

Reese, Harry, M.D.

STANDARD OF REVIEW

Removal of physician from approved examiners list

In a physician's appeal of a decision to remove the physician from the approved examiner's list, pursuant to WAC 296-23-26503, the standard of review is a preponderance of evidence.***In re Harry Reese, M.D., BIIA Dec., 00 P0044, (2001)***
[*Editor's Note:* The Board's decision was appealed to superior court under Thurston County Cause No. 01-2-01713-3(DEPT) and (PROVIDER).]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: HARRY S. REESE, M.D.**) **DOCKET NO. 00 P0044**
2)
3 **PROVIDER NO. 26245**) **DECISION AND ORDER**
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5 APPEARANCES:

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7 Provider, Harry S. Reese, M.D., by
8 Law Office of David R. Osgood, per
9 David R. Osgood

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11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Beth A. Bielefield, Assistant
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15 The provider, Harry S. Reese, M.D., filed an appeal with the Board of Industrial Insurance
16 Appeals on February 11, 2000, from a letter/decision of the medical director of the Department of
17 Labor and Industries dated December 17, 1999, which removed Dr. Reese's name from the
18 Approved Examiners List for Independent Medical Examinations. **REVERSED AND REMANDED.**

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21 **DECISION**

22 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
23 and decision on a timely Petition for Review filed by the provider to a Proposed Decision and Order
24 issued on March 13, 2001, in which the letter/decision of the medical director of the Department
25 dated December 17, 1999, was affirmed. We have granted review in order to: (1) provide
26 guidance to the Department and providers regarding the appropriate standard of review in appeals
27 from Department determinations suspending or removing doctors who currently are on the
28 approved examiners list, as well as determinations denying applicant doctors a place on that list;
29 and (2) amend the letter/determination by changing the penalty against Dr. Reese to a three-year
30 suspension from the Approved Examiners List.
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36 **Standard of Review**

37 Until recently, we took the position that the only Department orders or determinations that
38 are reviewable under the "abuse of discretion" standard were those where the Department's
39 determination was specifically stated to be discretionary by statute. See, e.g., *In re Armando*
40 *Flores*, BIIA Dec., 87 3913 (1989); *In re Michael Pinger*, BIIA Dec., 97 2210 (1998) [vocational
41 rehabilitation determinations]; and *In re Ernest Therriault*, BIIA Dec., 90 0876 (1990) [waiver of time
42 limit for filing application to reopen claim]. When the Department has no such statutorily authorized
43 discretion we review its decisions using the preponderance of the evidence standard of review.
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1 E.g., *In re C & R Shingle*, BIIA Dec., 88 2823 (1990) [RCW 51.48.010 penalty assessments];
2 *In re Washington Metal Trades Ass'n*, BIIA Dec., 89 2296 (1990) [retrospective rating claim
3 reserving and valuation]; and *In re St. Alphonsus Regional Medical Center*, Dckt No. 96 P051
4 (June 16, 2000) [termination of provider's eligibility to treat or be paid for treating injured workers].
5 We have held that the Department cannot dictate our scope and standard of review by
6 promulgating regulations that make its determinations "discretionary" absent a specific legislative
7 mandate. *Washington Metal Trades Ass'n*. The statutory authority for the regulations pertaining to
8 independent medical examinations (IMEs) include RCW 51.04.020 and .030, RCW 51.32.112 and
9 .114, and RCW 51.36.015. These statutes give the Department broad regulatory authority
10 regarding provision of medical care for injured workers, including the use of the IME to address
11 medical questions or disputes. However, none of these statutes provides the Department or its
12 director with "discretion" or "absolute discretion" relating to these grants of regulatory authority.
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19 In 1998 we determined that an exception to this rule existed in appeals from determinations
20 of the Department regarding "matters of claims administration not involving the actual adjudication
21 of entitlement to benefits." *In re Gail Conelly*, BIIA Dec., 97 3849 (1998). In that appeal, a dispute
22 arose between the Department and a self-insured employer over the choice of the physician to
23 conduct an IME. Our concern was that in appeals arising from disputes over the minutiae of claims
24 administration, a flood of litigation would pour forth from the pool of employers and workers who
25 become unhappy with the pace or nature of the claims administration process if appellants were not
26 required to meet the more stringent standard of review. Imagine the detrimental impact on the
27 speed with which the Department adjudicates medical questions if the assignment of physicians
28 conducting independent medical examinations was subject to de novo review by us upon appeal.
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34 The type of decision involved in *Conelly*, choosing the doctor to perform a specific IME on
35 one particular claim, is a claims administration task. In this case, the departmental function under
36 review involves oversight by the medical director's office of doctors who are eligible to perform IMEs
37 without regard to any one individual claim. Similarly, in *Washington Metal Trades Ass'n*, although
38 one individual claim was the focus of the appeal, the departmental function that was under dispute
39 was not that of claims administration, but of reserving or valuing the current and potential future
40 costs of a specific claim in order to set the appropriate amount of industrial insurance premiums.
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44 Thus, because the action of the Department under appeal in this case involves a function
45 other than claims administration, Dr. Reese's appeal does not fit within the *Conelly* exception to the
46 general rule requiring our review of the Department action under the preponderance of the
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1 evidence standard. We hold, therefore, that in appeals from determinations of the medical director
2 to approve, disapprove, suspend, or remove a doctor from the Approved Examiner's List (the List),
3 the appropriate standard of review is preponderance of the evidence.
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6 **Evidentiary Considerations**

7 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
8 no prejudicial error was committed and the rulings are affirmed.
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10 We specifically affirm both the August 10, 2000 Interlocutory Order Partially Granting the
11 Department's Motion in Limine and the August 16, 2000 Interlocutory Order Denying the Provider's
12 Motion in Limine. We note that the rationale for the ruling within the August 10, 2000 Interlocutory
13 Order was based on the incorrect belief that the "abuse of discretion" standard of review was the
14 appropriate standard of review in this appeal. Nonetheless, we believe the rulings in that
15 Interlocutory Order to be appropriate. ER 402 and 403. Use of the preponderance of the evidence
16 standard broadens the type of evidence that is relevant in this appeal. Under the "abuse of
17 discretion" standard of review relevant, and therefore admissible, evidence would be restricted to
18 "the same, or at least substantially similar, factual information as was before the administrative
19 decision-maker." *In re Mary Spencer*, BIIA Dec., 90 0264 (1991), at 6. The administrative
20 decision-maker in this case was Dr. Gary Franklin, the medical director of the Department. Much of
21 the testimony included within the record was not information that Dr. Franklin had before him or
22 otherwise considered when he made the decision to remove Dr. Reese's name from the List.
23 However, under the preponderance of the evidence standard, that testimony, with the exception of
24 proffered testimony by Dr. Reese regarding the impact on his practice caused by his removal from
25 the List, meets ER 402 relevancy requirements and is admissible.
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34 **Validity of the Department's Action to Remove Dr. Reese from the List**

35 In 1988 our state legislature enacted RCW 51.32.112 and .114. These statutes authorized
36 the Department to develop standards for the conduct of IMEs (referred to in the statutes as "special
37 medical examinations"), including the qualifications of the examiners, and to monitor the quality and
38 objectivity of the IMEs, which included ensuring the examinations are performed only by doctors
39 who meet Department standards. During the life of a claim, the Department usually will schedule
40 one or more IMEs in order to obtain expert medical opinion or advice on issues such as diagnosis,
41 causation, appropriate treatment, extent and duration of impairment, etc. The injured worker is
42 required to appear for the IME; if he or she neglects or refuses to do so, his or her benefits may be
43 suspended or terminated for non-cooperation. RCW 51.32.110. The injured worker does not have
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1 a voice in selecting the doctor(s) who conduct the IME. The mandatory nature of the IMEs and the
2 worker's lack of say in the choice of the doctors who perform them can make these examinations
3 appear adversarial. This can be very stressful to an injured worker whose entitlement to further
4 treatment, time loss compensation, and other benefits may be affected by the conclusions of the
5 doctors performing the IMEs. Our state legislature recognized these concerns and clearly
6 expressed its intent that these examinations "be conducted fairly and objectively by qualified
7 examiners and with respect for the dignity of the injured worker." Laws of 1988, ch. 114, sec. 1.
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11 In order to effectuate the intent of the Legislature, the Department promulgated regulations
12 relating to how IMEs are conducted as well as delineating which doctors may perform them.
13 WAC 296-23-255, *et seq.* In order to become an "approved examiner," a doctor must submit an
14 application to the Department. Once the medical director approves the application, the doctor's
15 name is placed on the List and he or she may begin conducting IMEs, although referrals are never
16 guaranteed. An injured worker can file a written complaint with the Department or self-insurer
17 about the conduct of the doctor performing an IME. WAC 296-23-26506. These complaints are
18 one of several factors that the medical director of the Department **may** consider in approving,
19 disapproving, suspending, or removing a doctor from the List. WAC 296-23-26503. Other factors
20 enumerated by this regulation include board certification, disciplinary proceedings or actions,
21 experience in direct patient care in the doctor's area of specialty, ability to convey and substantiate
22 conclusions concerning workers, quality and timeliness of reports, geographic need, availability to
23 testify, and acceptance of the fee schedule rate for testimony. If a doctor is suspended or removed
24 from the List, neither the Department nor self-insurers may make examination referrals to them, nor
25 will the doctor be reimbursed by the Department or self-insurers for examinations that other referral
26 sources request. WAC 296-23-26504.
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30 It is clear from the language of WAC 296-23-26503 that the medical director may suspend or
31 remove a physician from the List based on one or more of the nine factors enumerated within that
32 regulation, as well as for other reasons that are consistent with the legislative mandate that injured
33 workers be provided with examiners who are fair and objective and who also respect the dignity of
34 the worker. The statutes and regulations governing the IME process do not require the director to
35 consider all of the factors or weigh them against each other whenever a decision to approve,
36 disapprove, suspend, or remove an examiner is made.
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40 It is not particularly clear from the December 17, 1999 letter/determination and the testimony
41 of the medical director of the Department whether his decision to remove Dr. Reese from the List
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1 was based on WAC 296-23-26503(2) or (3), or both subsections, or for some other reason. In its
2 initial paragraph, the letter/determination identified the April 15, 1999 Stipulation to Informal
3 Disposition (Stipulation) issued by the Medical Quality Assurance Commission (the Commission).
4 In its second paragraph it stated, "Because of the conditions impacting your medical practice,
5 outlined in the Commission's Stipulation to Informal Disposition, the Department has decided to
6 remove your name from its Approved Examiners List for Independent Medical Examinations."
7 However, the only "condition" described in the letter/determination is the requirement that a
8 chaperone be present whenever Dr. Reese sees a female patient. Later in the letter/determination,
9 the medical director wrote, "The Department has been given authority to remove examiners from
10 the Approved Examiners List on the basis of medical disciplinary proceedings (WAC 296-23-
11 26503)." Dr. Franklin testified that the Department's action was based on a history of complaints
12 against Dr. Reese and the action taken by the Commission. Later in his testimony, Dr. Franklin
13 included as another ground for removal of Dr. Reese, the Department's inability to monitor his
14 compliance with the conditions imposed in the Stipulation. Another potential ground mentioned by
15 the Department employees who testified was Dr. Reese's failure to inform the Department of the
16 existence of the Commission investigation and the Stipulation as required by the *Medical
17 Examiner's Handbook* published by the Department.

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19 Dr. Reese first contends that his 14th Amendment due process rights were contravened by
20 the failure of the Department to provide adequate notice and an opportunity to be heard before it
21 issued its letter determination. This is a constitutionally based argument. This Board does not
22 have authority to address constitutional issues or rule on the constitutionality of statutes or
23 administrative process. See *Bare v. Gorton*, 84 Wn.2d 380 (1974). Nonetheless, it is our opinion
24 that Dr. Reese had adequate notice of the grounds for his removal from the List by the medical
25 director notwithstanding the lack of clarity of those grounds within the December 17, 1999
26 letter/determination, since the subject matter of the complaints and the reason for the Commission
27 investigation and the Stipulation are essentially identical. In the future, when the medical director
28 makes a determination that a doctor is to be removed or suspended, he should clearly and
29 completely specify all the bases for that action in the order or letter/determination that he has
30 issued. Dr. Reese has preserved this issue, however, should this matter reach superior court.

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32 We first examine the medical director's reliance on the WAC 296-23-26503(3) factor as a
33 basis for removing Dr. Reese from the List. Initially we must decide whether the Commission
34 investigation and the Stipulation constitute "Disciplinary proceedings or actions" within the meaning
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1 of WAC 296-23-26503(3). Dr. Reese has strenuously contended that the Stipulation is not a
2 disciplinary action within the meaning of that regulation. He testified that he signed the Stipulation
3 voluntarily because he understood it to be an informal "response" that was not a formal disciplinary
4 action and because the Stipulation specifically stated in Sec. 1.6 that it "shall not be construed as a
5 finding of unprofessional conduct or inability to practice."
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8 The investigatory procedure used by the Commission, which ultimately resulted in the
9 Stipulation between the Department of Health and Dr. Reese, is codified within the Uniform
10 Disciplinary Act, Chapter 18.130, RCW, (the UDA), an act that applies to many different health care
11 professionals, and businesses, not merely medical doctors. The Commission is a "Disciplining
12 authority" as defined by RCW 18.130.020(1). An investigation by such a "disciplining authority"
13 commences when a written complaint is submitted to the disciplining authority regarding one of its
14 license holders or applicants. RCW 18.130.080.
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19 Dr. Heye, a medical consultant with The Commission testified about the process used in
20 Dr. Reese's case. He noted that the Commission received 5 written complaints, between 1990 and
21 1997, from female injured workers regarding insulting or offensive comments Dr. Reese allegedly
22 made to them during IMEs. Initially, someone at the Commission reviews a complaint and decides
23 if it is "below threshold" (apparently meaning that no action or investigation will occur) or warrants
24 investigation. In this case, an investigator was assigned and contacted several of the
25 complainants. After the investigation the case proceeded to a panel of the Commission, at which
26 point the investigation could have been closed. Instead, Dr. Reese's case was assigned to a single
27 Commission member for further review. When this occurs, the Commission member reviews the
28 case in detail and then presents it to a larger panel of the Commission. At this stage, the
29 Commission panel could have decided to close the case without action. Instead, it chose to
30 compose a statement of allegations against Dr. Reese. Had the allegation been considered to be
31 severe, the Commission would have drafted a statement of charges pursuant to RCW 18.130.090,
32 instead of a statement of allegations.
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40 Once the statement of allegations was furnished to Dr. Reese, The Commission offered him
41 the opportunity for informal disposition of the matter by way of the Stipulation. This informal
42 resolution is authorized by RCW 18.130.172. The Stipulation includes the statement of allegations,
43 which had they been proven, would have constituted unprofessional conduct as described in one or
44 more subsections within RCW 18.130.180. The Stipulation contained requirements that Dr. Reese
45 take a specific ethical course, undergo a psychological examination (and therapy if recommended),
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1 and for no less than three years hire a chaperone to be present during all his examinations of
2 female patients. The chaperone must be a licensed nurse, accepted in advance by the
3 Commission, who is informed of the Stipulation and its allegations and who documents his or her
4 presence at the examinations in question. Among the other provisions of the Stipulation were the
5 provisions, required by statute, that it was not to be construed as a finding of unprofessional
6 conduct or inability to practice, nor was it to be considered formal disciplinary action within the
7 meaning of the UDA. See RCW 18.130.020(7). The Stipulation was entered into in lieu of more
8 formal disciplinary proceedings found in RCW 18.130.090 *et seq.* Those proceedings could have
9 resulted in entry of an order or agreed order, which constitutes formal disciplinary action according
10 to Dr. Heye. Further action is still possible if Dr. Reese violates the terms of the Stipulation.

11 "Disciplinary proceedings and actions" is not defined anywhere within Chapter 296-23, WAC,
12 therefore, we look to the ordinary everyday meaning of this phrase when determining if it fairly and
13 accurately describes the Commission investigation culminating in the Stipulation. We note that
14 The Commission is, by definition, a disciplinary authority empowered with investigative and
15 sanctioning authority, which correspond with disciplinary process and action, respectively. By the
16 time the complaints against Dr. Reese reached the stage in the Commission process that a
17 statement of allegations was drafted, they had advanced through several stages of this process and
18 could have been dismissed or closed without any action on three separate occasions. Instead,
19 these complaints were deemed of sufficient merit and weight to require a Stipulation, which
20 included some of the sanctions authorized by RCW 18.130.160. According to Dr. Heye, had
21 Dr. Reese not accepted the Stipulation, the Commission likely would have proceeded with formal
22 charges. We conclude that when, at the close of the Commission investigation and review, a
23 statement of allegations is furnished as authorized by RCW 18.130.172, that process and
24 statement of allegations constitutes "disciplinary proceedings or actions" within the meaning of
25 WAC 296-23-26503. Therefore, it was appropriate for the medical director to consider that factor
26 as part of the justification for removing Dr. Reese's name from the List.

27 We acknowledge that the Stipulation is not included within the UDA's definition of
28 "disciplinary action" found in RCW 18.130.020(7). However, the determination to remove
29 Dr. Reese from the List by the medical director is not based on or controlled by provisions of the
30 UDA, but on the legislative mandate found in RCW 51.32.112 and .114 and regulations
31 promulgated thereunder.

1 We now turn to the worker complaints to see if they justify the medical director's action of
2 removing Dr. Reese. These are the same complaints that the Commission used as a basis for
3 drafting the Stipulation. However, the existence of that Stipulation and the fact that the bases for it
4 are complaints by injured workers does not mean that the medical director is prohibited from using
5 those same complaints as an independent basis for removal of a provider. The goal of the UDA is
6 to protect the general public from the hazards of incompetence and misconduct on the part of
7 health care professionals. *Heinmiller v. Department of Health*, 127 Wn.2d 595 (1995). As stated in
8 *Department of Labor & Indus. v. Kantor*, 94 Wn. App. 764 (1999), at 781, "The UDA is intended
9 primarily to govern the eligibility of health care providers to hold a license to practice medicine
10 within the state of Washington." The legislative policy behind RCW 51.32.112 and .114 is more
11 specific and more stringent than that behind the UDA because of the lack of the traditional doctor-
12 patient relationship between the examining physicians and the injured workers and because of the
13 lack of choice provided workers. Protection of injured workers who are required to submit to IMEs
14 from any incompetence or misconduct by medical providers who perform them is also part of the
15 Department's mandate from RCW 51.32.112 and .114. But in addition to that is the mandate that
16 IMEs be conducted fairly, objectively, and with respect for the dignity of the injured worker. A
17 medical professional may not be guilty of misconduct or incompetence, and thus not subject to the
18 sanctions in the UDA, but still not permitted to perform IMEs if he or she does not respect the
19 dignity of an injured worker.

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29 In this case, the Commission considered five complaints, at least four of which were referred
30 to it by the Department. However, the Department chose to present evidence regarding only two of
31 those complaints, one by Deborah Carter-Warfield regarding an IME Dr. Reese conducted on
32 January 16, 1995, and the other by Jill Guernsey regarding an IME Dr. Reese conducted on
33 November 22, 1995.

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37 Ms. Carter-Warfield's complaint was filed before the IME report was released. Thus, we do
38 not believe that the complaint was made as retaliation for conclusions expressed by Dr. Reese in
39 his report. In her testimony, the worker alleged two specific situations during the IME that made her
40 feel "vulnerable," "uneasy and disturbed" as well as "upset." The first incident occurred during the
41 history taking and involved an attempt at humor by Dr. Reese that was in poor taste, without overt
42 vulgarity, but which could have been taken as having a sexual double-meaning. Dr. Reese denied
43 making part of the statement and admitted to making part of it, which he acknowledged as a "poor
44 attempt" on his part "to add a little humor" to the situation because the worker seemed "sad and self
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1 absorbed." The second incident occurred during the physical examination portion of the IME and
2 involved bodily contact, potentially much more serious than a mere joke or comment. However,
3 despite the worker's perception, we do not believe that any inappropriate touching occurred.
4 Dr. Reese merely was attempting to conduct an orthopedic examination on a person who could not
5 or would not allow it to be done in the usual manner. We have questions about the reliability of this
6 worker's perception of Dr. Reese's actions or movements as opposed to his statements. Our
7 concern is based on her emotional state, which seems quite overwrought, as is evident from her
8 description of what happened during an unanticipated encounter with Dr. Reese when she was
9 scheduled to have another IME (in which Dr. Reese did not participate).

10 We have no questions regarding Ms. Guernsey's reliability. She also relates two instances
11 of inappropriate comments by Dr. Reese during a November 22, 1995 IME. The first, during the
12 history taking, was frankly vulgar and overtly sexual in nature. The fact that the comment was not
13 directed to the worker does not excuse it. The second comment, at the end of the examination,
14 was not overtly sexual, but much more threatening. Ms. Guernsey testified that the remarks were
15 "extremely inappropriate and offensive to me." These remarks reveal a disturbing lack of sensitivity
16 in Dr. Reese toward this injured worker.

17 There is little in the record regarding the other three complaints, with the exception of the
18 admission of Dr. Reese's letter of apology (Exhibit No 5, page 1) regarding the 1990 complaint.
19 Paragraph 1.1 of the Stipulation contains very brief and general descriptions of the five complaints.
20 Essentially all that the Stipulation tells us is that there are **allegations** he used "abusive,
21 demeaning and embarrassing language" during these IMEs, and that the subject matter of these
22 alleged comments was Dr. Reese's "personal life." Dr. Henry Stockbridge noted that the
23 complaints regarded the use by Dr. Reese of sexually inappropriate language. The
24 characterizations of Dr. Reese's remarks within the Stipulation and by Dr. Stockbridge are correct in
25 relation to his remarks to Ms. Guernsey and to a lesser extent, to Ms. Carter-Warfield. However,
26 his behavior and remarks in those two instances are not sufficient to prove similar behavior and
27 remarks in the other three instances as well.

28 We conclude that the complaints of Jill Guernsey and Deborah Carter-Warfield have been
29 proven by a preponderance of the evidence (the latter worker's complaint has been proven only in
30 regard to the allegation of offensive remarks). The lack of evidence regarding the other three
31 complaints prevents us from determining that they are valid. The fact that Dr. Reese does not deny
32 making offensive comments to "at least one" of the complainants does not validate any of these

1 three complaints. He testified that he attempts to put workers at ease by injecting humor into the
2 examination process whenever he can. He notes that much of the humor is self-deprecating,
3 directed at his substantial girth among other things. In the case of the 1997 complaint, Dr. Reese
4 testified that the complaint probably was the result of Bell's Palsy, which affected his speech and
5 facial movements. The Commission did not investigate all of these complaints. The Department
6 did not investigate any of them either before or after the action by the Commission. No one at the
7 Department talked with the complainants. We do not know whether the medical director would
8 have taken any action at all against Dr. Reese because of them, if the Commission had not.
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10 We turn now to the two grounds for the medical director's determination that do not appear
11 within WAC 296-23-26503. The first was stated in the December 17, 1999 letter determination as
12 "conditions impacting your medical practice" contained within the Stipulation. The second, not
13 expressed by the medical director in the letter/determination, was Dr. Reese's failure to inform the
14 Department of the Commission's investigation and the Stipulation. We conclude that the
15 Department has failed to present sufficient proof for us to include them as separate grounds or
16 factors supporting the medical director's decision.
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18 The December 17, 1999 letter/determination lists only one "condition" impacting Dr. Reese's
19 medical practice. That condition is also described as a "restriction" placed upon Dr. Reese's
20 medical license. The condition in question was the provision in the Stipulation requiring Dr. Reese
21 to have a chaperone present during his examination and treatment of female patients. We do not
22 believe that the Department has proven this to be a condition or restriction of sufficient weight to
23 justify any action against him because of it. In fact, this "condition" is one that many medical
24 doctors voluntarily adhere to without any prompting from the Commission or any other professional
25 organization, not only to protect their patients, but also as protection for themselves from false
26 accusations. Carolyn Moore, president of Physician Resources Northwest, a firm that contracts
27 with the Department to perform IMEs, testified that in the last two years her office always provides
28 chaperones to female patients during IMEs. Rather than being a restriction on a medical license,
29 we believe this to be a safeguard; a practice that is consistent with the legislative mandate to
30 "respect the dignity of the injured worker."
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32 The Department is correct that Dr. Reese was informed in writing both by the approved
33 examiner application form and by its *Medical Examiners' Handbook* that he must inform the medical
34 director of any disciplinary action taken against him or his medical license. When Dr. Reese filed
35 the applications contained within Exhibit. No. 7, the Commission investigation and the Stipulation
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1 had not yet taken place. Dr. Reese's failure to inform the medical director of the Commission
2 investigation and the Stipulation was due to his belief that such action was not a "disciplinary
3 action" that needed to be reported. Dr. Heye's testimony and language contained within the
4 Stipulation legitimize such a belief, even though it has been proven to be legally incorrect.
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7 In conclusion, there are two substantiated factors, both enumerated within WAC 296-23-
8 26503, which justify action by the medical director to either suspend or remove Dr. Reese from the
9 List. In this case, the medical director determined that outright removal from the List was
10 appropriate. One of the many procedural flaws we have found with the "process" by which the
11 medical director made his decision is the lack of consideration of any penalty less than the ultimate
12 penalty of removal. Furthermore, the penalty was determined without Dr. Reese ever having been
13 given an effective chance to respond to the allegations against him or to provide information in
14 support of a lesser penalty. Upon our review of all of the evidence presented, using a
15 preponderance of the evidence standard of review, we believe that a suspension of three years,
16 beginning December 17, 1999, the date of the issuance of the Department's letter/determination, is
17 a more appropriate penalty.
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20 Imposition of a penalty by the medical director in addition to that imposed by the Stipulation
21 is appropriate in this case and does not conflict with any provision of the UDA for the reasons
22 described in *Kantor*, at 781-782. When determining the appropriate penalty in this situation, we are
23 limited to the actions permitted by WAC 296-23-26503 and -26504. Only two are mentioned:
24 removal of a physician from the List or suspension from that list. Removal from the List is
25 permanent and does not allow for reinstatement. (If "removal" is not intended to be permanent,
26 then it is no different than a suspension.) Had Dr. Reese been the attending or treating physician
27 for any of these workers, the Department would have a much broader range of corrective (and
28 rehabilitative) actions from which to choose. WAC 296-20-015(5). The UDA process,
29 RCW 18.130, provides many other penalties and corrective actions, including mandatory
30 psychological evaluation as well as ethical education, both of which Dr. Reese has completed. We
31 believe that it would be prudent to incorporate the types of corrective action listed by WAC 296-20-
32 015(5) into WAC 296-23-26503 or in a new regulation within Chapter 296-23, WAC.
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35 WAC 296-23-26503 and -26504 do not provide any guidance as to the appropriate length of
36 a suspension. We conclude that the imposition of a three-year suspension is a sufficient sanction
37 in this case. In reaching this determination, we balanced a wide variety of facts and circumstances
38 surrounding this case with paramount consideration being given to the legislative goal that IMEs be
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1 fair and objective and that the examiner be qualified and respect the dignity of the injured worker.
2 We considered that Dr. Reese's verbal comments, whether or not intended by him to be humorous,
3 were disrespectful of the injured workers in question. We also believe that Dr. Reese knew or
4 should have known that vulgarity and jokes of a sexual nature are not appropriate during any IME.
5 The evidence presented at the hearing shows that Dr. Reese is complying with all of the terms of
6 the Stipulation. We note that the Commission did not view Dr. Reese's behavior as warranting the
7 drafting of a statement of charges or a penalty such as the suspension or revocation of his medical
8 license. Dr. Reese has not been the subject of an investigation or disciplinary action of this type
9 before. Under the circumstances, outright removal of Dr. Reese from the List is too heavy a penalty
10 to pay for behavior that was verbal only and has been proven to have occurred only twice. We
11 considered the length of time Dr. Reese must comply with the terms of the Stipulation. The length
12 of the suspension chosen by us is the same as the Stipulation's minimum time limit for its
13 requirement that a chaperone be present whenever Dr. Reese has contact with a female patient.
14

15
16 The three-year suspension should begin to run from December 17, 1999, the date of the
17 letter/determination under appeal. We do not believe that the start of the three-year suspension
18 should begin on the same date that the Stipulation was entered. The Department was unaware of
19 the Stipulation or its provisions for a considerable length of time after it had been entered. Once
20 the Department did learn of the Stipulation, it needed a reasonable length of time to investigate the
21 circumstances behind it and to determine the appropriate course of action in this matter.
22

23 **FINDINGS OF FACT**

- 24
25 1. On December 17, 1999, the Department issued a letter to Harry S.
26 Reese, M.D., the provider, which contained the following determination:
27

28
29 (T)he Department has decided to remove your name
30 from its Approved Examiners List for Independent
31 Medical Examinations (IMEs). This decision means
32 that you may no longer do IMEs for the State Fund or
33 self-insured employers. This includes so-called
34 "Agreed Exams," or any other exams that may be
35 requested by any representative of the State Fund or
36 self-insured employers . . .
37

38
39 On February 11, 2000, the provider filed an appeal with the Board of
40 Industrial Insurance Appeals. On February 25, 2000, this Board granted
41 the appeal, assigned it Docket No. 00 P0044, and directed that further
42 proceedings be held.
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- 1 2. Harry S. Reese, M.D., is a physician who specializes in orthopedic
2 surgery. He is certified by the American College of Orthopedic
3 Surgeons. He has conducted thousands of independent medical
4 examinations (IMEs) for the Department of Labor and Industries and
5 self-insured employers pursuant to RCW 51.32.110.
6
- 7 3. During an IME conducted by Dr. Reese on January 16, 1995, he made
8 at least one offensive remark to the injured worker, who was greatly
9 upset by it. During the IME, Dr. Reese's verbal comments did not
10 display appropriate consideration for the dignity of this injured worker.
11
- 12 4. During an IME conducted by Dr. Reese on November 22, 1995, he
13 made multiple comments that were vulgar and offensive and one of
14 which was overtly sexual in nature. The injured worker considered
15 these comments inappropriate and threatening. Dr. Reese's verbal
16 remarks did not display appropriate consideration for the dignity of the
17 injured worker.
18
- 19 5. The Medical Quality Assurance Commission (the Commission) received
20 five complaints of insulting and offensive comments made by Dr. Reese
21 to injured workers during IMEs he was performing. The IMEs in
22 question occurred between 1990 and 1997. The Commission
23 conducted an investigation and review of the complaints. At the close of
24 its investigation, the Commission drafted a statement of allegations
25 pursuant to RCW 18.130.172(1) and proposed a Stipulation to Informal
26 Disposition (Stipulation), which both it and Dr. Reese entered into in
27 1999.
28
- 29 6. The Stipulation recited the allegations from the five worker complaints.
30 Dr. Reese did not admit to any of the allegations, but agreed to be
31 bound by the terms and conditions of the Stipulation. The Stipulation
32 was not considered formal disciplinary action under the Uniform
33 Disciplinary Act (UDA), Chapter 18.130, RCW. Failure of Dr. Reese to
34 comply with the provisions of the Stipulation would result in further
35 disciplinary proceedings by the Commission and would expose
36 Dr. Reese to sanctions under the UDA. Dr. Reese agreed to provide a
37 licensed nurse as a chaperone whenever he had contact with a female
38 patient, in an IME or otherwise. The chaperone was to be present
39 throughout the entirety of each examination unless the patient waives
40 his or her presence. Dr. Reese was required to maintain a log of all
41 female patients he examined, which the chaperone would sign. Each
42 chaperone had to be approved by the Commission and was required to
43 read, sign, and date the Stipulation. Dr. Reese agreed to participate in
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1 and successfully complete an 18-hour program in professional ethics,
2 undergo a psychological evaluation, and submit to therapy if the
3 evaluator advised it. Dr. Reese agreed to issue written apologies to
4 each patient who filed a complaint.

5
6 7. As of December 17, 1999, Dr. Reese had complied with all the terms of
7 the Stipulation.

8
9 8. The medical director of the Department first became aware of the
10 Stipulation in August 1999. He did not learn of it from Dr. Reese or
11 anyone on his behalf. The medical director made no attempt to
12 interview the complainants or otherwise investigate the complaints. A
13 subordinate contacted Dr. Reese twice by phone, but did not arrange for
14 a meeting with him even though one was requested. The medical
15 director discussed the Stipulation with a medical consultant from the
16 Commission. On December 17, 1999, the medical director issued the
17 letter/determination removing Dr. Reese from the Department's
18 Approved Examiner List.

19
20 **CONCLUSIONS OF LAW**

21 1. The Board of Industrial Insurance Appeals has jurisdiction over the
22 parties and the subject matter of this appeal. However, the Board does
23 not have legal authority to rule on the constitutional issues raised by the
24 provider during this appeal.

25
26 2. The Stipulation to Informal Disposition entered into during 1999 by the
27 Medical Quality Assurance Commission (the Commission) and Harry S.
28 Reese, M.D., as a consequence of and conclusion to an investigation by
29 The Commission conducted pursuant to Chap. 18.130, RCW,
30 constitutes "disciplinary proceedings or actions" within the meaning of
31 WAC 296-23-26503.

32
33 3. Considering the applicable circumstances of this case, the appropriate
34 penalty pursuant to WAC 296-23-26503 and -26504 is to suspend Harry
35 S. Reese, M.D., from the Department's Approved Examiners List for a
36 period of three years beginning December 17, 1999.

37
38 4. The letter/determination of the medical director of the Department of
39 Labor and Industries dated December 17, 1999, is reversed. This
40 matter is remanded to the Department to issue an order suspending
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1 Dr. Harry S. Reese, M.D., from the Approved Examiners List for three
2 years beginning December 17, 1999.

3
4 It is so ORDERED.

5
6 Dated this 14th day of August, 2001.

7
8 BOARD OF INDUSTRIAL INSURANCE APPEALS

9
10
11
12 /s/ _____
13 THOMAS E. EGAN Chairperson

14
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16
17 /s/ _____
18 FRANK E. FENNERTY, JR. Member

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22 /s/ _____
23 JUDITH E. SCHURKE Member

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