

## Sawyer, Kenneth, M.D.

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### 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. WAC 296-23-26503 repealed by WSR 04-04-029, filed 1/27/04, effective 3/1/04.]

Scroll down for order.



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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27 With these exceptions, the Board finds our industrial appeals judge committed no other  
28 prejudicial evidentiary errors. All other rulings are, therefore, affirmed.  
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### 30 **DECISION**

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32 Our industrial appeals judge affirmed the Department's May 4, 2001 order that revoked  
33 Dr. Sawyer's authorization to be an approved examiner, authorized to perform IMEs. Dr. Sawyer  
34 argues the Department's policy decision to require physicians who are approved examiners to be  
35 either board certified in their practice specialty or to be engaged in direct patient care is unlawful.  
36 He maintains this policy should have been promulgated as a rule prior to its implementation.  
37 Furthermore, he maintains this policy is inconsistent with the current rule, WAC 296-23-26503,  
38 which he believes requires consideration of nine factors in determining the qualifications of  
39 approved examiners. Dr. Sawyer also asserts his certification as an independent examiner is  
40 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.<sup>1</sup> 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 <sup>1</sup> 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.<sup>2</sup> 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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<sup>2</sup> 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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38 It is clear from the language of WAC 296-23-26503 that the medical  
39 director may suspend or remove a physician from the List based on one  
40 or more of the nine factors enumerated within that regulation, as well as  
41 for other reasons that are consistent with the legislative mandate . . . .  
42 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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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.  
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#### 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.

