

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

***NOTICE OF RULEMAKING AFTER EMERGENCY ADOPTION***

**Spinal Surgery Second Opinion Procedure**

**NOTICE IS HEREBY GIVEN** that the Administrative Director of the Division of Workers' Compensation (hereinafter "Administrative Director"), exercising the authority vested in the Administrator Director by Labor Code Sections 133, 4062, and 5307.3, has adopted regulations on an emergency basis to implement the provisions of Labor Code Section 4062 which took effect on January 1, 2004 (Statutes of 2003, Chapter 639).

The regulations adopted constitute Article 5.1 of Chapter 4.5, Subchapter 1, of Title 8 of the California Code of Regulations, Sections 9788.01 - 9788.91. The regulations set forth the process and manner under which employers may obtain second opinions relating to spinal surgery from physicians randomly assigned by the Administrative Director.

The emergency regulations became effective on July 2, 2004, and will remain in effect for a period of 120 days from July 2, 2004. 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: September 21, 2004**

**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 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 the Administrative Director by Labor Code Sections 133, 4062, and 5307.3.

Reference is to Labor Code Section 4062.

## **INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW**

Labor Code Section 4062, as amended by Senate Bill 228 of 2003 (Chapter 639, Statutes of 2003, effective January 1, 2004), provides that an employer may object to a treating physician's recommendation for spinal surgery, within ten days of receipt of the report recommending the surgery. Unless the employee is represented by counsel, the employer and the employee may agree on a physician to render a second opinion. If the employee is not represented, or if the parties do not agree, the Administrative Director will randomly select a qualified surgeon to render a second opinion on the need for surgery. The second opinion physician must serve his or her report on the recommendation within 45 days of the employer's receipt of the report recommending surgery.

The statute is not self-executing; it does not define "spinal surgery," nor does it outline how physicians will be selected to be on a list from which the Administrative Director shall randomly select the physicians. It does not provide any details as to what is to be covered by the report of the second opinion physician, whether the physician is to examine the employee, or how the physician is to be paid for the opinion. The Administrative Director had to adopt regulations to implement this section of the Labor Code. These regulations prescribed 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.

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 regulations were adopted as emergency regulations, effective July 2, 2004. This rulemaking would make the regulations permanent.

## **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 determined that the proposed regulations will not have a significant adverse economic impact on representative private persons or directly affected businesses. These representative private persons or directly affected businesses are insurance companies or self-insured employers. The amount of the economic

impact would depend on the number of cases in which the representative private person or directly affected business objected to a medical report recommending spinal surgery. A representative private person or directly affected business would incur the cost of one of the less expensive medical-legal examinations in each case in which it objected to a report recommending spinal surgery. The percentage of overall workers' compensation claims in which spinal surgery is recommended is very small, and the overall increase in medical-legal costs for second opinions will be a very small percentage increase. It will also be offset by large projected decreases in costs of medical treatment for spinal surgery.

- 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 second opinions which are requested by the insurance companies or employers.

## **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, of an additional medical-legal examination, will be offset by reduced costs for spinal surgery, but have been imposed by the enactment of SB 228 of 2003, and not by these regulations, which merely prescribe the manner in which examinations will be conducted. Additional costs to the Department of Industrial Relations, to implement the mandated program, will amount to an estimated annual \$181,911 for personnel, postage, and supplies, all of which are to be reimbursed to the state through user-funding of the workers' compensation program.
- Local Mandate: 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. The proposed regulation does not apply to any local agency or school district. (See "Local Mandate" section above.)

## **EFFECT ON SMALL BUSINESS**

The Administrative Director has determined that the proposed regulation will not affect small businesses. The regulations apply to 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. The Administrative Director, however, prior to the emergency adoption of the regulations, held several informal workshops to which the public was invited, at which proposed regulations were discussed, and at which a representative group of interested parties was present.

In addition, the text of the proposed regulations was made available for two pre-adoption public comment periods through the Division's Internet message board (the DWC Forum).

## **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](http://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.

## **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, prior to the public hearing to:

Ms. Kathleen Llemos  
Division of Workers' Compensation - 9th Floor  
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](mailto: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 21, 2004. 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](http://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 "Spinal Surgery Second Opinion" rulemaking link.

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### **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 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. Kathleen Llemos  
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.

### **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](http://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](http://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 at Title 8, California Code of Regulations, Sections 9788.01 - 9788.91.