



California Workers' Compensation Institute

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July 10, 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

Re: Proposed Amendments to Medical-Legal Fee Schedule Regulations

Dear Ms. Gray:

These comments on proposed amendments to the Medical-Legal Fee Schedule are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 83% of California's workers' compensation premium, and self-insured employers with \$65B of annual payroll (30% 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*.

Discussion and Critical Recommendation:

The per-page records review charge is an integral component of these proposed regulations. During the stakeholder meetings held over several months, all participants recognized that a per-page charge could only be implemented if made in conjunction with a Records Organizer that would act as a clearinghouse and gateway. The Institute understands that the Division may believe that it does not have sufficient authority to regulate a new process such as this, and that formal legislation would have to be enacted. Because of the current health pandemic, the legislative appetite for a new bill at this late stage is not clear. Accordingly, the Institute urges the Division to include a “sunset” clause in these proposed regulations, in order that the per-page charge might be tested and withdrawn if it is indeed unworkable without the Records Organizer concept being implemented concurrently.

§ 9793. Definitions.

(c)(2) performed by a **panel-selected** Qualified Medical Evaluator, **by an** Agreed Medical Evaluator, or **by** the primary treating physician **upon agreement of the parties**, for the purpose of proving or disproving a contested claim, and which meets the requirements of paragraphs (1) through (5), inclusive, of subdivision (h).

Discussion:

A longstanding concern has been the utilization of the medical-legal fee structure by treating physicians. A regulatory limitation is needed to curtail this practice in order to avoid disputes as to whether a treating physician’s report is medical-legal in nature. Accordingly, the Institute suggests new language that provides clarity to treating physicians wishing to bill for their services under the Medical-Legal Fee Schedule.

§ 9795 Reasonable Level of Fees for Medical-Legal Expenses, Follow-up, Supplemental and Comprehensive Medical-Legal Evaluations and Medical-Legal Testimony **services rendered prior to January 1, 2021.**

§ 9795.1 Reasonable Level of Fees for Medical-Legal Expenses, Follow-up, Supplemental and Comprehensive Medical-Legal Evaluations and Medical-Legal Testimony **services rendered on or after January 1, 2021.**

Discussion:

The proposed amendments to § 9795 do not include instructions or codes for services provided prior to January 1, 2021. The proposed code descriptions and fees vary substantially from those currently in effect under § 9795 and warrant a separate subsection for clarity. The Institute recommends a clear demarcation in the regulatory structure based on service date.

(b) The fee for each evaluation is calculated by multiplying the relative value by \$16.25 and adding any amount applicable because of the modifiers permitted under subdivision (d). The fee for each medical-legal evaluation procedure includes reimbursement for the history and physical examination, review of records, preparation of a medical-legal report, including typing and transcription services, and overhead expenses. **The complexity of the evaluation is the dominant factor determining the appropriate level of service under this section; the times to perform procedures is expected to vary due to clinical circumstances, and is therefore not the controlling factor in determining the appropriate level of service.**

Discussion:

Considering the flat fee payment structure, language describing payment based on complexity and time must be deleted from subdivision (b).

(c) Medical-legal evaluation reports and medical-legal testimony shall be reimbursed as follows:

CODE	RV	PROCEDURE DESCRIPTION
ML200	31 (503.75)	<p><i>Missed Appointment for a Comprehensive or Follow-Up Medical-Legal Evaluation.</i> Includes instances where the injured worker does not show up for the evaluation, the injured worker is more than 30 minutes late for the appointment and the QME is unable to continue with the scheduled QME appointment, or in the case where the appointment has been canceled within six business days of the scheduled appointment date. If the physician produces a record review report within 30 days of the date of the missed appointment the physician shall be reimbursed at the rate of \$3.00 per page for any records reviewed in excess of 200 pages, up to a limit of 1800 additional pages. The physician shall be reimbursed at the rate of \$2.00 per page for any records reviewed in excess of 2000 total pages. When billing for a record review report under this code, the physician shall include in the report a verification under penalty of perjury of the total number of pages of records reviewed by the physician as part of the medical-legal evaluation and preparation of the report. Any pages reviewed for this record review report will be excluded from the page count for reimbursement when the face-to-face or supplemental evaluation takes place.</p> <p><u>Fees for failed appointments and for late cancellations that are incurred through the fault or neglect of the injured worker or his/her representative shall be credited against the injured worker's award.</u></p>

Discussion:

The Institute's proposed language establishes differential treatment of the fee when incurred through the fault or neglect of the injured worker or their representative.

ML202	81 (1,316.25)	<p><i>Follow-up Medical-Legal Evaluation.</i> Limited to a follow-up medical-legal evaluation by <u>a the same evaluating</u> physician which occurs within twenty-four months of the date on which a prior comprehensive medical-legal evaluation was performed. The fee includes review of 200 pages of records <u>that were not reviewed as part of the initial comprehensive medical-legal evaluation or as part of any intervening supplemental medical-legal evaluations</u>. Review of records in excess of 200 pages shall be reimbursed at the rate of \$3.00 per page up to a limit of 1800 additional pages. Review of records in excess of 2000 total pages shall be reimbursed at the rate of \$2.00 per page. When billing under this code, the physician shall include in the report a verification under penalty of perjury of the total number of pages of records reviewed by the physician as part of the medical-legal evaluation and preparation of the report.</p>
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Discussion:

For ML-202, all Follow-up Evaluations should be conducted by the same evaluating physician. Also, since a Follow-up Medical-Legal Evaluation may occur after one or more Supplemental Medical-Legal Evaluation reports are submitted, medical records reviewed as part of a Supplemental Medical-Legal Evaluation should not again be eligible for inclusion in the page count for the Follow-up Medical-Legal Evaluation.

ML203	40 ((\$650))	<p><i>Fees for Supplemental Medical-Legal Evaluations.</i> The fee includes services for writing a report after receiving a request for a supplemental report from a party to the action or receiving records that were not available at the time of the initial or follow-up comprehensive medical-legal evaluation. Fees will not be allowed under this section for supplemental reports (1) following the physician's review of (1) information which was available in the physician's office for review or was included in the medical record provided to the physician prior to preparing a comprehensive medical-legal report or a follow-up medical-legal report; or (2) addressing an issue that was requested by a party to the action to be addressed in a prior comprehensive medical-legal evaluation, a prior follow-up medical-legal evaluation or a prior supplemental medical-legal evaluation.</p> <p><u>Review of records that were submitted by a party to the physician fewer than 10 days in advance of the initial or follow-up comprehensive medical-legal evaluation and that were not reviewed as part of that evaluation shall be reimbursed by the submitting party at the rate of \$3.00 per page.</u> Failure to issue a supplemental report upon request because of an inability to bill for the report under this code would constitute grounds for discipline by the Administrative Director or his or her designee. The fee includes review of 50 pages of records. Review of records in excess of 50 pages that were received as part of the request for the supplemental report shall be reimbursed at the rate of \$3.00 per page up to a limit of 1950 additional pages. Review of records in excess of 2000 total pages that were received as part of the request for the supplemental report shall be reimbursed at the rate of \$2.00 per page. When billing under this code, the physician shall include in the report a verification under penalty of perjury of the total number of pages of records reviewed by the physician as part of the supplemental medical-legal evaluation and preparation of the report.</p>
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Discussion:

The Institute suggests a slight alteration of syntax for purposes of clarity. The Institute recommends that additional language be added to require payment for records review to be made by the party who failed to submit the records in a timely manner for the initial or follow-up evaluation, which will incentivize early submission of records to the evaluating physician.

ML204	7 ((\$ 455 425/hr))	<p><i>Fees for Medical-Legal Testimony.</i> The physician shall be reimbursed at the rate of RV 7, or his or her usual and customary fee, whichever is less, for each quarter hour or portion thereof, rounded to the nearest quarter hour, spent by the physician. The physician shall be entitled to fees for all itemized reasonable and necessary time spent related to the testimony, including reasonable preparation and travel time. The physician shall be paid a minimum of two hours for a deposition. If a deposition is canceled fewer than eight (8) days before the scheduled deposition date, the physician shall be paid a minimum of one hour for the scheduled deposition.</p>
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Discussion:

During the stakeholder meetings, a figure of \$425 was suggested by attendees. Inasmuch as the current rate for deposition testimony is \$250, a 70% increase in the hourly rate should be sufficient to address the concerns in this instance.

ML206	(\$0)	Remedial Supplemental Medical-Legal Evaluations. This code is designed for communication purposes only. It indicates and acknowledges that compensation is not owed for this report. This code shall be used for supplemental reports following the physician's review of: (1) information which was available in the physician's office for review or was included in the document record provided to the physician prior to preparing a comprehensive medical-legal report or a follow-up medical-legal report, (2) addressing an issue that was requested by a party to the action to be addressed in a prior comprehensive medical-legal evaluation, a prior follow-up medical-legal evaluation or a prior supplemental medical-legal evaluation, or (3) addressing an issue that should have been addressed in a prior comprehensive medical-legal evaluation, a prior follow-up medical-legal evaluation or a prior supplemental medical-legal evaluation pursuant to the requirements for a medical-legal evaluation and or report as required by any provision of title eight, California Code of Regulations, sections 9793, 9794 and 9795.
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Discussion:

Creation of a code describing a non-payable service will cause confusion and the Institute suggests removing this language.

(g) Nothing in this regulation affects the operation of Labor Code section 5307.6. The term "extraordinary circumstances" as set forth in Labor Code section 5703.6(b) shall be limited to evaluations performed in the fields of psychiatry/psychology, oncology, or toxicology, and shall be reimbursed according to the modifiers set forth in this section.

Discussion:

The stakeholder discussion participants were united behind a limitation to the statutory opportunity to circumvent the fee schedule. Following extensive discussion, there was general agreement that "extraordinary circumstances" should be defined as evaluations for psychiatry, psychology, oncology, and toxicology. While the proposed modifiers of -96, -97, and -98 appropriately increase the reimbursement rate for these highly complex, specialized, and underrepresented fields, there needs to be a defined restriction in order to avoid abusive practices.

Alternatively, a change in the Definition section at the outset of these amendments could accomplish the same result.

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

Sincerely,

Stacy L. Jones

Stacy L. Jones
Senior Research Associate

SLJ /pm

cc: George Parisotto, DWC Administrative Director
Katrina Hagen, DIR Executive Director
CWCI Claims Committee
CWCI Medical Care Committee
CWCI Legal Committee
CWCI Regular Members
CWCI Associate Members