

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

**FINAL STATEMENT OF REASONS AND  
UPDATED INFORMATIVE DIGEST**

**Subject Matter of Regulations: Official Medical Fee Schedule Hospital Outpatient  
Departments and Ambulatory Surgical Centers  
Discharge on or after January 1, 2004**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS**

**Sections 9789.30, 9789.31, 9789.32, 9789.33, 9789.36, 9789.37, 9789.38, and 9789.39**

**AN IMPORTANT PROCEDURAL NOTE ABOUT THIS RULEMAKING:**

The Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule component of the Official Medical Fee Schedule "establish(es) or fix(es) rates, prices, or tariffs" within the meaning of Government Code section 11340.9(g) and is therefore not subject to Chapter 3.5 of the Administrative Procedure Act (commencing at Government Code section 11340) relating to administrative regulations and rulemaking.

This rulemaking proceeding to amend the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule is being conducted under the Administrative Director's rulemaking power under Labor Code sections 133, 4603.5, 5307.1 and 5307.3. This regulatory proceeding is subject to the procedural requirements of Labor Code sections 5307.1 and 5307.4.

**CONSIDERATION OF RELEVANT MATTER PRESENTED**

After Notice of the Proposed Rulemaking published pursuant to Labor Code section 5307.4, a public hearing was held on January 25, 2011 at which interested persons could participate through the submission of written data, views, and arguments, including oral presentations. A 15-day comment period was noticed for November 7, 2012 which invited interested persons to participate through the submission of written comments. The Acting Administrative Director has subsequently considered all of the data, views, statements, and arguments presented or submitted.

The Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her, has amended or adopted the following sections of Division 1, Chapter 4.5, Subchapter 1, of title 8, California Code of Regulations, relating to the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule component of the Official Medical Fee Schedule:

**Section 9789.30 Definitions [Amend]**

- Section 9789.31 Adoption of Standards [Amend]**
- Section 9789.32 Applicability [Amend]**
- Section 9789.33 Determination of Maximum Reasonable Fee [Amend]**
- Section 9789.36 Update of Rules to Reflect Changes in the Medicare Payment System [Amend]**
- Section 9789.37 Election for High Cost Outlier [Amend]**
- Section 9789.38 Appendix X [Amend]**
- Section 9789.39 Federal Regulations and Federal Register Notices by Date of Service [Adopt]**

## **BACKGROUND TO REGULATORY PROCEEDING**

In 2003, the Legislature enacted Senate Bill 228 (Alarcon, Chapter 639, Statutes of 2003; SB 228) as part of workers' compensation reform legislation intended to reduce unnecessary medical and litigation expenses, among other things, in workers' compensation cases in California.

As one of its provisions, the bill substantially amended Labor Code section 5307.1, which provided for the Administrative Director to adopt a medical fee schedule for workers' compensation claims which would establish maximum reasonable fees. Labor Code section 5307.1, as amended by SB 228, provides that, commencing January 1, 2004, all fees shall be paid in accordance with the fee-related structure and rules of the relevant Medicare payment systems and that the maximum reasonable fees shall be 120 percent of the estimated aggregate fees prescribed in the Medicare payment system before the application of the inflation factor set forth in the statute. In particular, Labor Code section 5307.1 caps the maximum facility fee for services performed in an ambulatory surgical center or in a hospital outpatient department to not exceed 120 percent of the fee paid by Medicare for the same services performed in a hospital outpatient department.

On January 2, 2004, to comply with the requirements of Labor Code section 5307.1, through emergency rulemaking, the Administrative Director adopted a Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule section of the Official Medical Fee Schedule (OMFS) (set forth in California Code of Regulations, title 8, sections 9789.30-38) for fees in accordance with the Medicare payment system. A Certificate of Compliance was filed on April 30, 2004, and the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule regulations became effective on June 15, 2004.

On September 19, 2012, the Legislature enacted Senate Bill 863, (De León, CHAPTER 363, Statutes of 2012; SB 863) as part of workers' compensation reform legislation intended to reduce unnecessary medical and litigation expenses, among other things, in workers' compensation cases in California. As one of its provisions, SB 863 amends section (c)(1) of Labor Code section 5307.1, which states in pertinent part, "the maximum facility fee for services performed in an ambulatory surgical center shall not exceed 80 percent of the fee paid by Medicare for the same services performed in a hospital outpatient department."

Labor Code section 5307.1 further provides that the Administrative Director shall adjust the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule to conform to any relevant changes in the Medicare payment system by issuing an order, exempt from Labor Code sections 5307.3 and 5307.4 and the rulemaking provisions of the Administrative Procedure Act (Chapter 3.2 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), informing the public of the changes and their effective date.

Sections 9789.30 through 9789.38 set forth the general information, definitions and payment schedule for the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule section of the OMFS. The amendments to the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule section of the OMF Schedule regulations address sections 9792.30, 9792.31, 9789.32, 9789.33, 9789.36, 9789.37, and 9789.38, which are intended to revise the methodology for reimbursement of facility services for surgical procedures provided in the ambulatory surgical centers setting, and make minor revisions to conform to the proposed changes in reimbursement, and to update or clarify sections of the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule. The Administrative Director also adopts section 9789.39 which provides for the updates to the federal regulation and federal register references made in the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule updates by Order of the Administrative Director, in order to conform to changes in the Medicare payment system as required by Labor Code section 5307.1.

## **UPDATED INFORMATIVE DIGEST**

The Administrative Director incorporates the Informative Digest prepared in this matter. Since the Notice of Proposed Regulatory Action, the Legislature enacted SB 863 (De León, Chapter 363, Statutes of 2012) as part of workers' compensation reform legislation intended to reduce unnecessary medical and litigation expenses, among other things, in workers' compensation cases in California. SB 863 impacts the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule regulations by amending subsection (c)(1) of Labor Code section 5307.1 which provides the maximum facility fee for services performed in an ambulatory surgical center (ASC) payment shall not exceed 80% of the fee paid by Medicare for the same services performed in a hospital outpatient department.

In response, the regulation was amended to implement SB 863, by revising the payment rate methodology for procedures performed in an ASC, to make minor revisions to conform to the proposed changes in payment rates, and to update or clarify subsections of the regulation.

## **UPDATE OF INITIAL STATEMENT OF REASONS**

The Acting Administrative Director incorporates the Initial Statement of Reasons prepared in this matter. The purposes and rationales for the regulations as set forth in the Initial Statement of Reasons continue to apply, unless otherwise noted in the Final Statement of Reasons.

**THE FOLLOWING SECTIONS WERE ADOPTED OR AMENDED FOLLOWING THE PUBLIC HEARING AND WERE CIRCULATED FOR A 15-DAY COMMENT PERIOD (There was one 15-day comment periods as follows: first 15-day comment period: October 23, 2012 – November 7, 2012)**

**Modification to Hospital Outpatient Departments and ASC fee schedule heading**

“Discharge” is replaced with “Services” to correct to the proper the terminology.

**Modification to Section 9789.30 Definitions**

**Subdivision (a)** is amended to move reference to adjusted conversion factor as specified in the federal register covering services on or after September 15, 2011, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director, to section 9789.39(b), and is deleted from this section.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (e)** is amended to move reference to APC payment rate as specified in the federal register covering services between September 15, 2011 and February 29, 2012; between March 1, 2012 and August 31, 2012; and for services on or after September 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director, to section 9789.39(b), and is deleted from this section.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (f)** is amended to move reference to APC relative weight as specified in the federal register covering services between September 15, 2011 and February 29, 2012; between March 1, 2012 and August 31, 2012; and for services on or after September 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director, to section 9789.39(b), and is deleted from this section.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (q)** is amended to move reference to market basket inflation factor as specified in the federal register covering services between September 15, 2011 and February 29, 2012, and for services on or after March 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director, to section 9789.39(b), and is deleted from this section.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (w)** is amended to move reference to wage index as specified in the federal register covering services between September 15, 2011 and February 29, 2012, and for services on or after March 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director, to section 9789.39(b), and is deleted from this section.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (x)** is modified to reflect a revised effective date of the proposed amendments to the Official Medical Fee Schedule Hospital Outpatient Departments and ASC fee schedule in response to SB 863. Also in response to SB 863, the workers' compensation multiplier, used in calculating the facility fees for services rendered in ASCs, on or after January 1, 2013, will be 80% of the Medicare hospital outpatient departments payment rate, or 82% multiplier which includes an extra 2% reimbursement for high cost outlier cases.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

### **Modification to Section 9789.31 Adoption of Standards**

**Subdivision (a)** is amended to move reference to Medicare's hospital outpatient department prospective payment system's certain addenda as specified in the federal register covering services between September 15, 2011 and February 29, 2012; between March 1, 2012 and August 31, 2012; and for services on or after September 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director, to section 9789.39(b), and is deleted from this section.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (b)** is amended to move reference to Medicare's inpatient hospital prospective payment system certain tables as specified in the federal register covering services between September 15, 2011 and February 29, 2012, and for services on or after March 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director, to section 9789.39(b), and is deleted from this section.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (c)** is amended to indicate Medicare's inpatient hospital prospective payment system payment impact file is located at <http://www.cms.hhs.gov/AcuteInpatientPPS/> for services between September 15, 2011 and February 29, 2012, and for services on or after March 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (d)** is amended to reference to American Medical Associations' Physician "Current Procedural Terminology" annual revision covering services between September 15, 2011 and February 29, 2012, and for services on or after March 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (e)** is amended to reference to CMS' Alphanumeric "Healthcare Common Procedure Coding System (HCPCS)" annual revision covering services between September 15, 2011 and February 29, 2012, and for services on or after March 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

### **Modification to Section 9789.32 Applicability**

**Subdivision (c)(3)** is amended to state, “[t]he maximum allowable fee for drugs not otherwise covered by a Medicare fee schedule payment for facility services shall be determined pursuant to Labor Code Section 5307.1, or, where applicable, Section 9789.40”.

Specific Purpose of Change: is amended to conform to amendments to section (e) of Labor Code section 5307.1 (Assembly Bill 378, Solorio, Chapter 454, Statutes of 2011).

**Subdivision (h)** is amended to state, “[h]ospital outpatient departments and ambulatory surgical centers billing for facility fees and other services under this Section shall be submitted in accordance with the e-billing regulations beginning with Section 9792.5.0 or the standardized paper billing regulations beginning with Section 9792.5.2”.

Specific Purpose of Change: This amendment is being made to conform to the e-billing and standardized paper billing regulations.

### **Modification to Section 9789.33 Determination of Maximum Reasonable Fee**

**Subdivision (a)(1)** is amended to add effective dates of service, to change the workers’ compensation multiplier for ambulatory surgical centers to 0.82 for services rendered on or after January 1, 2013, in response to SB 863, and to move references to the unadjusted conversion factor to Section 9789.39(b), and are deleted from this section.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule, and to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (a)(1)(A)** is amended to add effective dates of service, and to change the workers’ compensation multiplier for ambulatory surgical centers to 0.82 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (a)(1)(B)** is amended to add effective dates of service, and to clarify the workers’ compensation multiplier is 1.22 for listed hospital outpatient departments.

Specific Purpose of Change: This amendment is being made to add clarity to the regulations.

**Subdivision (a)(2)** is amended to add effective dates of service, and to change the workers’ compensation multiplier for ambulatory surgical centers to 0.82 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (a)(4)** is amended to add effective dates of service, and to change the workers' compensation multiplier for ambulatory surgical centers to 0.82 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (a)(5)** is amended to add effective dates of service, and to change the workers' compensation multiplier for ambulatory surgical centers to 0.82 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (a)(6)** is amended to add effective dates of service, and to change the workers' compensation multiplier for ambulatory surgical centers to 0.82 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (b)(1)(A)** is amended to add effective dates of service, and to change the workers' compensation multiplier for ambulatory surgical centers to 0.80 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (b)(1)(B)** is amended to add effective dates of service, and to change the workers' compensation multiplier for ambulatory surgical centers to 0.80 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (b)(1)(D)** is amended to add effective dates of service, and to change the workers' compensation multiplier for ambulatory surgical centers to 0.80 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.



**Subdivision (b)(1)(E)** is amended to add effective dates of service, and to change the workers' compensation multiplier for ambulatory surgical centers to 0.80 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (b)(1)(F)** is amended to add effective dates of service, and to change the workers' compensation multiplier for ambulatory surgical centers to 0.80 for services rendered on or after January 1, 2013, in response to SB 863.

Specific Purpose of Change: This amendment is being made to implement SB 863 as it pertains to the hospital outpatient departments and ASC fee schedule.

**Subdivision (b)(2)** is amended to move references to the outlier threshold specified in the federal register covering services between September 15, 2011 and February 29, 2012, and for services on or after March 1, 2012, made in the hospital outpatient departments and ASC fee schedule updates by Order of the administrative director, to section 9789.39(b), and is deleted from this section.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (b)(3)** is amended to add effective dates of service.

Specific Purpose of Change: This amendment is being made to add clarity to the regulations.

#### **Modification to Section 9789.37 Election for High Cost Outlier**

The Election for High Cost Outlier form is modified to reflect a revision date for the form.

Specific Purpose of Change: This amendment is being made to reflect the revision date of the form which is necessary for clarity of the regulations.

#### **Modifications to Section 9789.38 – Appendix X**

The first paragraph of this section is amended to correct a citation. The language now refers to "Sections 9789.30 through 9789.37" instead of "Sections 9789.30 through 9789.36".

**42 C.F.R. § 419.32** is amended to move amendments to 42 C.F.R. section 419.32 to section 9789.39(a), and are deleted from this section.

**42 C.F.R. § 419.43** is amended to move amendments to 42 C.F.R. section 419.43 to section 9789.39(a), and are deleted from this section.

Specific Purpose of Change: This format change is necessary to make reference to the newly adopted section 9789.39, and to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Modification to Section 9789.39(a) and (b) Federal Regulations and Federal Register Notices by Date of Service**

This section is added to provide the updates to the federal regulation and federal register references made in the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule updates by Order of the Administrative Director, in order to conform to changes in the Medicare payment system as required by Labor Code section 5307.1(g)(2).

**Subdivision (a)** is amended to add references to the federal regulations that are referenced in the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule Administrative Director Orders for services rendered on or after September 15, 2011 and March 1, 2012.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable.

**Subdivision (b)** is amended to add references to the federal register notices that are referenced in the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule Administrative Director Orders for services rendered effective September 15, 2011, March 1, 2012, and September 1, 2012.

A parenthesis “)” was inadvertently omitted in the text for the row labeled “Labor-related Share” and the column labeled “Services Occurring On or After 4/15/2010”. The parenthesis is now inserted.

Specific Purpose of Change: This format change is necessary to make the hospital outpatient departments and ASC Fee Schedule regulations more readable and understandable, and correct a clerical error.

**UPDATE OF MATERIAL RELIED UPON**

The following additional documents beyond those identified in the Initial Statement of Reasons were relied upon by the Acting Administrative Director and added to rulemaking file after close of the initial 30-day comment period. They were identified in the Notice of Modification to Text of Proposed Regulations and Notice of Addition of Documents to Rulemaking File for the first 15-day comment period. These additional documents were

available for 15 day public review and comment from October 23, 2012 – November 7, 2012.

**Additional documents relied upon by the Acting Administrative Director and added to the rulemaking file and made available for public inspection and comment during the first 15-day comment period (October 23, 2012 – November 7, 2012)**

1. Yee, Christine A., *Why Surgeon Owners of Ambulatory Surgical Centers Do More Surgery Than Non-Owners*, Workers' Compensation Research Institute, May 2012
2. Yang, Rui, Fomenko, Olesya, With the assistance of Juxiang Liu, *Hospital Outpatient Cost Index for Workers' Compensation*, Workers' Compensation Research Institute, January 2012
3. *Report to the Congress: Medicare Payment Policy, Chapter 5, Ambulatory Surgical Centers*, Med Pac, March 2012
4. Wynn, Barbara O., Hussey, Peter S., Ruder, Teague, *Policy Options for Addressing Medicare Payment Differentials Across Ambulatory Settings*, RAND, 2011

**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.
- 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.

**CONSIDERATION OF ALTERNATIVES**

The Division considered all comments submitted during the public comment period, and made modifications based on those comments to the regulations as initially proposed. The Acting 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 as and less burdensome to affected private persons and businesses than the regulations that were adopted.