulation is not necessary for the immediate preservation of the public peace, health and safety, or general welfare. Analysis of the factors cited in *Poschman, Sonoma County*, and *Doe*, supports this conclusion.

These proposed emergency regulations standardize the process to be used to predesignate a physician and provides optional forms for the employee and employer to use. In the 17 months since SB 899 was enacted, various employers have created forms for employees to use to make this predesignation. Undoubtedly, there are many different forms in use. Some may require more or less information than is required by these proposed regulations. Some physicians may be reluctant to sign the forms. Some injured workers may have to see workers compensation doctors rather than their own personal physician. While this may cause inconvenience to employers and employees that could be remedied through the adoption of these regulations, this does not constitute an immediate threat to public peace, health and safety, or general welfare.

The fact that this situation has existed for 17 months without resulting in anything like a "crisis situation, emergent or actual" is further evidence that the situation does not require adoption of emergency regulations. Furthermore, the magnitude of the potential harm appears to be low. While the possibility that forms may be confusing or that an injured worker may be treated by a

provider other than the one who might have been seen under these regulations may be a harm at some level, but OAL does not conclude that it is a threat to the preservation of public peace, health and safety, or general welfare. If there was a risk that without these regulations injured workers would be untreated, there might be such a threat, but in this case the only threat is that during the few months that it will take to adopt permanent regulations they might be treated by a provider that they did not predesignate. The magnitude of this harm does not justify adoption of emergency regulations.

EFFECT OF THIS DISAPPROVAL

OAL's disapproval of this emergency regulation, if not overturned by the Governor pursuant to section 11349.5 or by the courts pursuant to section 11350.3, means that the regulation cannot be enforced by the Division. This does not, however, mean that the Division lacks authority to implement section 4600 of the Labor Code. The Division retains its authority pursuant to 8 CCR 9780.1 to implement Labor Code 4600.

OAL does not agree with the characterization in the Division's Finding of Emergency that "Labor Code section 4600 is not self-executing." Section 4600 contains many specific provisions that seem precise enough and adequate enough for the Division to administer without further regulation. Although under section 11340.5 the Division cannot impose rules that implement, interpret, or make specific the provisions of Labor Code 4600, the Division retains full legal authority to enforce the requirements of Labor Code 4600 as written.

Prior to the adoption of permanent nonemergency regulations the Division could take any enforcement actions that are not regulatory. For example, Labor Code section 4600 (d) establishes the right of a worker to predesignate his or her own personal physician for workers compensation purposes. This right exists independently from any regulation adopted by the Division. The Division currently has authority to enforce the precise terms of Labor Code section 4600 (d). It could provide employers an optional form that contains only the information required by Labor Code section 4600 (d). If employers choose to use the optional form, they would be assured that they are in compliance with Labor Code section 4600 (d). If employers choose not to use the form they would not have that assurance.

The Division can also inform employers of the terms of Labor Code section 4600. For example, if an employer's own predesignation form requires information not required by Labor Code section 4600 (d), the Division could so advise the employer. Likewise, if an employer form requires a physician's signature, for example, the Division could inform the employer that such a signature is optional under the terms of Labor Code section 4600 (d). The Division clearly retains authority under 8 CCR 9780.1 to administer Labor Code section 4600. To this extent it appears that Labor Code section 4600 is self-executing.

CONCLUSION

For the reasons discussed above, OAL disapproved the emergency regulatory action because the proposed regulations were not necessary for the immediate preservation of the public peace, health and safety, or general welfare. If you have any questions, please do not hesitate to contact me at (916) 323-7465.

DATE:

KATHLEEN EDDY
Staff Counsel

For: WILLIAM L. GAUSEWITZ
Director

Original:
cc: