

Sawyer, Kenneth, M.D.

PROVIDERS

Approved examiners lists

The authority given the Director to make decisions regarding a physician's exclusion from the approved examiner's list allows the Director to consider any of the criteria listed in the rule and does not require the existence of all of the criteria. WAC 296-23-26503.*In re Kenneth Sawyer, M.D., BIIA Dec., 01 P0078 (2002)* [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 02-2-01400-1.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 **IN RE: KENNETH D. SAWYER, M.D.**) **DOCKET NO. 01 P0078**
2)
3 **PROVIDER NO. 46570**) **DECISION AND ORDER**

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5 APPEARANCES:

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7 Provider, Kenneth D. Sawyer, M.D., by
8 Karr Tuttle Campbell, per
9 William H. Beaver and Michaelanne Ehrenberg

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11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 AnnaLisa Gellermann, Assistant

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16 This is an appeal filed on May 14, 2001, by Kenneth D. Sawyer, M.D., the provider, from the
17 Department's May 4, 2001 order that revoked authorization for Dr. Sawyer to participate as an
18 approved examiner and to be paid for independent medical examinations provided to injured
19 workers. **AFFIRMED.**

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22 **PROCEDURAL AND EVIDENTIARY MATTERS**

23 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
24 and decision on a timely Petition for Review filed by the provider, Kenneth D. Sawyer, M.D., to a
25 Proposed Decision and Order issued on April 18, 2002, which affirmed the May 4, 2001 order.

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28 The Board has reviewed the evidentiary rulings in the record of proceedings. Our industrial
29 appeals judge erred in making the following rulings. During the testimony of Dr. Sawyer on
30 February 25, 2002, the objection on page 29, line 15, is overruled, and the question and answer
31 from page 29, line 7, through page 30, line 31, is removed from colloquy. Our judge also erred in
32 denying Dr. Sawyer an opportunity to answer a question in colloquy regarding the impact of the
33 Department's decision to remove him from the approved examiner list on his ability to earn a living.
34 2/25/02 Tr. at page 72, line 17. While we believe this testimony should have been properly
35 excluded, because it is irrelevant and overly prejudicial, Dr. Sawyer should have had an opportunity
36 to preserve his record by answering this question in colloquy.

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39 In the deposition of Charles Brooks, M.D., all objections are overruled and motions to strike
40 are denied. Dr. Brooks' opinions about the relevance of certification by a medical board to the
41 quality of an Independent Medical Examination (IME) and about the quality of Dr. Sawyer's IMEs
42 are relevant and admissible.

1 In the testimony of Renee Wiest, the objections on page 77, line 35, page 80, line 43, and
2 page 81, line 3, are overruled and the answers are removed from colloquy. Ms. Wiest's testimony
3 about the lack of complaints regarding Dr. Sawyer's IMEs and Medical Consultants Northwest's
4 desire to continue scheduling Dr. Sawyer for IMEs is relevant and admissible.
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7 During the testimony of Carol Britton, the objection on page 119, line 51, is overruled.
8 Testimony about the basis for the Department's policy regarding its criteria for allowing physicians
9 to be on its approved examiner list is relevant and admissible. Our judge also erred in denying
10 Dr. Sawyer's counsel the opportunity to inquire further about the Department's board certification
11 qualifications. 2/25/02 Tr. at page 127, line 23.
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14 As stated above, our industrial appeals judge denied Dr. Sawyer the opportunity to place
15 certain information on the record. We are not remanding this appeal to complete the record for the
16 following reasons. First of all, Dr. Sawyer did not request a remand in the Petition for Review.
17 Most importantly, we do not believe our judge's rulings were prejudicial. Dr. Sawyer sought to
18 introduce evidence to bolster his qualifications and to undercut the basis for the Department's policy
19 regarding approved examiner qualifications. However, for the reasons stated below, we believe the
20 Department's policy, which denies physicians who are neither certified by a medical board in their
21 area of practice nor engaged in actively treating patients from being approved examiners, is lawful.
22 The information excluded from the record would not alter our decision and should not affect the
23 outcome of this case. Accordingly, these errors need not be corrected by remanding this matter to
24 the trial judge to complete the record.
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28 With these exceptions, the Board finds our industrial appeals judge committed no other
29 prejudicial evidentiary errors. All other rulings are, therefore, affirmed.
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32 **DECISION**

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34 Our industrial appeals judge affirmed the Department's May 4, 2001 order that revoked
35 Dr. Sawyer's authorization to be an approved examiner, authorized to perform IMEs. Dr. Sawyer
36 argues the Department's policy decision to require physicians who are approved examiners to be
37 either board certified in their practice specialty or to be engaged in direct patient care is unlawful.
38 He maintains this policy should have been promulgated as a rule prior to its implementation.
39 Furthermore, he maintains this policy is inconsistent with the current rule, WAC 296-23-26503,
40 which he believes requires consideration of nine factors in determining the qualifications of
41 approved examiners. Dr. Sawyer also asserts his certification as an independent examiner is
42 sufficient to meet the Department's criteria, because the term "Board certification" is not defined in
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1 the rule. He argues he should be authorized to be an examiner, because he is certified by two
2 medical boards. Finally, Dr. Sawyer argues our industrial appeals judge reached her decision
3 based on an overly narrow analysis of whether he is qualified to be an approved examiner under
4 the Department's current policy. Instead, he maintains we should decide whether the Department
5 policy is correct under governing law.
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8 The issue in this appeal is not just whether Dr. Sawyer is qualified to perform IMEs under
9 Department **policy**. In our appeals, this Board reviews Department decisions *de novo* to determine
10 whether they are consistent with governing law. We have repeatedly stated that we are not bound
11 by Department policies, and make our decisions based on the provisions of the Industrial Insurance
12 Act and the relevant Department rules.¹ We have also recently held that the appropriate standard
13 of review in appeals from orders disapproving or removing a physician from the Approved
14 Examiners List (the List) is the preponderance of the evidence standard. *In re Harry Reese, M.D.*,
15 BIIA Dec., 00 P0044 (2001). Accordingly, we review the Department's decision to revoke
16 Dr. Sawyer's name from the List without deferring to Department policy. Based on our careful
17 review of the record in this proceeding, we have determined the Department's criteria for approving
18 physicians to be examiners is reasonable and legally correct. We also hold that the Department
19 appropriately revoked Dr. Sawyer's authorization to perform IMEs.
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22 We discussed the statutes requiring the Department to establish criteria for determining
23 which physicians can become approved examiners. See *In re Harry Reese, M.D.*, at 3-4. In 1988,
24 our state Legislature enacted RCW 51.32.112 and RCW 51.32.114. These statutes authorize the
25 Department to develop standards for the conduct of IMEs, including the qualifications of the
26 examiners. The Department was further required to adopt rules to ensure that IMEs are performed
27 only by qualified medical professionals meeting Department standards. The Legislature gave the
28 Department broad discretion to determine the qualifications of its medical examiners.
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44 ¹ For example, we have held the Department policy denying in all cases implantation of a spinal cord stimulator was
45 inappropriate under governing law. *In re Susan Pleas*, BIIA Dec., 96 7931 (1998). We held the Department should
46 provide Ms. Pleas with this medical treatment. We also have rejected Department policy under which loss of earning
47 power (LEP) benefits are denied if an injured worker refuses to return to a light-duty job. We found this policy was not
supported by applicable law, and ordered the Department to pay LEP benefits. *In re Daniel J. Keenan*, Dckt.
No. 98 17270 (July 19, 1999).

1 Pursuant to this statutory authority, the Department adopted WAC 296-23-26503. The rule
2 broadly states the medical director may consider several factors in approving or disapproving
3 examiners, including, but not limited to:
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- 5 (1) Board certification;
- 6 (2) Complaints from workers about the conduct of the examiner (see
7 WAC 296-23-26506);
- 8 (3) Disciplinary proceedings or actions;
- 9 (4) Experience in direct patient care in the area of specialty;
- 10 (5) Ability to effectively convey and substantiate medical opinions and
11 conclusions concerning workers;
- 12 (6) Quality and timeliness of reports;
- 13 (7) Geographical need of the department and self-insurer;
- 14 (8) Availability and willingness to testify on behalf of the department,
15 worker, or employer; and
- 16 (9) Acceptance of the department fee schedule rate for testimony.
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18 These nine criteria have remained in effect since 1991, when the Department first adopted a
19 rule regarding examiner qualifications. However, during the fall of 2000, the Department changed
20 its policies and procedures for approving its physician examiners. Until then, physicians had
21 applied to be certified examiners through the panels with whom they had contracts. The
22 Department is supplied physicians to conduct IMEs through panels of medical professionals.² The
23 panels respond to Department claims managers' requests for medical examinations by arranging to
24 have physicians in the requested medical specialties conduct them. The panels also transmit the
25 physicians' reports to the Department. Until the 2000 change, each panel submitted physicians'
26 applications to be approved examiners for their own particular panel to the Department. The
27 Department then determined whether a physician would be approved as an examiner authorized to
28 conduct examinations through that specific panel. The Department required physician applicants to
29 meet two of the following three criteria to be certified examiners. First, there had to be a
30 geographic need for the physician's services. Secondly, the physician had to be either board
31 certified or board eligible by a medical board recognized by the American Board of Medical
32 Specialists (ABMS). If a physician was not board certified, he or she had to maintain an active
33 practice or have hospital privileges. The geographic criteria was apparently usually met, so the key
34 question for Department approval was whether a physician met one of the last two criteria.
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43 By the fall of 2000, Dr. Sawyer had been approved to provide examinations through seven
44 different panels, including Medical Consultants Northwest (dba today as Medical Consultants
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² As of 2002, the Department contracted with approximately 40 different panels throughout the state to conduct IMEs.

1 Network), Seattle Panel of Consultants, Medical Diagnostic Services, and Independent Medical
2 Examiners. In his January 1994 application to be an approved examiner through Independent
3 Medical Examiners, Dr. Sawyer wrote that he expected to obtain certification by the American
4 Board of Orthopedic Surgery in 1998, and that he had hospital privileges. See Exhibit No. 17. His
5 application was approved, because he specified he was board eligible. However, a 1995
6 application through Access Independent Medical Services was disapproved because Dr. Sawyer
7 indicated he expected board certification in orthopedics in 1997. At that time, the Department
8 became concerned about whether Dr. Sawyer was being misleading about his board eligibility. In
9 fact, he was, since he testified he could not obtain board certification in orthopedic surgery without
10 returning to medical school and completing another orthopedic surgery residency. (One of the
11 prerequisites for board certification is practicing orthopedic surgery at the same location for two
12 years. Dr. Sawyer knew he was not a practicing surgeon. Dr. Sawyer also testified he could not
13 work as a surgeon in Washington because his medical training, including his residency, was out-of-
14 date). Since the Department determined Dr. Sawyer's board certification was not forthcoming, it
15 denied the 1995 application, but did not revoke his certification to do IMEs through the panels with
16 whom he was already employed.

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25 By the fall of 2000, the Department decided to modify its criteria for approving physician
26 examiners. The Department determined too many physicians gave misleading information
27 regarding when they would obtain board certification. To eliminate any uncertainty about a
28 physician's board status, the Department decided to require them to be board certified in their area
29 of practice, instead of merely being board eligible. Physicians who did not have board certification
30 had to be engaged in direct patient care to be placed on the List. The Department determined that
31 having hospital privileges or having a practice limited to conducting IMEs would not meet its
32 practice requirements. Only physicians who had a minimum average of eight hours a week of
33 direct patient care over the last two years would be considered active practitioners.

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38 To ensure all physicians were meeting Department criteria, in September 2000, the
39 Department contacted everyone on its List. The physicians were all asked to reapply for IME
40 certification directly to the Department so their eligibility could be reviewed based on current criteria.
41 See Exhibit No. 19. Dr. Sawyer's re-application indicated that his specialty area was orthopedic
42 surgery; that he was not involved with direct patient care; and that he had obtained certification
43 from the American Board of Independent Medical Examiners (the ABIME). See Exhibit No. 3. The
44 Department disapproved his application because he did not have board certification in his specialty
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1 area, orthopedic surgery, and because he was not providing any direct patient care. The
2 Department does not consider certification as an independent examiner sufficient to meet its board
3 certification criteria. To meet this criteria, the Department requires certification by a medical board
4 that is recognized by the ABMS. The ABIME is not recognized by the ABMS. The Department,
5 accordingly, concluded Dr. Sawyer did not meet its current criteria to be an approved examiner. It
6 subsequently issued the May 4, 2001 order revoking his authorization to be an approved examiner,
7 which is the subject of this appeal.
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11 Dr. Sawyer initially contends that the Department's current criteria of requiring either board
12 certification in a physician's specialty area or direct patient care experience is unlawful because it
13 was not adopted as a rule. This Board lacks jurisdiction to determine whether the Department
14 violated the Administrative Procedure Act by implementing this criteria without amending WAC 296-
15 23-26503. Only superior and appellate courts have the jurisdiction to hold that a Department policy
16 is unlawful because it was not properly adopted as a rule. Dr. Sawyer should have filed a suit in
17 Superior Court if he wished to force the Department to amend its rule prior to disqualifying him as
18 an approved examiner. RCW 34.05.570(4). See *Rios v. Department of Labor & Indus.*, 145 Wn.2d
19 483 (2002).
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22 Dr. Sawyer also maintains that the Department's current criteria is inconsistent with its rule.
23 WAC 296-23-26503 lists nine factors the Department's medical director can consider in approving
24 physicians for the List. He argues the director is currently basing his decision on only two of the
25 nine factors (namely, (1) board certification and (4) experience in direct patient care in the area of
26 the [physician's] specialty). Furthermore, Dr. Sawyer insists he meets the rule's criteria of board
27 certification, since this is not defined in the rule as certification by a board recognized by the ABMS.
28 Neither argument is persuasive.
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31 This rule, and the relevant statutes, give the Department's medical director broad discretion
32 in deciding which physicians should be qualified examiners. The rule itself states that the director
33 "may consider several factors in approving, disapproving, or suspending examiners," including, **but**
34 **not limited to**, the nine factors listed in the rule itself. As we noted in the *Reese* decision,
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41 It is clear from the language of WAC 296-23-26503 that the medical
42 director may suspend or remove a physician from the List based on one
43 or more of the nine factors enumerated within that regulation, as well as
44 for other reasons that are consistent with the legislative mandate
45 The statutes and regulations governing the IME process do not require
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1 the director to consider all of the factors or weigh them against each
2 other whenever a decision to approve, disapprove, suspend, or remove
3 an examiner is made.
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5 Reese, at 4. Hence, the Department director is certainly free to make a decision regarding
6 physician certification based on two of the nine factors listed in the rule, so long as it is reasonable.
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8 We believe the current criteria are rational and consistent with governing law.

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10 Carol Britton, an occupational nurse consultant who is the IME project manager for the
11 Department, and Dr. Henry Stockbridge, the Associate Medical Director for the Department,
12 explained the basis for the Department's current policy. When requesting IMEs, the Department
13 seeks to obtain objective reports from physicians who have qualifications equal to or superior to the
14 physicians treating injured workers.
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17 Board certification in one's specialty area by a board recognized by the ABMS means a
18 physician is recognized by his or her peers as having expertise in a particular specialty. It is difficult
19 to obtain certification in a particular specialty area. For example, to obtain certification as an
20 orthopedic specialist a physician must first complete an orthopedic residency program. After the
21 residency director certifies the physician has satisfactorily completed all aspects of the residency,
22 he or she is qualified to take a written examination. If the physician passes that examination, he or
23 she must work for at least 22 months as an orthopedic surgeon before being eligible to take an oral
24 examination. The latter examination is based on cases the surgeon has treated during his or her
25 practice. By contrast, board certification as an approved examiner is far less rigorous. All that is
26 required for a physician to obtain certification from the ABIME is passing a 4-hour examination.
27 There is no residency or practice requirement. The examination is more general, and the questions
28 concern general medical issues and specific issues regarding disability evaluations.
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35 Certification by the ABIME does little to bolster a physician's expertise. The Department is
36 interested in obtaining information from physicians based on their area of expertise, not their
37 certification as IME experts. The Department schedules IMEs to obtain information about a
38 worker's treatment options, residual impairment, and ability to work. An approved examiner's
39 opinion is requested based on his or her expertise in a particular specialty area, which, in
40 Dr. Sawyer's case, would be orthopedic surgery. In general, board certification in a particular
41 medical specialty area increases a physician's credibility with the worker, the attending physician,
42 Department personnel, and in Board proceedings. Dr. Sawyer himself admitted that local
43 orthopedic practices require a physician to be at least board eligible as a precondition for hiring.
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47 Dr. Brooks, the president of the Washington Association of Independent Medical Examiners, also

1 admitted his organization had advised the Department to require board certification in the
2 physician's practice area as a criteria for certification on the List. Accordingly, it is obvious that
3 certification by the ABIME is no substitute for certification by the medical board that governs a
4 physician's specialty area (in this case, the American Board of Orthopedic Surgery).
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7 Physicians who are not board certified in their specialty area can still be approved to perform
8 IMEs if they meet the Department's practice criteria. The Department's criteria on this point are
9 fairly minimal: an average of eight hours of direct patient care a week. Dr. Sawyer admitted he has
10 been unable to obtain any direct patient care position, although he has sought such a position since
11 the mid-1980s, because he is not board eligible in orthopedic surgery. It is reasonable for the
12 Department to conclude that physicians who cannot obtain positions involving direct patient care
13 lack the credentials to conduct IMEs. Dr. Sawyer also has not performed surgery since 1982
14 (except for assisting in a single case in 1988). His experience as a practicing surgeon was limited
15 to two years from 1980-1982. It is also reasonable for the Department to prefer reports from
16 orthopedic surgeons who have more recent and extensive practice experience than Dr. Sawyer.
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19 Accordingly, we have concluded that Dr. Sawyer's certification by the National Board of
20 Medical Examiners and the ABIME does not meet the Department's criteria of Board certification by
21 a medical board recognized by the ABMS. Since Dr. Sawyer neither engages in direct patient care,
22 nor is certified as a specialist in orthopedic surgery, he does not meet the Department's criteria to
23 be an approved examiner. This criteria is consistent with the provisions of WAC 296-23-26503 and
24 with the provisions of RCW 51.32.112 and 51.32.114. We, therefore, affirm the May 4, 2001 order
25 that revoked Dr. Sawyer's authorization to be an approved examiner and to be paid for IMEs
26 provided to injured workers.
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29 **FINDINGS OF FACT**

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1. On February 12, 2001, the Department of Labor and Industries sent Kenneth D. Sawyer, M.D., a letter stating he did not meet the criteria to be an approved medical examiner and his name was being removed from its Approved Examiners List (the List).

On April 5, 2001, Dr. Sawyer filed a protest and request for reconsideration of the Department's February 12, 2001 letter with the Department.

On May 4, 2001, the Department issued an order that revoked authorization for Dr. Sawyer to be an approved examiner and to be paid for independent medical examinations (IMEs) provided to injured workers.

1 On May 14, 2001, the Board of Industrial Insurance Appeals received
2 Dr. Sawyer's Notice of Appeal from the May 4, 2001 order.

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4 On June 12, 2001, the Board issued an order granting the appeal,
5 assigning it Docket No. 01 P0078, and directing that further proceedings
6 be held.
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- 8 2. Kenneth D. Sawyer, M.D., is licensed to practice medicine in the state of
9 Washington. He specializes in orthopedic surgery, but he only practiced
10 as an orthopedic surgeon for two years, from 1980 to 1982, following the
11 completion of his residency. Since 1982, Dr. Sawyer's practice has
12 been limited to performing medical examinations (except for assisting in
13 a single case in 1988).
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- 15 3. The Department contracts with panels of medical professionals to
16 supply it with physicians to conduct IMEs. As of 2002, the Department
17 contracted with approximately 40 different panels to conduct IMEs. Until
18 the fall of 2000, each panel submitted physicians' applications to be
19 approved examiners for their own specific panel to the Department. The
20 Department then determined whether a physician would be approved as
21 an examiner authorized to conduct examinations through that particular
22 panel. By the fall of 2000, Dr. Sawyer had been approved to provide
23 examinations through approximately seven different panels.
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- 25 4. Prior to the fall of 2000, the Department required physician applicants to
26 meet two of the following three criteria to be added to the List. First,
27 there had to be a geographic need for the physician's services.
28 Secondly, the physician had to be either board certified or be board
29 eligible by a medical board recognized by the American Board of
30 Medical Specialists. (ABMS). If a physician was not board certified, he
31 or she had to maintain an active practice or have hospital privileges.
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- 33 5. By the fall of 2000, the Department decided to modify its criteria for
34 approving physicians to the List. The Department decided physicians
35 would be required to be board certified in their area of practice, instead
36 of merely being board eligible. The Department also clarified that
37 having hospital privileges or having a practice limited to conducting
38 IMEs would not meet its practice requirement. Only physicians who had
39 a minimum average of eight hours a week of direct patient care over the
40 last two years could be considered active practitioners.
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- 42 6. In September 2000, the Department contacted all the physicians on its
43 List to ensure they were meeting its criteria to be approved examiners.
44 The physicians were all asked to reapply directly to the Department to
45 be recertified as approved examiners.
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- 47 7. Dr. Sawyer reapplied to be on the List. In his application, which the
Department received on October 20, 2000, he wrote his specialty area

1 was orthopedic surgery; he was not involved with direct patient care;
2 and he had obtained certification from the American Board of
3 Independent Medical Examiners. The Department disapproved
4 Dr. Sawyer's application to be an approved examiner because he did
5 not have board certification in his specialty area, orthopedic surgery,
6 and because he was not providing any direct patient care.
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- 8 8. Dr. Sawyer has not obtained board certification from the American
9 Board of Orthopedic Surgery, which is the medical board recognized by
10 ABMS in his area of medical expertise. To obtain board certification
11 from the American Board of Orthopedic Surgery, a physician must
12 complete an orthopedic residency. Following certification from the
13 residency director that the physician has satisfactorily completed all
14 aspects of the residency, the physician is qualified to take a written
15 examination. If the physician passes this examination, he or she will be
16 eligible to take an oral examination only after working for at least 22
17 months as an orthopedic surgeon. The physician must pass the oral
18 examination, concerning cases he or she has treated, to obtain
19 certification.
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- 21 9. Board certification as an orthopedic surgeon is a recognized medical
22 qualification indicating the surgeon is respected by his or her peers as
23 an expert in orthopedic surgery. This qualification generally tends to
24 increase a physician's credibility with the parties who review IMEs.
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- 26 10. Dr. Sawyer has obtained certification from the National Board of Medical
27 Examiners and the American Board of Independent Medical Examiners.
28 Successful completion of a medical residency program is not a
29 prerequisite for certification by either board. A physician can obtain
30 certification from the latter board by passing a 4-hour written
31 examination that does not focus on the specialty area of the physician's
32 practice.
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- 34 11. Dr. Sawyer does not meet the Department's criteria for being an
35 approved medical examiner because he is neither providing direct
36 patient care nor certified by the American Board of Orthopedic Surgery.
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- 38 12. The Department's criteria for approving physicians to be qualified
39 examiners is reasonably designed to ensure injured workers are
40 examined by qualified medical professionals whose reports are credible.
41

42 **CONCLUSIONS OF LAW**

- 43 1. The Board of Industrial Insurance Appeals has jurisdiction over the
44 parties and the subject matter of this appeal. However, this Board lacks
45 the legal authority to determine whether the Department violated the
46 Administrative Procedure Act by implementing new criteria for approving
47 physicians to its List without amending WAC 296-23-26503.

- 1 2. The Department's policy of requiring a physician to obtain either
2 certification by a medical board recognized by the ABMS in the
3 physician's specialty area, or to have an average of at least eight hours
4 of direct patient care in the prior two years, as a prerequisite for
5 authorization to be an approved examiner, is consistent with and
6 authorized by the provisions of WAC 296-23-26503, RCW 51.32.112,
7 and RCW 51.32.114.
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- 9 3. Dr. Sawyer is not qualified to be an approved medical examiner as
10 contemplated by RCW 51.32.114 and WAC 296-23-26503.
11
- 12 4. The Department's May 4, 2001 order is correct and is affirmed.
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14 It is so ORDERED.
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16 Dated this 2nd day of August, 2002.
17

18 BOARD OF INDUSTRIAL INSURANCE APPEALS
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21
22 /s/ _____
23 THOMAS E. EGAN Chairperson
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27 /s/ _____
28 FRANK E. FENNERTY, JR. Member
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32 /s/ _____
33 JUDITH E. SCHURKE Member
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