

**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:  
Physician Fee Schedule**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS  
Sections 9789.12.1 et seq.**

**NOTICE IS HEREBY GIVEN** that the Acting 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 sections 9789.12.2, 9789.12.3, 9789.12.4, 9789.12.8, and 9789.19, 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 – Physician Fee Schedule.

**PROPOSED REGULATORY ACTION**

The Division of Workers' Compensation, proposes to modify existing regulations related to the physician and nonphysician practitioner fee schedule by amending Article 5.3 of Chapter 4.5, Subchapter 1, Division 1, of Title 8, California Code of Regulations. The following regulations are proposed for amendment:

Section 9789.12.2	Calculation of the Maximum Reasonable Fee - Services Other than Anesthesia
Section 9789.12.3	Status Codes C, I, N and R
Section 9789.12.4	“By Report” - Reimbursement for Unlisted Procedures / Procedures Lacking RBRVUs
Section 9789.12.8	Status Codes
Section 9789.19	Update Table

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

The Physician 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 Physician 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 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:** December 12, 2013  
**Time:** 10:00 a.m. to 5:00 p.m. or conclusion of business  
**Place:** Elihu M. Harris State Building, Room 1  
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 Acting 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 December 12, 2013**. 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: [dwcrules@dir.ca.gov](mailto:dwcrules@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 December 12, 2013**.

## AUTHORITY AND REFERENCE

The Acting 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 Directive in the Official Medical Fee Schedule (OMFS) or the amounts set pursuant to a contract. (Labor Code sections 5307.1, 5307.11.)

In September of 2012, the California legislature passed Senate Bill 863 (Statutes of 2012, Chapter 363), a sweeping reform bill that, among other things, amended Labor Code section 5307.1. The legislation directs the Administrative Director to “adopt and review periodically an official medical fee schedule based on the resource-based relative value scale for physician services and nonphysician practitioner services,” provided:

- Liability for medical treatment, including issues of reasonableness, necessity, frequency, and duration shall be determined in accordance with Labor Code section 4600
- The fee schedule is updated annually to reflect changes in procedure codes, relative weights and the adjustment factors in subdivision (g) (the Medicare Economic Index and any relative value scale adjustment factor)
- The maximum reasonable fees paid shall not exceed 120% of the estimated annualized aggregate fee prescribed in the Medicare physician fee schedule as it appeared on 7/1/2012 (before application of the Medicare Economic Index and any relative value scale adjustment factor)
- Any service provided to injured workers that is not covered under Medicare shall be included at its rate of payment established by the administrative director.
- There is a 4-year transition between the estimated aggregate maximum allowable under the OMFS physician schedule prior to 1/1/2014 and the maximum allowable based on 120% of the Medicare conversion factors
- The physician fee schedule includes ground rules that differ from Medicare payment ground rules, including, as appropriate, payment of consultation codes and payment of evaluation and management services provided during a global period of surgery.

In June of 2013 the Acting Administrative Director commenced a rulemaking action to adopt a new physician fee schedule based upon the Resource Based Relative Value Scale (RBRVS). After considering public comments received during a public hearing and two written comment periods, the Acting Administrative Director adopted regulations to establish a new physician fee schedule based upon the RBRVS. The regulations were filed with the Secretary of State for publication in the California Code of Regulations on September 24, 2013. The regulations are effective for services rendered on or after January 1, 2014.

### **Objective and Anticipated Benefits of the Proposed Regulation Amendments:**

The objective of the rulemaking action is to amend the RBRVS-based fee schedule for physician and nonphysician services to eliminate use of the federal Office of Workers' Compensation Program

(OWCP) relative value units. The amendments also make minor clarifying revisions to the regulations. Eliminating use of OWCP is beneficial because the structure of the OWCP data file results in erroneous fee calculations for certain procedures.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Acting Administrative Director has determined that this proposed regulation is not inconsistent or incompatible with existing regulations.

The Administrative Director now proposes to amend the RBRVS-based fee schedule for physician and nonphysician practitioners. The proposed regulations implement, interpret, and make specific Labor Code section 5307.1 as follows:

**Section 9789.12.2 Calculation of the Maximum Reasonable Fee - Services Other than Anesthesia:**

sets forth the formulas for calculating the maximum fee for physician and nonphysician practitioner services other than anesthesia. One formula is for physician services rendered in a “facility” and one formula is for physician services rendered in a “nonfacility.” The amendment deletes a duplicative heading in subdivision (b), facility site of service.

**Section 9789.12.3 Status Codes C, I, N and R:** sets forth methods for workers’ compensation of pricing codes that have Medicare Status Code C (“Carriers price the code”), Status Code I (“Not valid for Medicare purposes”), Status Code N (“Non-covered services”), and Status Code R (“Restricted Coverage”) in the CMS’ National Physician Fee Schedule RBRVS file. The amendment eliminates language that references use of OWCP RVUs in fee calculations.

**Section 9789.12.4 “By Report” - Reimbursement for Unlisted Procedures / Procedures Lacking RBRVUs:** sets forth instructions to bill an unlisted procedure code or procedures lacking RVUs. The section provides a method for determining fees for CPT codes with status indicator codes C, N, or R, that do not have RVUs assigned under the CMS’ National Physician Fee Schedule RBRVS file. The amendment eliminates use of the OWCP as a method of calculating fees and directs payment to be made “By Report”.

**Section 9789.12.8 Status Codes:** adopts the Status Code Indicators that are used in the National Physician Fee Schedule Relative Value File, but sets forth modified definitions of the status codes where needed for use in the workers’ compensation context. The amendment eliminates reference to OWCP for status codes “C” and “N”.

**Section 9789.19 Update Table:** sets forth a table of documents incorporated by reference that are used in physician billing and payment. The amendment eliminates use of OWCP data file, “CPT, HCPCS, ADA & OWCP codes with RVU and conversion factors”. The amendment eliminates the table entry for “Statewide GAF (Consolidated Work, Practice Expense, Malpractice Expense, for use with OWCP Consolidated RVU)”. The reference to the CMS’ Medicare National Physician Fee Schedule Relative Value File was amended to clarify exclusions from the zip file.

## **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 eliminate use of the OWCP. However, there will be offsetting benefits by reducing the complexity and avoiding erroneous fee calculations that may result from application of the OWCP data file.

### **EFFECT ON SMALL BUSINESS**

The Administrative Director has determined that the proposed amendments to the regulations 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 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 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 Acting 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 Acting 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, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE / 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.

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 addition, the Notice, Initial Statement of Reasons, and proposed text of regulations may be accessed and downloaded from the Division's website at:

[http://www.dir.ca.gov/dwc/rulemaking/dwc\\_rulemaking\\_proposed.html](http://www.dir.ca.gov/dwc/rulemaking/dwc_rulemaking_proposed.html)

Any interested person may inspect a copy or direct questions about the proposed regulations 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, 18<sup>th</sup> 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 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:

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](mailto: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, or to obtain responses to questions regarding the proposed action, inquiries should be directed to the following backup contact person:

Jacqueline Schauer, Industrial Relations Counsel  
Department of Industrial Relations  
Division of Workers' Compensation  
Post Office Box 420603  
San Francisco, CA 94142  
E-mail: [jschauer@dir.ca.gov](mailto:jschauer@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 that will be effective 1/1/2014.

### **AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING**

If the Acting 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:

[http://www.dir.ca.gov/dwc/rulemaking/dwc\\_rulemaking\\_proposed.html](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 Acting 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.