

**State of California**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**  
**Division of Workers' Compensation**

**FINAL STATEMENT OF REASONS**

**Subject Matter:**

Workers' Compensation – **SPINAL SURGERY SECOND OPINION PROCEDURES**

**Title 8, California Code of Regulations Sections 9788.01 et seq.**

The Administrative Director of the Division of Workers' Compensation, pursuant to the authority granted by Labor Code Sections 133 and 5307.3 has adopted the following amendments to Title 8, California Code of Regulations:

Proposed Section 9788.01	Definitions
Proposed Section 9788.1	Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery
Proposed Section 9788.11	Form for Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery
Proposed Section 9788.2	Qualifications of Spinal Surgery Second Opinion Physicians
Proposed Section 9788.3	Application Procedures
Proposed Section 9788.31	Application Form
Proposed Section 9788.32	Administrative Director's Action on Application
Proposed Section 9788.4	Removal of Physicians from the Spinal Surgery Second Opinion Physician List
Proposed Section 9788.45	Unavailability of Second Opinion Physicians
Proposed Section 9788.5	Random Selection of Second Opinion Physician
Proposed Section 9788.6	Examination by Second Opinion Physician or Agreed Second Opinion Physician
Proposed Section 9788.7	Contents Of Second Opinion and Agreed Second Opinion Physician Reports
Proposed Section 9788.8	Time Limits For Providing Reports
Proposed Section 9788.9	Charges for Services of Second Opinion Physician and Agreed Second Opinion Physician
Proposed Section 9788.91	Filing of a Declaration of Readiness to Proceed

**UPDATE OF INITIAL STATEMENT OF REASONS AND INFORMATIVE DIGEST**

As authorized by Government Code §11346.9(d), the Administrative Director incorporates the Initial Statement of Reasons and the initial Informative Digest prepared in this matter. The proposed regulation changes are summarized below.

**THE FOLLOWING SECTIONS WERE AMENDED FOLLOWING THE PUBLIC HEARING AND CIRCULATED FOR A 15-DAY COMMENT PERIOD (OCTOBER 13 – OCTOBER 28, 2004)**

**Modifications to Section 9788.01**

**Definitions**

Section 9788.01 is modified to include CPT procedure code 22899 within the definition of spinal surgery. This change is in response to a comment. Code 22899 is a spinal surgery procedure which should have been included in the original list of procedure codes.

**Modifications to Section 9788.1**

**Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery**

Section 9788.1 is reorganized for clarity. Additional subdivisions and subparagraphs are used. It is modified to clarify what means of delivery of the Objection are acceptable, when it will be deemed received by the Administrative Director, and how it may be served on other parties. Added language also acknowledges that persons who will serve the objection may be different from those who will receive mail, and so separate declarations are required for the use of the person who received the physician's report or has knowledge of the receipt of the physician's report, and the person who serves the Objection. The person who signs the Objection may be a third person. This change is made to allow for common circumstances in which the claims examiner who executes the form will not be the person who attests to its service. Another language change clarifies that only a represented employee may agree to an agreed second opinion physician. Comments suggested that by omitting this restriction, the regulation impliedly permitted unrepresented employees to agree to an agreed second opinion physician. The last change provides that when the parties agree to an agreed physician or when the employer withdraws the objection subsequent to filing the objection, they may notify the Administrative Director by fax instead of by mail. The Division has determined that the number of such requests are not likely to be so great as to impose an administrative burden by accepting them via fax. Not to accept these requests by fax would add additional time to the selection process. These changes are in response to comments.

**Modifications to Section 9788.11**

**Form for Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery**

The Form promulgated by Section 9788.11 is modified to adopt the changes to Section 9788.1. In addition, blanks are added for the optional insertion of the employee's claim number, telephone number, and fax number. The declarations section is modified to include alternate versions of a declaration regarding receipt of the treating physician's recommendation, depending on who executes the declaration. The declaration of service is revised, and the instructions are revised. The Form appears at the end of the regulations, along with the repealed version of the Form.

**Modifications to Section 9788.3**

**Application Procedures**

Section 9788.3 is modified to provide that a physician on the list of second opinion physicians must notify the Administrative Director within 10 days, if any state medical board from whom the physician is licensed, files any accusation or charges against the physician, or imposes any discipline. This change is intended to allow the Administrative Director to learn if any disciplinary procedures have been instituted against a second opinion physician after the Administrative Director has ruled the physician is qualified to participate in the program.

#### **Modifications to Section 9788.4**

#### **Removal of Physicians from the Spinal Surgery Second Opinion Physician List**

Section 9788.4 is modified by renumbering some paragraphs for clarity. It is also modified to clarify one reason for removing a physician from the list, and to provide two additional reasons. Removal for not providing a report within the regulations' time limits has been changed to removal for not completing a report within the required forty-five days, unless the employee failed to attend an examination. Forty-five days is the normal time in which a report is to be completed, but it would be inappropriate to penalize a physician if the reason for not completing the report is due to the employee's failure to attend an examination.

The additional reasons for removal are: 1) The physician's declining to accept an assignment, except during times for which the physician had notified the Administrative Director that he/she would not be available; and 2) The physician's having been unavailable for more than 120 days during a one year period. The Division has determined that keeping on the lists physicians who have either not notified the Administrative Director of their unavailability or who are unavailable for excessive amounts of time, causes a slowdown in the second opinion process.

#### **Modifications to Section 9788.45**

#### **Unavailability of Second Opinion Physicians**

Section 9788.45 is added to provide that a physician may notify the Administrative Director that he/she will be unavailable for periods of time, and unable to accept assignments for second opinions. There have been problems with second opinion physicians not advising the Administrative Director that they would be unavailable for periods of time, resulting in delays when they have been selected for a second opinion.

#### **Specific Purpose of Section 9788.45:**

The purpose of new Section 9788.45 is to establish a procedure for second opinion physicians to provide advance notification to the Administrative Director of periods of unavailability.

#### **Necessity:**

Providing for physicians to notify the Administrative Director in advance of periods for which they will be unavailable to serve as second opinion physicians is necessary to allow the selection system to operate without delays caused by selecting physicians who are not available.

**Modifications to Section 9788.5****Random Selection of Second Opinion Physician**

Section 9788.5 is modified to acknowledge the common practice of the physician attempting to arrange by telephone a mutually convenient time for an appointment. The practice is allowed, and the physician is required to send a confirming written notice of appointment details. Allowing the physician's office and the employee to arrange examination details in a phone conversation will make the process operate faster in many cases. A new paragraph (e) is added to clarify that a second opinion physician who has notified the Administrative Director of his/her unavailability, will be excluded from any selection process during the time of unavailability.

**Modifications to Section 9788.6****Examination by Second Opinion Physician or Agreed Second Opinion Physician**

In response to a comment, Section 9788.6 is modified to provide that for an unrepresented employee, there shall be no communication between any party and the second opinion physician, except for matters of scheduling, furnishing of records, availability of the report, and the examination itself. Limiting communication with the unrepresented employee's second opinion physician will help to eliminate the appearance of unfairness that may arise in cases involving an unrepresented employee and represented employer. Because the second opinion physician is essentially an independent medical reviewer, communication with other parties to the dispute are unnecessary and improper. The examinee does have to be able to communicate with the physician during the examination.

Also, the employer is to serve the employee with records and reports that have not previously been served. Serving the employee with unserved reports will speed up the process for those employees who would demand the reports, and adopts a principle of Workers Compensation Appeals Board Regulations, that requires service of unserved reports when a party seeks a hearing where the reports would be relevant. Also, fairness requires that the employee have the ability to see any reports which are sent to the decision maker.

In response to a comment, the extension of time to complete the process in cases where the employee has failed to attend an examination has been reduced from 45 days to 30 days. This reduction is made because the full 45 day period would not be necessary in the case of a missed appointment.

**Modifications to Section 9788.8****Time Limits For Providing Reports**

Section 9788.8 is modified to provide that the second opinion physician shall serve the report on the Administrative Director, and that service on all parties shall be at the same time. Routinely obtaining copies of the reports will allow the Administrative Director to monitor the content of the reports, analyze how well the second opinion physician process is working, and learn when reports are not timely completed. Requiring that all parties be served at the same time will reduce administrative burdens upon the Administrative Director in answering inquiries about the status of reports not yet received.

**Modifications to Section 9788.91****Filing of a Declaration of Readiness to Proceed**

Section 9788.91 is modified to clarify that that if the second opinion physician concurs with the recommendation of the treating physician, the surgery is to be authorized. The purpose of the second opinion physician procedures is to provide a speedy process to determine whether recommended spinal surgery should be provided. Although Labor Code section 4062(b) provides that upon the recommendation of the second opinion physician, that the employee should authorize the surgery, it specifies no deadline. It was expressed in comments that a deadline should be specified. The regulation will now provide a time limit of three working days in which to communicate the authorization. Comments had sought that authorization be required within one day, a time period which the Division finds unnecessarily short in view of the forty-five day statutory allowance of time to complete the second opinion process. The modification also provides that the declaration of readiness must be filed within fourteen days of receipt of the second opinion physician's report, where no time limit had been previously specified. The statute requires that a declaration of readiness be filed, but specifies no time limit. The Division determined that fourteen days would be a reasonable time for the employer to review the report, consult with counsel, and make a decision regarding the surgery. The section is also modified to clarify that an employer need not file a declaration of readiness if the employer authorizes the surgery, as this filing would no longer be necessary.

**UPDATE OF MATERIAL RELIED UPON / DOCUMENTS ADDED TO RULEMAKING FILE**

In addition to the documents identified in the Initial Statement of Reasons the following documents were relied upon by the Division and were made available to the public as required by Government Code Section 11347.1.

<b>Title of Document Added to Rulemaking File</b>	<b>Dates of Availability for Public Comment</b>
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Comments received by the Division of Workers' Compensation concerning the Division's proposed changes.	October 13, 2004 through October 28, 2004.
Comments received by the Division of Workers' Compensation concerning the Division's emergency regulations.	August 9, 2004 through September 21, 2004

**LOCAL MANDATES DETERMINATION**

- 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 proposed amendments do not apply to any local agency or school district.

- 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. The proposed amendments do not apply to any local agency or school district.
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed amendments do not apply to any local agency or school district.

## **CONSIDERATION OF ALTERNATIVES**

The Division considered all comments submitted during the public comment periods, and made modifications based on those comments to the regulations as initially proposed. The Administrative Director has now determined that no alternatives proposed by the regulated public or otherwise considered by the Division of Workers' Compensation would be more effective in carrying out the purpose for which these regulations were proposed, nor would they be as effective and less burdensome to affected private persons and businesses than the regulations that were adopted.

## **SUMMARY OF COMMENTS RECEIVED AND RESPONSES THERETO CONCERNING THE REGULATIONS ADOPTED**

The comments of each organization or individual are addressed in the following charts.

The public comment period was as follows:

### **Initial 45-day comment period on emergency regulations:**

August 9, 2004 through September 21, 2004.

### **First 15-day comment period on modifications to proposed text:**

October 13, 2004 through October 28, 2004.