

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

INITIAL STATEMENT OF REASONS

**Subject Matter of Regulations: Spinal Surgery
Second Opinions**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 9788.01 – 9788.91**

Section 9788.01	Definitions
Section 9788.1	Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery
Section 9788.11	Form for Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery
Section 9788.2	Qualifications of Spinal Surgery Second Opinion Physicians
Section 9788.3	Application Procedures
Section 9788.31	Application Form
Section 9788.32	Administrative Director's Action on Application
Section 9788.4	Removal of Physicians from the Spinal Surgery Second Opinion Physician List
Section 9788.5	Random Selection of Second Opinion Physician
Section 9788.6	Examination by Second Opinion Physician or Agreed Second Opinion Physician
Section 9788.7	Contents Of Second Opinion And Agreed Second Opinion Physician Reports
Section 9788.8	Time Limits For Providing Reports
Section 9788.9	Charges for Services of Second Opinion Physician and Agreed Second Opinion Physician
Section 9788.91	Filing of a Declaration of Readiness to Proceed

BACKGROUND TO REGULATORY PROCEEDING

The Legislature amended Labor Code Section 4062 (Senate Bill 228, effective January 1, 2004) to provide for employers who object to a proposed recommendation for spinal surgery to obtain from the Administrative Director the name of a randomly selected physician who is to render a second opinion. These regulations prescribe the qualifications of the physicians, the manner of their appointment and removal, the manner of selection and assignment of the second opinion physicians, and the content of their reports.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Division did not rely upon any technical, theoretical, or empirical studies, reports, or similar documents in proposing the above-identified regulations.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

None of the proposed regulations mandate the use of specific technologies or equipment.

FACTS ON WHICH THE AGENCY RELIES IN SUPPORT OF ITS INITIAL DETERMINATION THAT THE REGULATIONS WILL NOT HAVE A SIGNIFICANT ADVERSE IMPACT ON BUSINESS

The Division made an initial determination that these regulations will not have a significant adverse effect on business. The regulations are directed to insurance companies and self-insured employers, which are not small businesses. Any costs are primarily due not to the regulations, but to the legislative enactment that mandated the spinal surgery second opinion process, effective January 1, 2004. The fees set for these medical-legal examinations are the same as those set for other medical-legal examinations, and so do not represent an increase. The percentage of workers' compensation claims utilizing the procedures of these regulations is small. The cost of adopting new forms and procedures to follow these regulations is minimal.

Section 9788.01 Definitions

Specific Purpose of Section 9788.01:

Section 9788.01 lists and defines the terms used in these regulations. The purpose of the definitions is to implement, interpret, and make specific Labor Code section 4062 and to ensure that the meanings of the terms are clearly understood by the regulated community.

Necessity:

It is necessary to define each of the key terms used in the Spinal Surgery Second Opinion Regulations to ensure that the content and meaning of the regulations are clearly understood by the regulated community.

Consideration of Alternatives:

No more effective alternative to any of the definitions, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Specific Purpose of Section 9788.01(a): Agreed second opinion physician is defined to distinguish this physician from the second opinion physician which is to be assigned whenever an employee is not represented.

Specific Purpose of Section 9788.01(b): Completion of the second opinion process is defined in order to make clear exactly when the process is deemed complete, because consequences attend to certain actions taken before this process is complete.

Specific Purpose of Section 9788.01(c): CPT[®] is defined to provide specificity as to which version of the CPT codes is being referred to.

Specific Purpose of Section 9788.01(d): Income is defined so that income of a person's business partner, physician member of the office of a group practice, spouse, cohabitant, and immediate family can be included within the definition of material financial affiliation.

Specific Purpose of Section 9788.01(e): Material familial affiliation is defined in order to specify the family relationships of the second opinion physician which would cause a violation of Labor Code section 4062 subdivision (c).

Specific Purpose of Section 9788.01(f): Material financial affiliation is defined in order to specify the financial relationships of the second opinion physician which would cause a violation of Labor Code section 4062 subdivision (c).

Specific Purpose of Section 9788.01(g): Material professional affiliation is defined in order to specify the professional relationships of the second opinion physician which would cause a violation of Labor Code section 4062 subdivision (c).

Specific Purpose of Section 9788.01(h): Parent, subsidiary, and otherwise related business entity are defined to make clear the definition material financial affiliation in subdivision (f).

Specific Purpose of Section 9788.01(i): Receipt of the treating physician's report is defined in order to make clear that the report is deemed received when either of the three listed entities first receive it.

Specific Purpose of Section 9788.01(j): Retired spinal surgeon is defined in order to delineate a class of physicians who used to have spinal surgery privileges, but who did not lose these privileges through a disciplinary process or surrender them while facing possible discipline.

Specific Purpose of Section 9788.01(l): Spinal surgery is defined in order to make clear precisely what medical procedures are covered by subdivision (b) of Labor Code section 4062, since spinal surgery is itself a vague term. The listed procedure numbers in subdivision (1) establish that those procedures within the Official Medical Fee Schedule (OMFS), and not necessarily CPT procedure numbers for similar procedures within the American Medical Association's CPT codebooks of later vintage, are within the

definition of spinal surgery. Subdivision (2) is included to make clear that procedures which do not correspond to the OMFS numbers of subdivision (1), are nevertheless included if they are invasive, non-diagnostic, and not analgesic. Subdivision (3) is included to make clear that procedures which are not analgesic and which may not otherwise be considered invasive, are included if they involve implantation or the introduction of energy into spinal structures. Subdivision (4) is included to make clear that acupuncture and emergency procedures are excluded.

Section 9788.1 Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery.

Specific Purpose of Section 9788.1:

The purpose of section 9788.01 is to specify the procedures to be followed when an employer objects to a treating physician's recommendation for spinal surgery, and to establish an Administrative Director's form on which an objection is to be made. Because of the short time periods prescribed by Labor Code section 4062, objections containing insufficient information need to be avoided, and the Administrative Director staff needs to be able to screen out objections relating to procedures that are not actually spinal surgery. Because only ten days are allowed from the receipt of the physician's report until an objection is made, in order that it can be quickly known if the objection is untimely, the objection form includes the date that the treating physician's report was first received. That date is to be stated in a declaration, so that it is reliable. Two copies of the form are required to save the time and expense of making copies. If a subsequent agreement is reached on an agreed second opinion physician, the parties must immediately inform the Administrative Director, so that a scheduled assignment of a second opinion physician can be cancelled as soon as possible.

Necessity:

For efficient administration, it is necessary to utilize a form containing all the information relevant to the parties involved and the treatment recommendation. Use of a form will also allow a computer assisted check on the existence of some of the conflicts of interest prohibited by subdivision (c) of Labor Code section 4062, and will make easier the computer assisted process of assigning second opinion physicians.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.11 Form for Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery.

Specific Purpose of Section 9788.11:

The purpose of Section 9788.11 is to prescribe the exact form to be used for filing objections.

Necessity:

It is necessary to establish a form for parties to use to obtain the assignment of a second opinion physician. For efficient administration, it is necessary to utilize a form containing all the information relevant to the parties involved and the treatment recommendation.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.2 Qualifications of Spinal Surgery Second Opinion Physicians.

Specific Purpose of Section 9788.2:

The purpose of Section 9788.2 is to establish the qualifications of physicians whom the Administrative Director may select to be second opinion physicians, and to protect the integrity of the workers' compensation judicial system by preventing physicians convicted of a crime of dishonesty or moral turpitude and those subject to discipline from participating as second opinion physicians.

Necessity:

It is necessary for clarity to repeat the language of Labor Code section 4062 that an "agreed second opinion physician" can be any California licensed board certified or board eligible orthopedic surgeon or neurosurgeon, since the requirements for a "second opinion physician" are different. Labor Code section 4062 specified that second opinion physicians had to be orthopedic surgeons or neurosurgeons without adding the qualification that these surgeons might be only "board eligible," as it did for "agreed second opinion physicians." Certification by one of two specialty boards recognized by the American Board of Medical Specialties (for physicians), or one board (for osteopaths), is required in order to meet the legislature's unqualified specification of "orthopedic surgeon" or "neurosurgeon."

Unrestricted hospital privileges in spinal surgery (within the last three years) are required to establish the physician's recent knowledge of spinal surgery procedures. To prevent the judicial process from receiving opinions of noncredible physicians and of physicians who have difficulty in following California workers' compensation law and rules, physicians who have been convicted of a crime of dishonesty or moral turpitude, or who have had disciplinary problems related to service as a Qualified Medical Evaluator with the Industrial Medical Council (now the Administrative Director) are excluded. To protect the public from less than fully competent physicians, those who have been disciplined by their licensing agencies, or who are under current disciplinary proceedings, are excluded.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.3 Application Procedures.

Specific Purpose of Section 9788.3:

The purpose of Section 9788.3 is to establish an efficient application procedure, to make sure that applicant physicians have the qualifications they claim, and to make sure that the Administrative Director has current contact information for all accepted second opinion physicians.

Necessity:

Requiring physician applicants to submit certified copies of their board certification and hospital privileges will allow the Administrative Director to determine if physician applicants meet the prescribed qualifications. Requiring physicians to furnish current contact information will enable the Administrative Director to be reasonably certain of the accuracy of this information in the Administrative Director's files.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.31 Application Form.

Specific Purpose of Section 9788.31:

The purpose of Section 9788.31 is to prescribe the exact form to be used for physician applicants to apply to be on the list of second opinion physicians.

Necessity:

It is necessary to establish a form for physicians to use to apply to the Administrative Director, so that all necessary information is furnished and can be efficiently entered into a computer data system.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.32 Administrative Director's Action on Application.

Specific Purpose of Section 9788.32:

The purpose of Section 9788.32 is to set forth uniform written procedures for the Administrative Director to examine applications for second opinion physicians, to appoint second opinion physicians, to reject applications, to allow the Administrative Director to exercise discretion with regard to accepting otherwise qualified physicians who have been the subject of discipline more than five years earlier, to establish procedures for physician applicants to appeal adverse determinations, and to preclude rejected applicants from burdening the system by immediately reapplying.

Necessity:

It is necessary to establish a uniform procedure for compiling the list of qualified applicants. Allowing rejected applicants whose rejection was based solely on long past discipline to submit evidence of rehabilitation, and allowing the Administrative Director to investigate the physician and make a decision on rehabilitation, allows the Administrative Director to accept rehabilitated physicians. Providing for notice of rejection of applications, requests for hearing on the rejection, the filing of a statement of issues, and making the procedures subject to chapter 5 (Administrative Adjudication: Formal Hearing), part 1, division 3, title 2 of the Government Code, protects the due process rights of the rejected applicant.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.4 Removal of Physicians from the Spinal Surgery Second Opinion Physician List.

Specific Purpose of Section 9788.4:

The purpose of Section 9788.4 is to set forth procedures for the Administrative Director to remove from the list of second opinion physicians those who no longer meet the qualifications, those whose licenses have become subject to revocation, and those who have not complied with these regulations, and also to establish procedures for physicians to appeal their removal from the list.

Necessity:

Providing for the removal from the list of physicians who no longer meet the qualifications, those who have become subject to disciplinary procedures by their licensing board, those who have not met the time deadlines of these regulations, those whose applications contained untrue statements, and those who have failed to disclose material professional, familial, or financial relationships as required by Labor Code section 4062, will allow the Administrative Director to maintain a list of second opinion physicians who at all times meet the required qualifications, and protect the public from having unqualified physicians on the list. Providing for notice of removal, requests for hearing on the removal decision, the filing of an accusation, and making the procedures subject to chapter 5 (Administrative Adjudication: Formal Hearing), part 1, division 3, title 2 of the Government Code, protects the due process rights of the removed physician. Providing that Government Code section 11522 applies to removed physicians applying for reinstatement after one year specifies the procedure applicable to a request for reinstatement.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.5 Random Selection of Second Opinion Physician.

Specific Purpose of Section 9788.5:

The purpose of Section 9788.5 is to establish procedures by which the Administrative Director can make a random selection of a second opinion physician from the list while minimizing travel distance to examinations, to provide for an assignment system that will not take an excessive amount of time from the 45 days allowed between the date of recommendation and the date of the second opinion physician report, and to reduce the possibility that there will be proscribed conflicts of interest.

Necessity:

By allowing only five days for the Administrative Director to make a selection, only five days for the selected physician to notify the Administrative Director of a conflict of interest, and only five days for the selected physician to notify the parties of the selection and of the date of an examination appointment, the minimum amount of the 45 day period will be used by the selection process. Using an initial thirty mile radius from the address of the employee will keep employee travel distance to a minimum, while including a geographic area that, at least in urban areas, is likely to include a number of physicians from which to make a random selection. By using a minimum of six physicians from a selection pool, the likelihood of a random selection is enhanced. Because certain conflicts of interest in second opinion physicians are proscribed by statute, providing for an initial screening by the Administrative Director to eliminate physicians with determinable conflicts of interest, and requiring selected physicians to notify within five days if they have any conflict of interest, will reduce the time required for the selection process. By providing for the use of a manual selection process using zipcodes as a geographic base, the Administrative Director is able to begin providing randomly selected second opinion physicians before a computerized system is fully functioning. Providing for initial objections to be made based on alleged proscribed conflicts of interest will increase the amount of time available for record review and reporting in those cases where there is a conflict of interest.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.6 Examination by Second Opinion Physician or Agreed Second Opinion Physician.

Specific Purpose of Section 9788.6:

The purpose of Section 9788.6 is to establish the parameters of an examination by the second opinion physician of the employee, to establish when an examination is required and when paper review will suffice, considering both economy and the need for accurate conclusions, to provide for the method of transmitting medical records to the second opinion physicians for review in a timely fashion, to provide for the details of transportation of the employee to the examination in a manner that will make timely attendance more likely, and to address the situation where the employee fails to attend a scheduled examination in order to reduce litigation in such situations.

Necessity:

Because a physical examination would not be necessary in all cases, and it would be wasteful to require one when the second opinion physician can determine by record review that the physician concurs with the recommendation of the treating physician, requiring a physical examination only when the second opinion physician would have disagreed with the treating physician's recommendation will achieve a proper balance of the need for economy and the need for accuracy of conclusions. Requiring the second opinion physician to schedule examinations and to give at least 10 day's notice to the parties will allow adequate notice and will be an efficient means of scheduling the examination.

The second opinion physician cannot make an evaluation without the employee's records to review. Requiring the employer to furnish records for the review will ensure that the employee's records are provided in a timely manner, as the employer (including insurer or administrator) normally has the records (or can obtain them expeditiously), and the employee often does not. Stating that the employer has the obligation to furnish transportation to an examination, that the employer is to furnish transportation expense in advance, and that the employer is to arrange any specially required means of transport will make it more likely that employees with transportation difficulties can attend examinations within the 45 day period. Prohibiting *ex parte* contacts and requiring contacts to be in writing will reduce the incidence of claims of undue influence being exerted over the physician, which would otherwise have to be investigated and adjudicated.

Labor Code section 4062 is silent as to what should transpire should an employee fail to attend an examination. Providing for an additional 45 days for the examination, or for the selection of another second opinion physician if the first second opinion physician cannot accommodate a rescheduled examination within the next 45 days, will provide clarity and reduce litigation as to what should be done in a situation where the employee fails to attend a scheduled examination.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.7 Contents Of Second Opinion And Agreed Second Opinion Physician Reports.

Specific Purpose of Section 9788.7:

One purpose of Section 9788.7 is to reduce litigation should the second opinion physician not agree with the treating physician's recommendation, but recommend some other treatment or therapy. Another purpose is to encourage participation by physicians who

believe they should be able to make a full recommendation as to treatment of an employee's condition. Another purpose of this section is to prescribe what a second opinion physician report should contain in order that it can be rationally analyzed and reviewed, and to ensure that the second opinion physician did not have a proscribed conflict of interest.

Necessity:

By providing that the second opinion physician may recommend an alternative therapy rather than only opining that he/she does not agree with the recommendation of the treating physician, litigation will likely be reduced. For example, in cases where the second opinion physician disagrees with the recommendation of the treating physician and recommends an alternative therapy, the employee may choose to follow that recommendation rather than continuing to litigate whether the employee should be allowed to have the originally recommended treatment. Allowing second opinion physicians to make alternate therapy recommendations will also increase the number of physicians who are willing to undertake the responsibilities of serving as second opinion physicians, as there is a percentage of physicians who believe they must make such a recommendation when that is their medical judgment of the condition.

By prescribing the minimum details that reports shall contain, such as the date of the examination, the listing of the records reviewed, the relevant medical history, the findings, the diagnosis, the opinion and the reasons for it, the reports will include the necessary information so that they could be reviewed by another physician or fact-finder. By requiring the physician to declare that he/she does not have any of the proscribed conflicts of interest, the parties and the Administrative Director can rely on that declaration to know that the process was likely free of such conflicts of interest.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.8 Time Limits For Providing Reports.

Specific Purpose of Section 9788.8:

The purpose of Section 9788.8 is to make clear the statutory time limit for serving the report, to encourage physicians to file reports earlier, to identify who should be served, to expedite the litigation process by ensuring that necessary parties receive the report, and to make provision for extenuating circumstances which the parties agree should allow for an extension of time rather than incur additional litigation expense.

Necessity:

It is necessary for clarity to restate the statutory requirement that reports be furnished within 45 days, as most second opinion physicians will have a copy of the regulations, but not be familiar with the underlying statute. By providing that the physician should serve the report as soon as possible on the employee, employer, and employee's attorney, the regulation is encouraging the physician to act as expeditiously as possible, and it makes clear which parties must receive a copy of the report. By providing that the parties may agree to extend the time during which the report must be filed, the regulation allows for unusual circumstances which all parties agree should permit an extension, and avoids situations of incomplete reports which would result in further litigation, where for some reason it was not possible to complete the report within the 45 days.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.9 Charges for Services of Second Opinion Physician and Agreed Second Opinion Physician.

Specific Purpose of Section 9788.9:

The purpose of Section 9788.9 is to reduce litigation by setting the fees to be paid for reports of second opinion physicians and agreed second opinion physicians. Another purpose is to encourage participation by many qualified physicians who may be reluctant to participate if no fees were specified.

Necessity:

Labor Code section 4062 requires an employer who objects to a report of a treating physician to obtain a report from a second opinion physician randomly selected by the Administrative Director. It makes no provision for fees to be paid for the report. While the second opinion physician would be entitled to a fee, there is no clearly discernable rate under current law or regulations at which the fee should be charged. Many qualified physicians would not participate if there were no set fee. Without set fees, there would be litigation over the amount of the fee. By setting the fees by reference to those allowed for other comparable medical-legal examinations, but without allowing modifiers, the Administrative Director has achieved predictable certainty in the amount of all fees in advance of the examination or report.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.

Section 9788.91 Filing of a Declaration of Readiness to Proceed.

Specific Purpose of Section 9788.91:

The purpose of Section 9788.91 is to reduce litigation by allowing the parties to agree with the report of the second opinion physician, and in that case, not require the employer to file a declaration of readiness to proceed.

Necessity:

Labor Code section 4062 provides that the employer is to file a declaration of readiness to proceed if the report of the second opinion physician "does not recommend surgery." The legislature did not provide for the situation where both parties agree with the findings of the second opinion physician. By providing that the employer need not file a declaration of readiness to proceed where the parties agree with the report, the regulation will be reducing unnecessary litigation.

Consideration of Alternatives:

No more effective alternative, nor equally effective and less burdensome alternative, has been identified by the Administrative Director at this time.