

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation**

NOTICE OF PROPOSED RULEMAKING

**Subject Matter of Regulations: Workers' Compensation – Official Medical Fee Schedule:
Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS
Section 9789.32.**

NOTICE IS HEREBY GIVEN that the Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her by Labor Code sections 59, 133, 4603.5, 5307.1 and 5307.3 proposes to amend section 9789.32 in Article 5.3 of Division 1, Chapter 4.5, Subchapter 1, of title 8, California Code of Regulations, relating to the Official Medical Fee Schedule – Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule (HOPD/ASC).

PROPOSED REGULATORY ACTION

The Division of Workers' Compensation, proposes to modify an existing regulation related to the HOPD/ASC fee schedule by amending Article 5.3 of Chapter 4.5, Subchapter 1, Division 1, of Title 8, California Code of Regulations. The following regulation is proposed for amendment:

Section 9789.32 Applicability

AN IMPORTANT PROCEDURAL NOTE ABOUT THIS RULEMAKING:

The HOPD/ASC 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 HOPD/ASC 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 Section 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.

PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: June 17, 2015
Time: 10:00 a.m. to 5:00 p.m. or conclusion of business
Place: Elihu M. Harris State Building, Auditorium
1515 Clay Street,
Oakland, CA 94612

In order to ensure unimpeded access for disabled individuals wishing to present comments and facilitate the accurate transcription of public comments, camera usage will be allowed in only one area of the hearing room. To provide everyone a chance to speak, public testimony will be limited to 10 minutes per speaker and should be specific to the proposed regulations. Testimony which would exceed 10 minutes may be submitted in writing.

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 hearings also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

ACCESSIBILITY

The State Office Buildings and Auditoriums are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other type of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the Statewide Disability Accommodation Coordinator 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.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Workers' Compensation. The written comment period closes at **5:00 p.m., on June 17, 2015**. The Division of Workers' Compensation will consider only comments received at the Division by that time. Equal weight will be accorded to oral comments presented at the hearing and written materials.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Maureen Gray
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 above-named contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwrules@dir.ca.gov. Unless submitted prior to or at the public hearing, Ms. Gray must receive all written comments no later than **5:00 p.m. on June 17, 2015**.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in her by Labor Code sections 59, 133, 4603.5, 5307.1, and 5307.3.

Reference is to Labor Code sections 4600, 5307.1 and 5307.11.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW

Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment. Labor Code section 4600 requires an employer to provide medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury. Under existing law, payment for medical treatment shall be no more than the maximum amounts set by the Administrative Director in the Official Medical Fee Schedule or the amounts set pursuant to a contract. Labor Code Section 5307.1, (as amended by Senate Bill 228 of 2003 (Chapter 639, Statutes of 2003); Senate Bill 1852 (Chapter 538, Statutes of 2006); Assembly Bill 1269 (Chapter 697, Statutes of 2007); Assembly Bill 378 (Chapter 545, Statutes of 2011); and Senate Bill 863 (Chapter 363, Statutes of 2012)), requires the Administrative Director to adopt and revise periodically an official medical fee schedule that establishes the reasonable maximum fees paid for all medical services rendered in workers' compensation cases.

As set forth in Labor Code section 5307.1(c)(1), the maximum facility fee for services performed in a hospital outpatient department, shall not exceed 120 percent of the fee paid by Medicare for the same services performed in a hospital outpatient department. Senate Bill 863 also required that for services rendered in ambulatory surgical centers on or after January 1, 2013, the maximum facility fee shall not exceed 80 percent of the fee paid by Medicare for the same services performed in a hospital outpatient department. The inflation factor for hospital outpatient services and ambulatory surgical center services is determined solely by the estimated adjustment in the hospital market basket for the 12 months beginning October 1 of the preceding calendar year. The Administrative Director may adopt different conversion factors, diagnostic related group weights, and other factors affecting payment amounts from those used in the Medicare payment system, provided estimated aggregate fees do not exceed the

maximum percent of the estimated aggregate fees set forth in Labor Code section 5307.1.

Labor Section 5307.1 also provides that the Administrative Director shall adjust the HOPD/ASC 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.

Effective Jan. 1, 2004, the Administrative Director adopted the HOPD/ASC fee schedule (Title 8, California Code of Regulations, sections 9789.30 et seq.), which is regularly updated by Administrative Director Order.

Effective Jan. 1, 2013, the Administrative Director amended the HOPD/ASC fee schedule (Title 8, California Code of Regulations, sections 9789.30 et seq.), to implement Senate Bill 863 as it relates to the OMFS HOPD/ASC fee schedule.

In March of 2014, the Division initiated a rulemaking action to amend the HOPD/ASC fee schedule as follows: 1. Transition payment policies from the pre-2014 OMFS physician fee schedule to the OMFS RBRVS-based physician fee schedule; 2. Eliminate the alternative payment methodology for hospital outpatient and ASC services rendered on or after September 1, 2014; and in accordance with changes to Medicare's fee-related structure and payment rules for the hospital outpatient departments prospective payment system (OPPS), adjust the Workers' Compensation Multiplier (which included the additional percentage added to the Medicare Multiplier for outliers).

On May 22, 2014, after considering public comments received during a public hearing and one written comment period, the Administrative Director submitted the amended regulations to the Office of Administrative Law for file and print only. The amended regulations were filed with the Secretary of State on June 3, 2014. The regulations were effective for services rendered on or after September 1, 2014.

The Division subsequently initiated a rulemaking to correct an inadvertent error in the payment methodology for "Other Services." The RBRVS conversion factor should have been applied in the payment methodology instead of the HOPD/ASC Workers' Compensation Multiplier. This correction became effective for services rendered on or after September 1, 2014.

Objective and Anticipated Benefits of the Proposed Regulation Amendments:

The objective of this rulemaking action is to amend the OMFS HOPD/ASC fee schedule to make more specific the payment method for "Other Services". Because Medicare occasionally changes its coding practices, it is necessary to provide guidance on the proper HCPCS code to use for calculating "Other Services" maximum payment amounts when a different HCPCS code is used to describe comparable Other Services under CMS' Hospital Outpatient Departments Prospective Payment System (CMS HOPPS) and the OMFS RBRVS. Refining the payment methodology to include guidance on which HCPCS code to use is beneficial because payable outpatient services might otherwise be denied.

For example, effective January 1, 2014, CMS began to recognize HCPCS code G0463 (hospital outpatient clinic visit for assessment and management of a patient) and no longer recognizes CPT codes

99201-99205 (evaluation and management – new patient) and 99211-99215 (evaluation and management – established patient) for payment under the CMS HOPPS. The OMFS RBRVS, however, continues to recognize CPT codes 99201-99205 and 99211-99215, but does not recognize HCPCS code G0463. As a result, it has come to the Division’s attention that hospitals are being denied payment for these clinic visits. This amendment will specify that when this circumstance occurs, the clinic visit should be paid in accordance with the HCPCS code used under the OMFS RBRVS.

The Administrative Director now proposes to amend the OMFS HOPD/ASC fee schedule. The proposed regulation implements, interprets, and makes specific Labor Code section 5307.1 as follows:

Section 9789.32: Applicability

Section 9789.32 sets forth the applicability of the HOPD/ASC fee schedule and sets forth payment methods for calculating the maximum fee for hospital outpatient departments and ASC facility fees.

Section 9789.32(c)(1)(B)(iii): This subdivision is added to provide that for services rendered on or after XXX XX, 2015 [Date amendment is filed with the Secretary of State. Date to be inserted by OAL.], if different HCPCS codes are used to describe comparable Other Services under the CMS HOPPS and the OMFS RBRVS, the HCPCS code used under the OMFS RBRVS shall be used to determine the maximum allowable amount.

Section 9789.32(c)(1)(B)(iv) formally (iii): This subdivision is amended to change the subdivision numbering from (iii) to (iv).

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 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.

The Division of Workers’ Compensation is aware of cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Claims administrators may incur costs to adjust their payment system to implement the proposed guidance regarding coding of hospital outpatient department Other Services paid according to the RBRVS. However, there will be offsetting benefits by avoiding denial of payable hospital outpatient services that might result if the proposed amendment is not adopted.

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed amendments to the regulation will not

affect small business.

FISCAL IMPACTS

- Costs or savings to state agencies: The state will experience the same costs and savings as other employers.
- Costs/savings in federal funding to the State: None.
- Local Mandate: None. The proposed amendments to the regulation 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 amendments, 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 amendments 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 amendments, 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.

CONSIDERATION OF ALTERNATIVES

The Administrative Director invites interested persons to present statements or arguments with respect to alternatives to the proposed amendments to the regulation at the scheduled hearing or during the written comment period.

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED AMENDMENTS TO THE REGULATION, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed amendments to the 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.

As of the date of this notice, the rulemaking file consists of the notice; the initial statement of reasons; the proposed amendments to text of the regulation which may be accessed and downloaded from the Division's website at:

http://www.dir.ca.gov/dwc/rulemaking/dwc_rulemaking_proposed.html

Any interested person may inspect a copy or direct questions about the proposed amendments to the regulation and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Department of Industrial Relations, Division of Workers' Compensation, 1515 Clay Street, 18th Floor, Oakland, California, between 9:00 a.m. and 4:30 p.m., Monday through Friday, unless the state office is closed for a state holiday. Copies of the proposed regulations, initial statement of reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON

Inquiries concerning this proposed action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed amendments to the regulation, 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:

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142
E-mail: mgray@dir.ca.gov

The telephone number of the contact person is (510) 286-7100.

BACKUP CONTACT PERSON

In the event the contact person is unavailable, inquiries should be directed to the following backup contact person:

Jarvia Shu, Industrial Relations Counsel
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142
E-mail: jshu@dir.ca.gov

The telephone number of the backup contact persons is (510) 286-7100.

FORMAT OF REGULATORY TEXT

Text proposed to be added is displayed in underscore type.

Text proposed to be deleted is displayed in strikeout type.

Plain text is the current codified language.

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 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:

http://www.dir.ca.gov/dwc/rulemaking/dwc_rulemaking_proposed.html

AUTOMATIC MAILING

A copy of this Notice will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the regulations as adopted will appear in Article 5.3 of Division 1, Chapter 4.5, Subchapter 1, title 8, California Code of Regulations.