

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

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) The Workers' Compensation claim for the case was filed on or after August 5, 2009.

Q. How do I know when the claim was filed? When I meet with the claimant, I may know the date of injury, but is that the same as the date the claim was filed?

A. Not necessarily. The date of injury and the date the claim was filed are usually NOT the same date, although they may be close in time. The insurer who is scheduling the IME should indicate to you whether the audio-taping requirement is applicable, but if they do not, you are advised to ask this question.

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.coworkforce.com/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 device(s) EXCEPT that the recording must be saved in a DIGITAL format. This means that it can be saved on a CD, an MP3 player, a flash drive, or perhaps other devices where storage and digital reproduction are possible. The recording *may* later be subject to copying. The respondent can provide the equipment for you, or you may decide to obtain your own equipment. When obtaining equipment for this purpose, consider that we are talking about a narrow range of audible hertz – the range of the human voice. Many types of recording devices are oriented to music recording; that level of high-quality reception is probably not necessary. But also consider issues of portability, ease of operation, compactness, the types and number of microphones, and ease of storage and reproduction of the final product—whatever the needs and set-up of your office may demand.

In addition, the statute says that the parties to the claim may also make their own audio recording of the examination. Therefore, if either party wants to set up a recording device, that is allowed.

Q. What if, in a given examination, it doesn’t record or there is a problem with the sound?

A. Be aware that if the recording is inaudible or not recorded at all, the parties to the case may ask an administrative law judge to fashion a remedy. The new Rule (at 8-13) indicates: “If the examining physician was responsible for the faulty or inaudible recording, the examining physician may be required to repeat the exam without additional payment.”

Let’s hope that doesn’t happen! But here are a few hints:

- This seems obvious, but when beginning the examination, ensure that the recording device is turned ON, there is fresh recording media, and you are not inadvertently recording over something else, like another recorded exam. Many courtrooms now use audio-recording instead of court reporters, and we have learned that problems or failure to record are often due to these types of errors.
- If the equipment you are using allows this, perhaps check the recording maybe 1-2 minutes in to the examination to ensure all is working properly.

Q. Is there an additional fee for billing this type of IME?

A. Yes, under Rule 8-10(C) you may bill the insurer/requester an additional \$30 for IMEs that are recorded, in addition to the standard hourly fee set forth in the Division’s Fee Schedule. (The January 1, 2010 proposed amendment to the Fee Schedule will include a Division “Z”-code for this \$30; at this time, there is no special code.)

Q. Are there any special protocols required for the exam itself, under these types of circumstances?

A. No, just proceed with your examination as you normally would. If you wish, you may start the exam with an oral acknowledgment (with the claimant) that this exam is being audio-recorded, the name of the claimant, and the date and time of the appointment.

Q. What happens after the examination? What do I do with the recording?

A. You must store, or arrange to be stored, the recording for 12 months, unless there is an order from an Administrative Law Judge to the contrary. (Rule 8-12).

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. 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.

Q. So, if the insurer makes the request for a copy of the recording, I send it to the claimant? Who pays for this? And when do I send it?

A. Yes, it first goes to the claimant. The insurer may make the initial request but is obliged to provide to you the address of the claimant, and a check for \$20 to pay for the copy. The doctor's office has 15 days within which to make a copy of the audio recording and send it to the claimant.

Q. If the *claimant* makes the initial request for the recording, I only send it to them?

A. Yes, you send the copy only to the claimant within 15 days of their request. The claimant must also pay the \$20 for his/her copy. Do not send a copy to the respondent.

Q. So, when does the respondent/insurer get a copy of the recording?

A. The claimant has 15 days within which he/she must listen to the recording and to raise an allegation that there is something on the recording that should not be disclosed. (They raise the issue with the Division and the other party; the doctor is not involved.) If the claimant does not raise that issue in that timeframe, basically the insurer/respondent can then request a copy of the recording from the doctor, with a \$20 payment for the copy. The doctor must provide that copy to the insurer within 15 days of the request.

Alternatively, the claimant may raise an issue about the recording which an administrative law judge will hear. (To redact certain parts of the recording, for example.) This may take some time, possibly months. After resolution of that issue, it is possible that the insurer/respondent will make a request to the doctor's office for a copy of the recording.

Basically, you cannot release the second copy to the insurer until you receive a written request and the \$20 payment.

Hint: If you/your office is asked by either party for the recording at the outset, it may be more expedient to just automatically make *two* copies of the recording at that time, only releasing one initially, but you'll have the second one immediately available if / when it can be released, down the road.

Q. The doctor's office is always in possession of the original recording?

A. Yes. You must retain it for 12 months unless you receive a court order to the contrary. (Rule 8-12).

Q. Who do I contact with questions about this process?

A. Depending on your question, in some instances you may need to contact the insurance adjuster, or whoever set up the IME with your office. Questions regarding the Rule can be directed to the Division:

- Becky Greben, Physicians' Accreditation, 303-318-8756 or
- Becky.greben@state.co.us
- Physaccred@state.co.us