

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

***NOTICE OF RULEMAKING AFTER EMERGENCY ADOPTION
AND INFORMATIVE DIGEST***

Official Medical Fee Schedule – Physician Fees

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation (hereinafter "Administrative Director"), exercising the authority vested in her by Labor Code Sections 133, 4062, and 5307.3, has revised regulations on an emergency basis to implement the provisions of Labor Code section 5307.1 (Statutes of 2003, Chapter 639).

The revised regulation, Section 9789.11 of Article 5.3 of Chapter 4.5, Subchapter 1, of Title 8 of the California Code of Regulations, adopts Table A effective January 14, 2005 to set forth fees for physician services in the Official Medical Fee Schedule (OMFS).

The emergency regulation became effective on January 14, 2005, and was readopted with changes effective May 14, 2005. Together with the emergency readoption the Administrative Director adopted a new Table A for services rendered on or after May 14, 2005. The purpose of this rulemaking is to adopt the emergency regulations on a permanent basis.

TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, either orally or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: August 1, 2005

Time: 10:00 a.m.

Place: Auditorium

**The Governor Hiram Johnson State Office Building
455 Golden Gate Avenue
San Francisco, California 94102**

The State Office Building and its Auditorium are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or any other type of reasonable accommodation to facilitate effective communication and program access for persons with disabilities, are available upon request. Please contact the Statewide Disability Accommodation Coordinator, Adel Serafino, at 1-866-681-1459 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in her by Labor Code Sections 59, 127, 133, 4603.5, 5307.1, and 5307.3.

Reference is to Labor Code Sections 4600, 4603.2, 4620, 4521, 4622, 4625, 4628, 5307.1, and 5402.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Labor Code Section 5307.1, as amended by Senate Bill 228 of 2003 (Chapter 639, Statutes of 2003, effective January 1, 2004), requires the Administrative Director to adopt and revise periodically an official medical fee schedule that establishes the reasonable maximum fees paid for all medical services rendered in workers' compensation cases. Except for physician services, all fees in the adopted schedule must be in accordance with the fee-related structure and rules of the relevant Medicare (administered by the Center for Medicare & Medicaid Services of the United States Department of Health and Human Services) and Medi-Cal payment systems.

For the Calendar Years 2004 and 2005, the maximum reimbursable fees for physician services are to be the fees set forth in the Official Medical Fee Schedule in effect on 12/31/2003, but reduced by five (5) percent. The Administrative Director has the discretion to reduce individual medical procedures (reflected in the Fee Schedule by separate CPT codes) by amounts different than five percent, but in no event shall a procedure be reduced to an amount that is less than that paid by the Medicare payment system for the same procedure.

The Administrative Director adopted regulation section 9789.11, and the incorporated Table A (setting forth maximum fees for physician services), effective January 2, 2004. A revised Table A was adopted effective July 1, 2004. Subsequently, it has been discovered that some of the fees in the Table A were not set according to the intentions of the Administrative Director, and there were some typographical and arithmetical errors. In addition, the Centers for Medicare & Medicaid Services of the United States Department of Health and Human Services (CMS) has revised some of the Medicare physician fees effective January 1, 2005, which results in some of the OMFS fees falling below Medicare. Therefore, the Administrative Director is now adopting revisions to Table A effective for services on or after January 14, 2005 to correct errors and adopting a new Table A effective for services on or after May 14, 2005 to take into account the Medicare rate revisions.

The Administrative Director determined that the emergency adoption of proposed regulations was necessary for the immediate preservation of the public peace, health and safety or general welfare. The following described regulation was adopted as an emergency regulation, effective January 14, 2005, including a Table A effective January 14, 2005, and readopted as an emergency regulation with changes effective May 14, 2005. In addition, the emergency regulation adopted a new Table A effective for services on or after May 14, 2005. This rulemaking would make the regulation permanent. This proposed regulatory change implements, interprets, and makes specific Section 5307.1 of the Labor Code as follows:

Section 9789.11 Physician Services Rendered on or after July 1, 2004.

This section sets forth the formula for determining the maximum reimbursable fees for physician services rendered after January 1, 2004. Amended Labor Code section 5307.1(k) requires that such fees, set forth in the Official Medical Fee Schedule 2003, be reduced by 5%. However, the Administrative Director has the discretion to adjust individual procedure codes by different amounts, provided that no resulting fee drops below the Medicare rate for the same procedure.

(a) This subdivision provides that, except for the “General Information and Instructions” section, the ground rules set forth in the Official Medical Fee Schedule 2003 are applicable to physician services rendered after July 1, 2004. A “General Information and Instructions” section is incorporated by reference. A change is made in the web link where the General Information and Instructions may be found.

(b) This subdivision establishes that for physician services rendered after July 1, 2004, the maximum reimbursable fees for each procedure set forth in the Official Medical Fee Schedule 2003 shall be reduced up to 5%, except that any procedure code in the OMFS 2003 that is reimbursed at a rate greater than 100% of the Medicare rate (adopted for Calendar Year 2004) will be reduced up to 5% so that reimbursement will not fall below the Medicare rate.

(c) For the convenience of the regulated public, this subdivision consists of a table, “Table A - OMFS Physician Services Fees,” incorporated by reference, setting forth each individual procedure code, its corresponding relative value, conversion factor, assigned percent reduction calculation (between 0 and 5.0%), and maximum reimbursable fee.

This amendment renumbers this subdivision as four subparagraphs. Subparagraph (1) incorporates by reference “Table A - OMFS Physician Services Fees for Services Rendered after July 1, 2004.” Subparagraph (2) incorporates by reference “Table A - OMFS Physician Services Fees for Services Rendered after January 14, 2005.” Subparagraph (3) incorporates by reference “Table A - OMFS Physician Services Fees for Services Rendered after May 14, 2005.” Subparagraph (4) tells how the Tables A may be obtained from the Administrative Director or found on the internet.

(d) This subdivision sets forth the formulas for determining the 5% reduction in maximum reimbursable fees for physician and anesthesia services. For physician services, the relative value unit for each procedure code is multiplied by the applicable conversion factor, which is then multiplied by the assigned percent reduction calculation (between 0 and 5%) to produce the maximum reimbursement fee before the application of the OMFS 2003 ground rules. For anesthesia services, the base unit for each procedure is added to a modifying unit (if any) and time value, and then multiplied by the conversion factor $\times 95\%$.

(e) This subdivision provides that except for listed exceptions, pathology and laboratory services will be reimbursed under Section 9789.50.

Changes in Table A effective January 14, 2005. Section 9789.11

Table A, which is incorporated by reference, contains maximum reasonable fees for several thousand medical procedures. The Table A which was adopted as an emergency regulation, and which is made permanent in this rulemaking action, for services on or after January 14, 2005, revised and corrected fees for 286 of these medical procedures. This new Table A is different from the Table A effective July 1, 2004 as described below. However, the changes are not retroactive and thus a new Table A is adopted.

The fees for three procedure codes in the Surgery section are revised, effective January 14, 2005, to include the 5% reduction which was inadvertently omitted:

62278, 62289, and 64443.

For the following twenty-four Physical Medicine procedure codes, the 5% reduction was eliminated, effective January 14, 2005, because it was determined that this reduction would reduce the reimbursement below the level of Medicare:

97012	97022	97112	97612	97631
97014	97024	97116	97614	97650
97016	97026	97250	97616	97721
97018	97028	97520	97618	97752
97020	97110	97530	97620	

For the following three Medicine procedure codes, the 5% reduction was eliminated, effective January 14, 2005, because it was determined that this reduction would reduce the reimbursement below the level of Medicare:

90842
90843
90844

In the Anesthesia section of Table A, all of the procedure code numbers were revised to the correct five-digit format, effective January 14, 2005. These codes are found in the range of 00100 - 01999.

The following six procedure codes were deleted, effective January 14, 2005, because they represent technical services only and therefore fall within the Clinical Laboratory Fee Schedule and not the Table A physician schedule:

86490
86510
86580
86585
89350
89360

The following nine procedure codes were deleted, effective January 14, 2005, because the services they describe now fall within the Clinical Laboratory Fee Schedule and not the Table A physician schedule:

99000
99001
99002
99017
99019
99020
99021
99026
99027

The following codes in the Radiology and Pathology sections were revised, effective January 14, 2005, to include a correct split between a professional and a technical component:

70010	73225	75710	76930	77750	88300
70015	73500	75743	76936	77761	88302
70030	73525	75746	76938	77763	88304
70170	73530	75774	76941	77777	88305
70190	73590	75790	76942	77778	88307
70332	73615	75801	76945	77781	88309
70336	73620	75803	76946	77782	88311
70350	73700	75805	76950	77783	88312
70360	73720	75807	76965	77784	88313
70370	74000	75809	76975	77789	88314
70371	74150	75810	76986	78460	88318
70373	74181	75820	77261	78472	88319
70390	74190	75825	77263	78478	88321
70450	74210	75880	77280	78481	88323
70540	74320	75885	77310	78483	88325
71010	74327	75893	77315	78580	88329
71036	74329	75961	77321	78647	88331
71040	74340	75962	77326	78650	88332
71060	74350	75980	77328	79000	88342
71100	74355	75984	77331	80500	88346
71250	74400	75992	77332	80502	88347
71550	74445	76000	77334	85060	88348
72010	74450	76010	77336	85097	88349
72125	74470	76061	77401	85102	88355
72141	74475	76066	77402	86077	88356
72170	74485	76070	77403	86078	88358
72192	74710	76075	77404	86079	88362
72196	74740	76080	77406	88104	88365
72200	74742	76086	77407	88106	89100
72240	74775	76090	77408	88107	89105
73000	75552	76093	77409	88108	89130
73010	75600	76095	77411	88125	89132
73040	75605	76150	77412	88160	89136
73050	75662	76350	77413	88161	89140
73085	75665	76355	77414	88162	89141
73090	75671	76360	77417	88172	
73120	75676	76370	77419	88173	
73200	75685	76400	77470	88180	
73220	75705	76506	77600	88182	

For the following five procedure codes, the conversion factor was corrected, effective January 14, 2005, for typographical errors in Table A:

99065
99100
99116
99135
99140

Codes 43899 and 48599 were deleted, effective January 14, 2005, because they do not exist in the OMFS, and had been included by error.

Codes 35700 and 77416 were added, effective January 14, 2005, because they had been inadvertently omitted.

The amounts for codes 57307 and 88099 were revised, effective January 14, 2005, to correct typographical errors.

Changes in Table A effective May 14, 2005.

A second new Table A, incorporated by reference, was adopted as an emergency regulation for services rendered on or after May 14, 2005. This rulemaking adopts the Table A effective for services on or after May 14, 2005 on a permanent basis. This second Table A revises and corrects fees for nine of the medical procedures, and adjusts fees for 105 medical procedures so that they do not fall below Medicare in light of CMS' fee increases which became effective January 1, 2005 for those procedures.

The fees for the following procedure codes are revised, effective May 14, 2005, because of changes in CMS' physician fee schedule which became effective January 1, 2005:

11740	27601	28153	32940	61520	68850
19001	27665	28160	36420	61530	70553
20910	27686	28193	36489	61583	80502
20972	27730	28250	36493	61596	88180
21400	27732	28261	36533	61888	88349
21493	27752	28285	36860	63301	90842
21925	27824	28286	42100	64726	91032
24560	27825	28300	47505	65900	92265
25455	28050	28302	47553	67025	92284
25565	28060	28305	50020	67028	93721
25600	28080	28308	50205	67120	93722
25622	28100	28455	50578	67121	94770
26765	28104	28576	50961	67345	96115
27035	28108	28645	53200	67808	99183
27060	28110	31720	54318	67916	99311
27071	28120	31725	54450	67923	
27517	28126	32815	60512	68530	
27600	28140	32905	61340	68770	

The fees for the following nine procedure codes are revised, effective May 14, 2005, to include the 5% reduction which was inadvertently omitted in previous iterations of the Table A:

88028
88029
88036
88037
88045
88130
88140
88150
88155

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative Director has made the following initial determinations:

- **Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states:** None.
- **Adoption of this regulation will not:** (1) create or eliminate jobs within the State of California; (2) create new businesses or eliminate existing businesses within the State of California; or (3) affect the expansion of businesses currently doing business in California.
- **Effect on Housing Costs:** None.
- **Cost impacts on representative private person or business:** The Administrative Director has made an initial determination that the proposed regulations will not have a significant adverse economic impact on representative private persons or directly affected businesses. The entities directly affected by the regulations, which govern payments for medical services provided to injured workers after January 14, 2005, and on or after May 14, 2005, include: (1) health care providers, including but not limited to physicians, pharmacists, inpatient and outpatient facilities, who bill for procedures covered under the Official Medical Fee Schedule; (2) employers who are large and financially secure enough to be permitted to self-insure their workers' compensation liability and who administer their own workers' compensation claims; (3) private insurance companies which are authorized to transact workers' compensation insurance in California. The representative private persons or directly affected businesses which might be negatively affected are insurance companies or self-insured employers. The possible cost impact would be slightly increased costs for treating some workers' compensation injuries.
- There will be no initial start-up costs to comply with the proposed regulation. The total annual ongoing costs will depend on the total number of medical procedures for which the fees are increased or decreased.

FISCAL IMPACTS

- **Costs or savings to state agencies or costs/savings in federal funding to the State:** None. Minimal costs to state agencies in their capacity as employers, which will result from slightly increased costs of some medical services. These increased costs have been imposed by the enactment of SB 228 of 2003.
- **Mandate on Local Agencies:** None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The potential costs imposed on all public agency employers by these proposed regulations, although not a benefit level increase, are not a new State mandate because the regulations apply to all employers, both public and private, and not uniquely to local governments. The Administrative Director has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not

constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See County of Los Angeles v. State of California (1987) 43 Cal.3d 46. The potential costs imposed on all public agency employers and payors by these proposed regulations, although not a benefit level increase, are similarly not a new State mandate because the regulations apply to all employers and payors, both public and private, and not uniquely to local governments.

- **Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code:** None. (See “Local Mandate” section above.)
- **Other nondiscretionary costs/savings imposed upon local agencies:** None. (See “Local Mandate” section above.)

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulation will not have any adverse impacts on small businesses. The small businesses that will be affected by the regulation are medical providers. They will experience a small positive economic impact. The regulations also affect insurance companies and self-insured employers, which are the largest of California's employers.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code Section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Administrative Director’s attention would be more effective in carrying out the purpose for which the actions are proposed, or would be as effective and less burdensome to affected private persons than the proposed actions.

The Administrative Director invites interested persons to present reasonable alternatives to the proposed regulation at the scheduled hearing or during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATION

A pre-adoption workshop, pursuant to Government Code Section 11346.45, is not required to implement the proposed regulations, because the issue addressed is not so complex that it cannot easily be reviewed during the comment period.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulation have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below or a copy will be provided upon written request.

In addition, this Notice, the Initial Statement of Reasons, and the text of regulations may be accessed and downloaded from the Department of Industrial Relations’ Internet site at www.dir.ca.gov under the heading "Rulemaking-proposed regulations." Any subsequent changes in regulation text and the Final Statement of Reasons will be available at that Internet site when made.

The Table A effective for services on or after January 14, 2005 (incorporated by reference into

Section 9789.11(c)(2)) and the Table A effective for services on or after May 14, 2005 (incorporated by reference into Section 9789.11(c)(3)) are available for download or upon request as specified above.

**PRESENTATION OF ORAL AND/OR WRITTEN COMMENTS AND DEADLINE
FOR SUBMISSION OF WRITTEN COMMENTS**

Members of the public are invited to present oral and/or written statements, arguments or evidence at the public hearing. If you provide a written comment, it will not be necessary to present your comment as oral testimony at the public hearing.

Any person may submit written comments on the proposed regulation to the DWC contact person:

Ms. Maureen Gray
Regulations Coordinator
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

Written comments may also be submitted by facsimile transmission (FAX), addressed to the contact person at (415) 703-4720. Written comments may also be sent electronically (via e-mail), using the following e-mail address: dwcrules@hq.dir.ca.gov

Unless submitted prior to or at the public hearing, all written comments must be received by the agency contact person, no later than 5:00 p.m. on August 1, 2005. Equal weight will be accorded to oral and written materials.

COMMENTS TRANSMITTED BY E-MAIL OR FACSIMILE

Due to the inherent risks of non-delivery by facsimile transmission and email transmission, the Administrative Director suggests, but does not require, that a copy of any comments transmitted by facsimile transmission or email transmission also be submitted by regular mail.

Comments sent to other e-mail addresses or other facsimile numbers will not be accepted. Comments sent by e-mail or facsimile are subject to the deadline set forth above for written comments.

**AVAILABILITY OF RULEMAKING FILE AND LOCATION
WHERE RULEMAKING FILE MAY BE INSPECTED**

Any interested person may inspect a copy or direct questions about the proposed regulation, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file.

The rulemaking file, including the Initial Statement of Reasons, the complete text of the proposed regulation and any documents relied upon in this rulemaking may be inspected during normal business hours (8:00 a.m. to 5:00 p.m., Monday through Friday, excluding public holidays) at the following location:

Division of Workers' Compensation
455 Golden Gate Avenue, Ninth Floor
San Francisco, California 94102

AVAILABILITY OF RULEMAKING DOCUMENTS ON THE INTERNET

Documents concerning this proceeding are available on the Division's website: www.dir.ca.gov. To access them, click on the "Proposed Regulations - Rulemaking" link and scroll down the list of rulemaking proceedings to find the rulemaking link, "Workers' compensation – Official medical fee schedule table A.

CONTACT PERSON:

Nonsubstantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulation, the Table A documents incorporated by reference, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be directed to the contact person. The contact person is:

Ms. Maureen Gray
Regulations Coordinator
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The telephone number of the contact person is (415) 703-4600.

BACK-UP CONTACT PERSON / CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

To obtain responses to questions regarding the substance of the proposed regulation, or in the event the contact person is unavailable, inquiries should be directed to: Richard Starkeson, Industrial Relations Counsel, at the same address and telephone number as noted above for the contact person.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulation as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be made available for public comment for at least 15 days prior to the date on which the regulation is adopted. The modified text will be made available on the Division's website: www.dir.ca.gov and may be located by following the direction provided above.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the Division's website: www.dir.ca.gov by following the directions provided above.

AUTOMATIC MAILING

A copy of this Notice, including the Informative Digest, will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted on a permanent basis, the proposed regulation will remain in effect as amended at Title 8, California Code of Regulations, Section 9789.11.