



California Workers' Compensation Institute

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October 8, 2020

VIA E-MAIL – DWCForums@dir.ca.gov

Maureen Gray, Regulations Coordinator
Division of Workers' Compensation, Legal Unit
P.O. Box 420603
San Francisco, CA 94142
Attn: DWC Forums

Re: Proposed Amendments to the Copy Service Fee Schedule Regulations

Dear Ms. Gray:

These comments on proposed amendments to the Copy Service Fee Schedule are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 81% of California's workers' compensation premium, and self-insured employers with \$88B of annual payroll (36.1% of the state's total annual self-insured payroll).

Insurer members of the Institute include AIG, Alaska National Insurance Company, Allianz Global Corporate and Specialty, AmTrust North America, AXA XL Insurance, Berkshire Hathaway, CHUBB, CNA, CompWest Insurance Company, Crum & Forster, EMPLOYERS, Everest National Insurance Company, GUARD Insurance Companies, The Hanover Insurance Company, The Hartford, ICW Group, Liberty Mutual Insurance, North American Casualty Company, Pacific Compensation Insurance Company, Preferred Employers Insurance, Republic Indemnity Company of America, Sentry Insurance, State Compensation Insurance Fund, Travelers, WCF National Insurance Company, Zenith Insurance Company, and Zurich North America.

Self-insured employer members include Albertsons/Safeway, BETA Healthcare Group, California Joint Powers Insurance Authority, California State University Risk Management Authority, Chevron Corporation, City and County of San Francisco, City of Los Angeles, City of Pasadena, City of Torrance, Contra Costa County Risk Management, Costco Wholesale, County of Los Angeles, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, East Bay Municipal Utility District, Foster Farms, Grimmway Farms, Kaiser Permanente, Marriott International, Inc., North Bay Schools Insurance Authority, Pacific Gas & Electric Company, Schools Insurance Authority, Sempra Energy, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group, Southern California Edison, Special District Risk Management Authority, Sutter Health, University of California, and The Walt Disney Company.

Recommended revisions to the proposed regulations are indicated by **underscore** and **strikeout**. Comments and discussion by the Institute are identified by italicized text.

Recommendation:

§ 9980. Definitions.

As used in this article:

(f) “Initial set of records” means records or documents that have been recorded in paper, electronic, film, digital, or other format from one custodian of records under one subpoena or authorization. **“Initial set of records” does not include separate types of records requested from a single source, regardless of the number of subpoenas issued.**

Discussion:

In the initial forum comments from 2019, concerns were raised about the practice of issuing multiple subpoenas to the same custodian of records for different types of records for the same injured worker (e.g., separate subpoenas for payroll records, employee handbook, personnel records, medical records, etc.) when one subpoena would be sufficient to obtain different types of records from a single source. The Institute urges the Division to revisit this issue and take the opportunity to preclude the practice, which has led to disputes and ultimately the adjudication of lien claims that must be resolved by the WCAB.

Recommendation:

§ 9981. Bills for Copy Services.

(b) Bills for copy and related services must specify the services provided and include:

(3) The source of the information, the type of records produced, **the date range of the copied records**, the date of **copy** service, a description of the billed services, and the number of pages produced; and

(4) The date the records were requested, the name of the individual requesting the records, and a statement from the requesting party, signed under penalty of perjury, that the request for records was issued in good faith, is not duplicative, and that the records are necessary to the litigation of the claim.

(c) Bills submitted under this section **must use are limited to** the following codes:

(1) WC 020: Flat Fee of \$180 **for services rendered between July 1, 2015, and December 31, 2020, or \$210 for services rendered on or after January 1, 2021.**

(2) WC 021: Cancelled Service - \$75.00.

(3) WC 022: Certificate of No Records - \$75.00.

(4) WC 023: Per Page Fee of **\$0.10** per page.

(5) WC 024: Records from the Employment Development Department (EDD) of \$20.

(6) WC 025: Records from the Workers' Compensation Insurance Rating Bureau **(WCIRB)** of \$30.

(7) WC 026: Additional Electronic Set of \$5.

(8) WC 027: Additional Electronic Set of \$30.

(9) WC 028: Duplication of X-Ray or scan of \$10.26.

(10) WC 029: Electronic storage media - \$3.00.

(11) WC 030: Requested Services. (Indicate amount.)

(12) WC 031: Contracted Fees for Additional Sets. (Indicate amount.)

(13) WC 032: Contracted Fees.

~~(14) WC 033: Flat Fee of \$210.~~

(15) S9999: Sales Tax.

(d) All bills submitted under this section must include a statement under penalty of perjury that the services described in the bill are neither related to nor the result of a violation of Labor Code section 139.32.

~~(e) Bills must be paid in accordance with Labor Code sections 4621, 4622, 4603.2, 4603.4 and 5811.~~

Discussion:

The Institute recommends additional language under subsection (b)(3), describing the copied records. Requiring the bills for copy services to include the date range of the records copied will enable identification of duplicative services.

In subsection (b)(4), the Institute understands that the Division intends to address the questionable practice of random searches for records from sources not known to be connected to the case, by requiring the requesting party to verify that a legitimate basis for the requested records exists. Unfortunately, the proposed language will likely not represent a sufficient deterrent. The Institute hopes that further examination of this problem area during the regulatory process will result in a more actionable solution.

In subsection (c), the Institute recommends replacing the proposed “must use” text with “limited to,” in order to clarify that no other codes may be used to bill copy and related services, without implying that each bill will include all listed codes. Additional changes are recommended for consistency.

To avoid confusion, the Institute recommends using the same code (WC 020) to denote flat fee services irrespective of the date of service. As is common with other California workers’ compensation fee schedules, the payment amount for the same code would simply be determined by the date of service.

Subsection (e) is a statement of existing law, which is to be avoided. The Institute recognizes that the question of the application of penalty and interest to delayed payment of copy service fees has been the subject of dispute. If, by this new subsection, the Division intends to confirm that the penalty and interest are applicable not only to delayed medical-legal copy service charges under Labor Code section 4622 but also to delayed medical treatment copy service charges under Labor Code section 4603.2, the proposed language does not accomplish that result. It is true that section 4603.2(b)(1)(A) expressly includes “copy services” in its requirement for itemization of services; however, section 4603.2(b)(2), which authorizes penalty and interest for delayed payments, is expressly limited to “medical treatment provided or prescribed by the treating physician” and does not include copy services payments. The proposed language of subsection (e) here cannot be used to justify an award of penalty and interest for delayed payment of medical treatment copy services where the statute itself does not authorize it.

Recommendation:

§ 9982. Allowable Services.

(a) The fees allowed under sections 9983 and 9984 must be applied to copy and related services:

(3) To obtain a copy of any subsequently-received medical report or medical-legal report, or other medical information relevant to the claim, ~~that~~ the claims administrator failed to timely serve within the time frames set forth in section ~~10637~~ 10635.

(4) To obtain records that the claims administrator is seeking by subpoena, ~~provided when~~ the claims administrator fails to provide written notice to the injured worker pursuant to Labor Code section 4055.2.

...

(c) The claims administrator is not liable for payment of:

(3) Subpoenaed records obtainable from the Workers' Compensation Insurance Rating Bureau or the Employment Development Department ~~that can be obtained without a subpoena at lower cost or that~~ were requested on or after January 1, 2021.

Discussion:

We recommend a correction of a typographical error in subsection (a), and a correction to syntax in subsection (a)(3). Additionally, the WCAB Rules of Practice and Procedure, effective January 1, 2020, replaced former section 10608 with two new sections (§§10635 and 10637). Of the two sections, §10635 is applicable since it is the section that mandates a compliance timeframe.

Additional syntax correction is suggested for subsection (a)(4).

In subsection (c)(3), we recommend a correction to syntax. Additionally, the proposed change eliminates language proscribing reimbursement for records obtained from the Workers' Compensation Insurance Rating Bureau or the Employment Development Department for services rendered prior to January 1, 2021. Because elimination of the language introduces uncertainty regarding billed fees for obtaining records from the WCIRB or EDD prior to January 1, 2021, the Institute recommends retaining existing language.

Recommendation:

§ 9983. Fees for Copy and Related Services for Dates of Service Prior to January 1, 2021.

[No changes to existing regulation.]

Discussion

While the amendments to the proposed regulation clearly separate the effective date for the new fee amounts, revising the language for services provided prior to January 1, 2021, would render the changes retroactive. The Institute recommends leaving the language unchanged from the existing regulation for services rendered between July 1, 2015, and December 31, 2020.

Recommendation:

§ 9984. Fees for Services for Dates of Service on and after January 1, 2021.

The reasonable maximum fees payable for copy and related services are as follows:

(b) \$75 in the event of cancellation after a subpoena or request for records by authorization has been issued but before records are produced, or for a certificate of no records.

(1) Bills submitted for cancellation of a subpoena shall also include a copy of the request for records containing the date of the request and identity of the requesting party, and a copy of the cancellation order containing the date of cancellation and identity of the requestor.

(2) Bills submitted for certificates of no records shall also include a copy of the request for records containing the date of the request and identity of the requesting party, and a copy of the certificate of no records containing the date of the certificate.

(3) If the copy service fails to provide the information required by this section, the claims administrator shall have no liability for payment.

(4) Applicable sales tax (under California Sales and Use Tax Regulations, Article 3, Regulation 1528).

Discussion:

A common industry practice has evolved whereby the employee's representative, through and/or in coordination with the copy service, serves multiple subpoenas on multiple individuals or entities where there is no good faith belief that records actually exist. Similarly, subpoenas may be issued and then quickly cancelled before any work might reasonably have been completed, but nevertheless result in billing for cancellation fees. All of these unreasonable copy service fees are unfairly borne by the claims administrator. The Institute suggests that additional requirements for the production of information in sections (b)(1) and (2) will help to eliminate inappropriate subpoenas, and result in subpoenas that will lead to the discovery of information pertinent to the industrial injury and for which payment of the copy service fee is appropriate.

The Institute recommends reference to the underlying regulation that defines "applicable sales tax." CWCI data from 2018 shows tremendous variability in sales tax fees related to the underlying copy services. For example, a single provider received 9.9% of flat fee service payments and 9.7% of total payments, but received 30.9% of the total payments for sales tax. Reference to the pertinent regulation would mitigate conflicts that arise due to lack of understanding or disagreement over which components of professional copy services are subject to sales tax.

Thank you for the opportunity to comment, and please contact us if additional information would be helpful.

Sincerely,

Stacy L. Jones

Stacy L. Jones, CWCI Senior Research Associate

SLJ/pm

cc: George Parisotto, DWC Administrative Director
Katrina Hagen, DIR Director
CWCI Claims Committee
CWCI Medical Care Committee
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