

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

NOTICE OF PROPOSED RULEMAKING

**PRIMARY TREATING PHYSICIAN REPORTING REQUIREMENTS;
PETITION FOR CHANGE OF PRIMARY TREATING PHYSICIAN**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 9785, 9785.2, 9785.3, 9786, AND 9787.**

PROPOSED REGULATORY ACTIONS

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in him by Labor Code Sections 133, 4061.5, 4603.2, 4603.5, 4627 and 5307.3, proposes to amend regulations contained in Title 8, California Code of Regulations, Sections 9785, 9785.2, 9785.3, 9786, and 9787.

The regulations concern the reporting duties of the primary treating physician, the "Primary Treating Physician's Progress Report" form (DWC Form PR-2), the "Primary Treating Physician's Permanent and Stationary Report" form (DWC Form PR-3), the Petition for Change of Primary Treating Physician process before the Administrative Director, and appeals from the Administrative Director's decisions on Petitions for Change of Primary Treating Physician.

TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, orally or in writing, with respect to the above noted subjects on the following date:

Date: September 13, 2002
Time: 10:00 AM
Place: Auditorium
Gov. Hiram W. Johnson State Office Bldg.
455 Golden Gate Avenue
San Francisco, CA 94102

The public hearing room is wheelchair accessible. Persons requiring additional accommodation of a disability are requested to alert the contact person identified below.

Please note that public comment will begin promptly at 10:00 AM and will conclude when the last speaker has finished his or her presentation. 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 making 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 of the Division of Workers' Compensation is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code sections 133, 139.5, 4061.5, 4603, 4603.2, 4603.5, 4627, and 5307.3, to modify existing regulations. Reference is to Labor Code sections 4061, 4061.5, 4062, 4600, 4600.3, 4603, 4603.2, 4636.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

The Administrative Director of the Division of Workers' Compensation proposes to amend provisions in the primary treating physician reporting requirements to clarify when an employee may change his or her primary treating physician, and to clarify the process which must be followed when a party disputes a medical determination made by the primary treating physician.

Amendments are proposed to clarify the reporting obligations of the primary treating physician, including but not limited to the service and formats of required reports.

Amendments are proposed to existing regulations dealing with "Petitions for Change of Primary Treating Physician," to clarify the grounds for filing Petitions for Change of Primary Treating Physician, and to clarify the procedures for filing and responding to these petitions.

Amendments are proposed to the "Primary Treating Physician's Progress Report" form (DWC Form PR-2), to substitute the term "released from care" for the term "discharged," and to clarify when the DWC Form PR-2 is being used by the primary treating physician to respond to a request for additional information.

Amendments are proposed to the "Primary Treating Physician's Permanent and Stationary Report" form (DWC Form PR-3), to avoid ambiguity regarding a physician's description of an employee's subjective factors of disability. The "subjective findings" portion of the DWC Form PR-3 is amended by deleting the graph in current form, which describes the frequency and severity of subjective complaints, and by allowing the primary treating physician to write a narrative description of the employee's subjective complaints. Further, the DWC Form PR-3 is amended to direct the primary treating

physician to address the need for continuing medical treatment. The current form only addresses the need for future medical treatment.

Amendments are proposed to the existing regulation dealing with an appeal from an Administrative Director's decision on a Petition for Change of Primary Treating Physician to conform the time for appeal with Section 10950 of the Workers' Compensation Appeals Board's (Appeals Board) Rules of Practice and Procedure, which is currently being amended.

1. Proposed Amendments to Section 9785.

Labor Code section 4600 provides that “[a]fter 30 days from the date the injury is reported, the employee may be treated by a physician of his or her own choice or at a facility of his or her own choice” Labor Code section 4061.5 requires a primary treating physician to render opinions on all medical issues necessary to determine the employee's eligibility for compensation in compliance with regulations promulgated by the Administrative Director. Labor Code sections 4061 and 4062 specify procedures to be followed when a party disputes a medical determination of the treating physician.

Proposed amendments to Section 9785 clarify when an employee may change his or her primary treating physician, and further clarify the process which must be followed when disputes arise regarding medical determinations made by the primary treating physician.

Further, proposed amendments to Section 9785 clarify the reporting requirements of the primary treating physician with respect to the obligations regarding the service of the reports, the dates for submission of the reports, and appropriate format of the reports.

Section 9785(a):

This subdivision defines key terms used in this regulation to ensure the meaning will be clear to the regulated public. The proposed amendments in this subdivision will clarify terms used in the current regulation and further define key terms that are contained in the proposed amendments.

9785(a)(2): The term "secondary physician" is amended for consistency purposes to delete the word “injured,” when referring to the term “employee.”

9785(a)(4): The term “medical determination” defines when the primary treating physician makes a medical decision which affects the employee's eligibility for compensation.

9785(a)(5): The term “released from care” defines the point in time when the primary treating physician makes a medical determination that the employee's condition is permanent and stationary without need for continuing or future medical treatment.

9785(a)(6): The term “continuing medical treatment” defines presently planned treatment that in the opinion of the primary treating physician is reasonably required to cure or relieve the employee from the effects of the injury.

9785(a)(7): The term “future medical treatment” defines medical treatment which in the opinion of the primary treating physician may be required or anticipated in the future.

9785(a)(8): The term “permanent and stationary status” defines a point in time when the employee in the opinion of the primary treating physician has reached maximum medical improvement.

Section 9785(b)

9785(b)(1): This subpart sets forth the requirement that an employee may not have more than one primary treating physician at the same time.

9785(b)(2): This subpart clarifies that an employee may change primary treating physicians at any time provided the primary treating physician has determined that the employee is in need of continuing or future medical treatment.

9785(b)(3): This subpart sets forth the requirement that if an employee disputes a medical determination made by the primary treating physician, including a determination that the employee should be released from care, the dispute must be resolved under the applicable procedures set forth in Labor Code sections 4061, 4062. This subpart further sets forth the requirement that the employee may not designate a new primary treating physician until the dispute is resolved.

9785(b)(4): This subpart sets forth the requirement that if the claims examiner disputes a medical determination made by the primary treating physician, the dispute must be resolved under the applicable procedures set forth in Labor Code sections 4061, 4062. This subpart further sets forth the requirement that the employee may designate a new primary treating physician during the course of such procedures, provided the primary treating physician has determined that there is need for continuing or future medical treatment.

Section 9785(c)

This subdivision is amended to reflect that the primary treating physician must send a copy of the required reports under this section to the employee in addition to the claims administrator. This subdivision is further amended to clarify that if the employee is known to be represented by an attorney, the treating physician must send the employee’s copy of the report to the employee’s attorney. This subdivision is also amended to clarify the last sentence of the subdivision to reflect that a claims administrator may designate any person or entity to be the recipient of its copy of the required treating report.

Section 9785(d)

This subdivision is corrected for clerical error to substitute the word “subdivisions” for the word “subsections.”

This subdivision is further amended to clarify that the primary treating physician may transmit reports to the employee, or to the employee’s attorney if represented, in addition to the claims administrator, by mail or FAX or by any other means satisfactory to the claims administrator, employee or employee’s attorney, including electronic transmission.

Section 9785(e)

9785(e)(2): This subpart is amended to clarify that each new primary treating physician shall submit a Form DLSR 5021 following the initial examination in accordance with subdivision (e)(1).

9785(e)(3): This subpart is amended for consistency purposes to delete the word “injured” when referring to the term “employee.”

9785(e)(4): This subpart is amended to clarify that the primary treating physician is required to promptly incorporate, or comment upon, the findings and opinions of secondary physicians in the treating reports. This subpart is further amended to require the primary treating physician to submit the secondary physicians’ reports to the employee, or to the employee’s attorney if represented, in addition to the claims administrator.

Section 9785(f)

This subdivision is amended to reflect that the primary treating physician is required to submit reports to the employee, or to the employee’s attorney if represented, in addition to the claims administrator, when certain enumerated conditions occur.

9785(f)(5): This subpart is amended for clarification purposes to substitute the term “released from care” for the term “discharged.”

9785(f)(7): This subpart is amended for clarification purposes to substitute the term “claims administrator” for “employer.” This subpart is further amended to clarify that the requested additional information must be necessary to administer the claim. The phrase “necessary” information is defined as that information which directly affects the provision of compensation benefits as defined in Labor Code Section 3207.

9785(f)(8): This subpart is amended for consistency purposes to substitute the word “continuing” for the word “ongoing.” The subpart is further amended to require the primary treating physician to sign and transmit a treating report to the appropriate parties within 20 days of the examination when an examination has been performed.

This subpart is also amended to specify that a response to a request for information made pursuant to Section 9785(f)(7) may be made in letter format. Further, this subpart is amended to require that a letter format response to a request for information made under Section 9785(f)(7), in addition to a narrative report under Section 9785(f)(8), must contain the same declaration under penalty of perjury as contained in the DWC Form PR-2, to wit: “I declare under penalty of perjury that this report is true and correct to the best of my knowledge and that I have not violated Labor Code § 139.3.”

Section 9785(g)

This subdivision is amended to require that the primary treating physician promptly issue the permanent and stationary report required under this subdivision. This subdivision is further amended for clerical error to add the word “and” in the first sentence of the subdivision.

Note: Authority Cited: Sections 139.5, 4061.5, 4603.2, 4603.5 and 5307.3, Labor Code.
Reference: Sections 4061, 4061.5, 4062, 4600, 4603.2 and 4636, Labor Code.

2. Proposed Amendments to Section 9785.2

Section 9785.2

Primary treating physicians are required to submit treatment reports using either the Primary Treating Physician’s Progress Report form (DWC Form PR-2) set forth in Section 9785.2, or in a narrative format meeting specified content and format requirements. The DWC Form PR-2 is amended for consistency purposes to substitute the term “released from care” for the term “discharged.” The DWC Form PR-2 form is amended to clarify when the primary treating physician is using the DWC Form PR-2 to submit a response to a request for information under Section 9785(f)(7). The DWC Form PR-2 may be used by checking the box indicating “Response to request for information,” and by filling in the appropriate information in the DWC Form PR-2 in response to the request for information, and/or by attaching additional pages to the DWC Form PR-2, if necessary.

Note: Authority cited: Sections 139.5, 4061.5, 4603.2, 4603.5, and 5307.3, Labor Code.
Reference: Sections 4061.5, 4600, 4603.2 and 4636, Labor Code.

3. Proposed Amendments to Section 9785.3

Section 9785.3

Primary treating physicians may submit their permanent and stationary reports using the Primary Treating Physician’s Permanent and Stationary Report form (DWC Form PR-3) as set forth in Section 9785.3. Page 3 of the DWC Form PR-3 form currently contains a graph which the primary treating physician uses in describing the employee’s

subjective complaints to be used in rating the employee's disability. It has been determined that this graph, describing frequency and severity of symptoms, causes confusion which may result in the mischaracterization of the employee's subjective factors of disability. The PR-3 is amended by deleting the graph, and by allowing the primary treating physician to write a narrative description of the subjective symptoms. The introductory language under "precipitating activity," is also amended to clarify when a specific activity may affect the subjective factors.

Further, the PR-3 form is amended to facilitate the reporting of a determination that the employee may need continuing medical treatment and/or need for future medical treatment. Continuing medical treatment is defined as treatment presently planned, and future medical treatment is defined as treatment which is not presently planned but may be required or anticipated at some time in the future.

Note: Authority cited: Sections 139.5, 4061.5, 4603.2, 4603.5, and 5307.3, Labor Code.
Reference: Sections 4061.5, 4600, 4603.2 and 4636, Labor Code.

4. Proposed Amendments to Section 9786

Section 9786

Labor Code section 4603 requires a claims administrator desiring a change of primary treating physician to file a Petition for Change of Primary Treating Physician with the Administrative Director. Section 9786 sets forth the procedures for filing a Petition for Change of Primary Treating Physician, and what constitutes good cause for granting such petition.

Section 9786(b)

9786(b)(1): This subpart is amended to add that good cause can be established by showing that the primary treating physician failed to comply with the permanent and stationary report requirements of Section 9785(g).

9786(b)(2): This subpart is amended to specify that where good cause to grant a petition is based upon the failure of a primary treating physician to comply with Section 9785(f)(8) by failing to submit timely or complete progress reports on two or more occasions, those failures must have occurred within the 12-month period immediately preceding the filing of the petition.

9786(b)(3): This subpart is amended to clarify that good cause to grant a petition includes a clear showing that the current treatment is not consistent with the treatment plan submitted pursuant to Section 9785, subdivisions (e) or (f).

Section 9786(c)

This subdivision is amended to number the first two paragraphs, and to add two more paragraphs clarifying what constitutes good cause for granting a Petition for Change of Primary Treating Physician.

9786(c)(3): This subpart is added to require that when an allegation of good cause is based upon failure to timely issue the Doctor's First Report of Occupational Injury or Illness pursuant to Section 9785, subdivisions (e)(1) or (e)(2), the petition setting forth such allegation must be filed within 90 days of the initial examination.

9786(c)(4): This subpart is added to require that failure to verify a letter response to a request for information pursuant to Section 9785(f)(7), failure to verify a narrative report pursuant to Section 9785(f)(8), or failure of the narrative report to conform to the format requirements of Section 9785(f)(8) does not constitute good cause to grant the petition unless the claims administrator submits documentation showing that the physician was notified of the deficiency in the reporting, and was allowed a reasonable time to correct the deficiency.

Section 9786(d)

This subdivision is amended to clarify that the employee, his or her attorney, and/or the primary treating physician may file a response to the Petition for Change of Primary Treating Physician with the Administrative Director. This subdivision is further amended to allow the responding party to include supportive documentary evidence relevant to the specific allegations raised in the petition to be filed with the response. Also this subdivision is amended to clarify that, unless good cause is shown to the contrary, the Administrative Director will not consider any other documents filed except for the Petition for Change of Primary Treating Physician, the response, and any supportive documentary evidence filed with the petition and the response.

Section 9786(h)

This subdivision is deleted as no longer applicable.

Note: Authority Cited: Sections 133, 139.5, 4603, 4603.2, 4603.5 and 5307.3, Labor Code. Reference: Sections 4600, 4603, and 4603.2, Labor Code.

5. Proposed Amendments to Section 9787

Section 9787

Section 9787 currently provides that an order denying or granting the claim's administrator's petition is final and binding unless the aggrieved party files an appeal with the Appeals Board, within 30 days from service of the decision in a manner prescribed by the Appeals Board pursuant to Section 10950.

Amendments are proposed to this section to conform with Section 10950 of the Board's Rules of Practice and Procedure which are been amended to require that the appeal be filed within 20 rather than 30 days from service of the decision.

STATE REIMBURSABLE MANDATE

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. (*County of Los Angeles v. State of California*, 43 Cal.3d 46 (1987)). The requirements imposed on all employers by these proposed regulations, although not a benefit level increase, is similarly not a new State mandate because the regulations apply to all employers, private and public, and not uniquely to local governments.

COST OR SAVINGS TO LOCAL AGENCIES OR SCHOOL DISTRICTS

The regulations proposed herein will not impose additional costs on local agencies and school districts.

OTHER NON-DISCRETINARY COST OR SAVINGS IMPOSED UPON LOCAL AGENCIES

None.

COST OR SAVINGS TO STATE AGENCIES

The proposed regulations will not impose additional costs or savings on State agencies.

COST OR SAVINGS IN FEDERAL FUNDING TO STATE

The proposed regulations will not affect any federal funding.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS/ABILITY TO COMPETE

The Administrative Director made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The amendments do not impose new fees or significant costs on either claims administrators or physicians.

ECONOMIC IMPACT ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The Administrative Director has determined that the proposed regulations will not have an adverse economic impact on private persons or businesses. There may be some savings due to clarification of procedures for changes of primary treating physicians and for filing petitions for changes of primary treating physicians because appeals related to procedural errors should be reduced. There will be insignificant cost increase on treating physicians who will be required to mail out one additional copy of the treatment report to the employee or his or her attorney. As a practical matter, many or most physicians probably already send a copy of the report to the patient's attorney.

ECONOMIC IMPACT ON SMALL BUSINESSES

The Administrative Director has determined that the proposed regulations may affect certain physicians and medical groups who fall within the definition of "small businesses" under Government Code Section 11342(h). The Administrative Director has further determined that the proposed regulations will not have an adverse economic impact on small businesses. Very small costs will be incurred by physicians to mail one extra copy of treatment reports.

ASSESSMENT OF EFFECTS ON JOB AND/OR BUSINESS CREATION, ELIMINATION OR EXPANSION

The Administrative Director has determined that the proposed regulations will have no effect on the creation or elimination of jobs or existing businesses within California, or affect the expansion of current California businesses.

IMPACT ON HOUSING COSTS

The proposed regulations will have no effect on housing costs.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative it considers or that has otherwise been identified and brought to the attention of the Administrative Director would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action. No other alternatives have been identified by the Administrative Director to date.

AVAILABILITY OF TEXT OF PROPOSED REGULATIONS, NOTICE AND STATEMENT OF REASONS/INTERNET ACCESS

An Initial Statement of Reasons has been prepared for the proposed regulations, in addition to the Informative Digest included in this Notice. The Initial Statement of

Reasons, the Notice, and the text of the proposed regulations will be available for inspection or a copy will be provided upon request. Please address all such requests to the contact person identified below. In addition, the Initial Statement of Reasons, the Notice, including the Informative Digest, and the text of the regulations may be accessed and downloaded from the Division of Workers' Compensation's website at www.dir.ca.gov.

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 regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file.

The rulemaking file, including the Initial Statement of Reasons, the Notice, the complete text of the proposed regulation, and all 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, 9th Floor
San Francisco, CA 94102

PRESENTATION OF ORAL AND/OR WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION OF WRITTEN COMMENTS/CONTACT PERSON

Members of the public are invited to present oral and/or written statements, arguments or evidence at the public hearing.

Any person may submit written comments on the proposed regulations, prior to the public hearing to:

Ms. Marcela Reyes,
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
455 Golden Gate
San Francisco, CA 94102
or
Post Office Box 420603
San Francisco, CA 94142

Written comments may 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 hearing, all written comments must be received by the agency contact person, no later than 5:00 PM on September 13, 2002.

The Administrative Director prefers written comments to oral testimony. If you have provided a written comment, it will not be necessary to present oral testimony at the public hearing. Equal weight will be accorded to oral and written materials.

CONTACT PERSON/BACKUP 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 or proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Ms. Marcela Reyes,
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
455 Golden Gate
San Francisco, CA 94102
or
Post Office Box 420603
San Francisco, CA 94142

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

Note: In the event the contact person is unavailable, or to obtain responses to questions regarding the substance of the proposed regulations, inquiries should be directed to the following back-up contact person at the same address and telephone number noted above: Minerva Krohn, Industrial Relations Counsel.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly indicated will be available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF 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 website at www.dir.ca.gov .

AUTOMATIC MAILING

A copy of this Notice, including the Informative Digest, the Initial Statement of Reasons, and the text of proposed regulations, will automatically be sent by regular mail, or upon request by electronic mail, to those interested persons on the mailing list of the Administrative Director of the Division of Workers' Compensation, and to all persons who have requested notice of hearing as required by Labor Code Section 5307.4.

If adopted, the regulations as amended will appear sequentially in the California Code of Regulations at Title 8, Chapter 4.5, Subchapter 1, commencing with Section 9785.