

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

NOTICE OF PROPOSED RULEMAKING

Subject Matter of Proposed Amendments to Regulations: Workers' Compensation – Payments for Medical Treatment and Medical-Legal Services

AN IMPORTANT PROCEDURAL NOTE ABOUT THIS RULEMAKING:

The regulations relating to the Official Medical Fee Schedule ("OMFS") and the Medical-Legal Fee Schedule ("MLFS") are regulations that establish or fix rates, prices, or tariffs" within the meaning of Government Code Section 11340.9(g) and are therefore not subject to Chapter 3.5 of the Administrative Procedure Act relating to rulemaking (commencing at Government Code Section 11340.)

This rulemaking proceeding to amend the OMFS and MLFS are being conducted under the Administrative Director's rulemaking power under Labor Code Sections 5307.1, 5307.3, 5307.4, and 5307.6. This regulatory proceeding is subject to the procedural requirements of Labor Code Sections 5307.1 and 5307.4. This Notice and the accompanying Initial Statement of Reasons are being prepared to comply with the procedural requirements of Labor Code Section 5307.4 and for the convenience of the regulated public to assist the regulated public in analyzing and commenting on this non-APA rulemaking proceeding.

PROPOSED REGULATORY ACTIONS

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority granted by Labor Code Sections 127, 133, 5307.1, 5307.3, 5307.4, and 5307.6 proposes to amend the Official Medical Fee Schedule, (a document that is incorporated by reference into Title 8, California Code of Regulations, Section 9791.1) and Title 8, California Code of Regulations, Sections 9791.1, 9792.5, 9793 and 9795. Sections 9791.1 and 9792.5 concern fees for medical treatment in workers' compensation cases. Sections 9793 and 9795 concern fees for medical-legal expenses in workers' compensation cases.

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 at the following time and place:

Date: Thursday, September 13, 2001
Time: 10:00 a.m.
Place: Auditorium
Gov. Hiram Johnson State Office Bldg.
455 Golden Gate Avenue
San Francisco, California 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 a.m. 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 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 of the Division of Workers' Compensation is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code Sections 127, 133, 4603.5, 5307.1, 5307.3, and 5307.6 to modify existing regulations.

Reference is to Labor Code Sections 139.2, 4061, 4061.5, 4062, 4600, 4603.2, 4620, 4621, 4622, 4625, 4628, 4650, 5307.1, 5307.6 and 5402.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

A. REVISIONS TO THE OFFICIAL MEDICAL FEE SCHEDULE

AN IMPORTANT NOTE CONCERNING THE EFFECTIVE DATE OF THE PROPOSED AMENDMENTS TO THE OMFS

In order to give the regulated public time to train their staff and implement the amendments set forth below, the Division will ask the Office of Administrative Law for the adopted amendments to have an effective date of *thirty (30) days* after their filing with the Secretary of State. The Office of Administrative Law will fill in the effective date as *thirty (30) days* after the date on which the amendments as adopted were filed with the Secretary of State.

The effective dates for the proposed amendments set forth below will be made available on the Division's website (http://www.dir.ca.gov/workers'_comp.html) as soon as their effective date is received from the Office of Administrative Law.

1. Proposed amendments to the Official Medical Fee Schedule, (a Document Incorporated by Reference into Title 8, CCR Section 9791.1).

Labor Code Section 5307.1 requires the Administrative Director of the Division of Workers' Compensation to "adopt and revise, no less frequently than biennially, an official medical fee schedule which shall establish reasonable maximum fees paid for medical services provided pursuant to [Division 4 of the Labor Code]." The Official Medical Fee Schedule incorporated by reference into Section 9791.1 is an extremely large document that cannot be published in its entirety in the Code of Regulations. The Official Medical Fee Schedule [OMFS] was last revised effective April 1, 1999.

The proposed amendments to the OMFS and related sections of the regulations are technical revisions, clarifications and corrections of typographical errors as follows:

General Information and Instructions for Use Section:

a. Services Covered

The existing section clarifies the application of the OMFS for the regulated public.

The proposed amendment will insert the following text after the second paragraph in the “Services Covered” section on page 1 of the OMFS:

No facility except those specified in the immediately preceding paragraph may charge or collect a facility fee for services provided on an outpatient basis.

b. Fee Computation and Billing Procedures

The existing section informs the regulated public how the conversion factors used in the OMFS are adjusted and where they are listed in the OMFS.

The proposed amendment will change an erroneous reference in the first paragraph on page 3 of the OMFS for the location of the current conversion factors from Appendix B to Appendix C.

c. Supplies and Materials

The existing section identifies what supplies and material are or are not separately reimbursable.

The proposed amendment will insert the following text after the asterisked paragraph on page 4 of the OMFS:

The following formulas only apply to health care providers such as physicians, physical therapists, Physician Assistants and Nurse Practitioners, dispensing items from their office or outpatient surgery facility.

d. Reports

Consultation Reports.

The existing section identifies which consultation reports are separately reimbursable.

The proposed amendment will insert the following text after the three bulleted sections on page 7 of the OMFS:

- *A report by a consulting physician where the claim does not meet the criteria of a “contested claim” as set forth in 8 CCR § 9793(b).*
- *A consultation code may not be billed when care or any part of care has been clearly transferred from the primary treating physician to the consulting physician. (See definition of Referral under the Evaluation and Management Section page 11.)*

e. Missed Appointments

The existing section sets forth the procedure for identifying missed appointments.

The proposed amendment will insert the following text after the first sentence on page 8 of the OMFS:

This code applies to both treatment and consultation appointments. For Medical-Legal missed appointments use the appropriate code from the Medical-Legal Fee Schedule - CCR 9795 (see Appendix C).

Evaluation and Management Section:

Levels of E/M Services

The existing section sets forth the procedure for identifying the appropriate level of evaluation and management services.

The proposed amendment will replace the third underlined section of the second full paragraph on page 13 of the OMFS with the following text:

The physician's interpretation of the results of diagnostic tests/studies (i.e. professional component) with preparation of *either* a separate distinctly identifiable signed written report *or a separate distinctly identifiable section of an overall report (i.e. PR-2, PR-3, Narrative Report or Doctor's First Report of Injury)* may also be reported separately, using the appropriate CPT code with the modifier -26 appended.

Anesthesia Section

Other Modifiers.

The existing section sets forth optional modifier codes used for identifying various anesthesia related services and procedures.

The proposed amendment will delete Modifier - 51 on page 82 of the OMFS.

Radiology And Nuclear Medicine Section

Modifiers.

The existing section sets forth modifier codes used for identifying various radiology and nuclear medicine related services and procedures.

The proposed amendment will insert the following text at the end of the first paragraph on page 351 of the OMFS:

Modifier - 29 for global procedures (those procedures where one provider is responsible for both the professional and technical component) has been deleted. If a provider is billing for a global service, no modifier is necessary.

Pathology And Laboratory Section

Modifiers.

The existing section sets forth modifier codes used for identifying various pathology and laboratory related services and procedures.

The proposed amendment will insert the following text at the end of the first paragraph on page 394 of the OMFS.

Modifier - 29 for global procedures (those procedures where one provider is responsible for both the professional and technical component) has been deleted. If a provider is billing for a global service, no modifier is necessary.

Medicine Section

a. Modifiers.

The existing section sets forth modifier codes used for identifying various medicine related services and procedures.

The proposed amendment will insert the following text at the end of the first paragraph on page 451 of the OMFS:

Modifier - 29 for global procedures (those procedures where one provider is responsible for both the professional and technical component) has been deleted. If a provider is billing for a global service, no modifier is necessary.

b. Central Nervous System Assessment

The existing section sets forth the appropriate CPT code for reporting and billing for services related to the development of cognitive skills.

The proposed amendment will correct the erroneous reference in the first sentence on page 498 of the OMFS, concerning the development of cognitive skills, from CPT 97770 to 97799.

Physical Medicine Section

The existing section sets forth the fee schedule for physical medicine services.

The first proposed amendment will correct the erroneous reference in the fifth bulleted paragraph on page 503 of the OMFS from California Code of Regulations Section 9785(c) to Section 9785(f).

The second proposed amendment will insert the following text after the third sentence and just above the section heading for “MODALITIES” on page 505 of the OMFS:

The appropriate physical medicine code for the use of a transcutaneous electrical nerve stimulator (TENS unit) is 97014.

Manipulative Treatment Section

Specific Billing Instructions

The existing section sets forth the fee schedule for Osteopathic manipulative treatment.

The proposed amendment will delete the reference to the physical medicine ground rules in second paragraph of the Osteopathic Manipulation section on page 510 of the OMFS.

Orthotics And Prosthetics Section

The existing section sets forth the fee schedule for orthotics and prosthetics services and devices.

The proposed amendment will add the prosthetics section that was inadvertently omitted from the current Official Medical Fee Schedule.

2. Proposed amendments to Section 9791.1- the Official Medical Fee Schedule.

The existing section incorporates by reference the OMFS as revised April 1, 1999.

The proposed amendment to Section 9791.1 will incorporate by reference the amendments to the OMFS as proposed in this rulemaking proceeding. The document to be incorporated by reference is the *Official California Workers' Compensation Medical Fee Schedule Revised */*/01*. A copy of this document will be part of the rulemaking file, and will be available for public inspection as specified below.

As noted above, in order to give the regulated public time to train their staff and implement the amendments set forth below, the Division will ask the Office of Administrative Law for the adopted amendments to have an effective date of **thirty (30) days** after their filing with the Secretary of State. The Office of Administrative Law will fill in the effective date as thirty (30) days after the date on which the amendments as adopted were filed with the Secretary of State.

3. Proposed amendments to Section 9792.5 - the Official Medical Fee Schedule.

The existing section sets forth the requirements for timely payment or objection to billings for medical treatment subject to the fee schedule, and provides for increased fees and interest for untimely objections and/or payment.

The proposed amendment to section 9792.5(a)(1) will conform this section to the provisions of Sections 9785, 9786, 9792.5, 9793, and 9794. These sections use the term "claims administrator" instead of "employer."

The proposed amendment to Section 9792.5(a)(5) will conform this section to the legislature's amendment of Labor Code Section 4603.2(b) (Chapter 124, Stats. 1999,) to include both employee and/or employer selected treating physicians by cross-referencing the definition of the term "treating physician" to the definition of "primary treating physician" provided by Section 9785(a)(1).

The proposed amendments to Section 9792.5(b), (d) and (e) will conform these sections to the legislature's amendment of Labor Code Section 4603.2(b) (Chapter 124, Stats. 1999,) to require that if a medical billing or a portion thereof is contested, denied, or considered incomplete, the physician shall be notified, in writing, that the billing is contested, denied, or considered incomplete, within 30 working days after receipt of the billing by the employer.

The proposed adoption of the second paragraph of Section 9792.5(b) will clarify that, for purposes of this Section, treatment which is "provided or authorized by the treating physician selected by the employee or designated by the employer" includes but is not limited to treatment provided by a "secondary physician" as that term is defined by section 9785(a)(2).

The proposed repeal of Section 9792.5(f) is necessary as this section conflicts with the provisions of Labor Code Section 4603.2, which establishes that interest on a properly documented bill accrues from the date of receipt of the bill. The current regulation provides that for a case in which injury is initially denied and then later accepted, the interest begins to accrue 60 days after liability is accepted. In the opinion on Boehm & Associates v. WCAB, (Lopez) (1999) 76 Cal. App. 4th 513, the Court of Appeal stated that this provision conflicts with Labor Code Section 4603.2, and held that interest accrues, retroactive to the date the bill was received, beginning 60 days after receipt of the bill regardless of the date liability for the claim is accepted or adjudicated. Existing subsection 9792.5(g) is being renumbered to conform to the repeal.

The proposed addition of Labor Code Section 4603.5 to the authority note will inform the regulated public that this section gives the Administrative Director the authority to issue regulations to carry out the requirements of Article 2, Chapter 2, Part 2 of Division 4 of the Labor Code. This article deals with medical and hospital treatment.

The proposed addition of Labor Code Section 5307.1 to the reference note will inform the regulated public that this section contains rules integral to establishing fee levels payable under the OMFS.

B. REVISIONS TO THE MEDICAL-LEGAL FEE SCHEDULE

Labor Code Section 5307.6 requires the Administrative Director to “adopt and revise a fee schedule for medical-legal expenses as defined by Section 4620 ... at the same time he or she adopts and revises the medical fee schedule pursuant to Section 5307.1.” As the OMFS is being revised to make technical revisions, clarifications and corrections of typographical errors, it is also appropriate to make technical revisions, clarifications and corrections of typographical errors in the medical-legal fee schedule at this time.

1. Proposed amendments to Section 9793 - the Medical-Legal Fee Schedule.

The existing section sets forth the definitions of terms concerning medical-legal expenses and comprehensive medical-legal evaluations.

The proposed amendment to Section 9793(f) will correct a technical error and conform this subsection to Section 9795(c) / ML 101 which provides that a follow-up medical-legal evaluation is to be performed within 9 months, not one year.

The proposed non-substantive amendment to Section 9793(i) will correct the cross-reference in light of the repeal of Section 9785.5, and the inclusion of its requirements into Section 9785(a)(1) as amended effective January 1, 1999.

2. Proposed amendments to Section 9795 - the Medical-Legal Fee Schedule.

The existing section sets forth the reasonable level of fees for medical-legal expenses, follow-up, supplemental and comprehensive medical-legal evaluations and medical-legal testimony.

The proposed amendment to Section 9795(b) will clarify that the all inclusive fee for each medical-legal evaluation procedure includes reimbursement for any transcription services used in the preparation of a medical-legal report.

The proposed amendment to Section 9795(d) will provide that the -93 interpreter modifier does not apply to ML 101. Where Modifier -93 is applicable, the value of the procedure is multiplied by 1.1 to compensate the doctor for the increased time necessary for the examination. Since ML 101 is a timed code, the length of time to perform the exam is already accounted for in the higher fee resulting from the commensurately longer evaluation attributable to translation time.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Division 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. The proposed regulatory changes are only technical revisions, clarifications and corrections of typographical errors. The economic effects, if any, will be minor. Such potential impacts are discussed in the DWC analysis of the impact of these proposed amendments, dated July 5, 2001. This document is included in the rulemaking file.

- Adoption of these regulations 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 Division is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

FISCAL IMPACTS

- Costs or savings to state agencies or costs/savings in federal funding to the State: None.
- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district.

Additionally, 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 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.
- Other nondiscretionary costs/savings imposed upon local agencies: None. To the extent that local agencies and school districts are self-insured employers who must reimburse physicians or other providers for medical treatment for industrially injured employees, they will be subject to the same cost impacts as all other employers in the state. These impacts are discussed in more detail elsewhere in this Notice.

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed amendments to the regulations may affect small businesses.

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 Division'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 statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

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

An Initial Statement of Reasons and the text of the proposed regulations 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.

As of the date of this notice, the rulemaking file consists of the notice, the initial statement of reasons, the proposed text of the regulations in strikeout/underline format, the Form 399 and the Memo to the Rulemaking File dated July 5, 2001 regarding the Government Code section 11340.9(g) exemption. In addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Division's website at www.dir.ca.gov.

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 regulations, prior to the public hearings to:

Ms. Marcela Reyes,
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
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 public hearing, all written comments must be received by the agency contact person, no later than 5:00 p.m. on September 13, 2001. Equal weight will be accorded to oral and written materials.

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 complete text of the proposed regulations 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, Ninth Floor
San Francisco, California 94102

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 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
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 backup contact person at the same address and telephone number as noted above: James Robbins.

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 made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

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 website: www.dir.ca.gov

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, the regulations as amended will appear in Title 8, California Code of Regulations, Section 9791.1 (and in the Official Medical Fee Schedule, a document that is incorporated by reference into 9791.1), 9792.5, 9793 and 9795.

Dated: _____

RICHARD P. GANNON
Administrative Director,
Division of Workers' Compensation