



California Workers' Compensation Institute
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February 25, 2022

VIA E-MAIL – dwcrules@dir.ca.gov

Maureen Gray, Regulations Coordinator
Division of Workers' Compensation
1515 Clay Street, 18th Floor
Oakland, CA 94612

Re: Modification to Text of Proposed Rules [Copy Service Price Schedule]

Dear Ms. Gray:

These comments on proposed modifications to the text of rules related to the Copy Service Price Schedule are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 78% of California's workers' compensation premium, and self-insured employers with \$89B of annual payroll (33.7% of the state's total annual self-insured payroll).

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

Self-insured employer members include Albertsons/Safeway, BETA Healthcare Group, California Fair Services Authority, 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, Costco Wholesale, County of Los Angeles, County of San Bernardino Risk Management, County of Santa Clara Risk Management, Dignity Health, Disneyland Resort, East Bay Municipal Utility District, Grimmway Farms, Kaiser Permanente, North Bay Schools Insurance Authority, Pacific Gas & Electric Company, Schools Insurance Authority, San Diego Gas and Electric, Shasta County Risk Management, Shasta-Trinity Schools Insurance Group, Southern California Edison, Southern California Gas, Special District Risk Management Authority, Sutter Health, United Airlines, and the University of California.

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

Priority Consideration:

Proposed subsection 9981(e) contravenes existing statutory law, which is to be avoided.

Pursuant to Labor Code section 4622(a)(1), to the extent that the subject copy services are considered to be medical-legal expenses, the claims administrator has 60 days (not 30, as suggested in these proposed revisions) in which to make payment. In the rare instance that the subject copy services are considered to be medical treatment under Labor Code section 4600, section 4603.2(b)(2) already provides for payment within 45 days at the risk of a 15% penalty together with interest. Even if the subject copy services are deemed a cost item under Labor Code section 5811 as awarded by the WCAB, any such award is subject to ordinary timeframes for payment plus penalty and interest as applicable.

As the Division itself explained in its Responses to Comments for the original Copy Service Fee Schedule in 2015, the fee schedule regulations are premised on authority under Labor Code section 5307.9, which does not provide authority for imposition of a penalty.

The Division simply does not have statutory authority to impose a new penalty, no matter how it is phrased in the regulation. As explained in detail below, the Division's new inclusion of an opportunity to "object" does not avoid the conflict with existing statutory provisions. Payment timeframes are fixed by statute, including any financial remedies for increased payments when these timeframes have expired. Thus, we strongly urge the Division to delete this section.

Recommendation:**§ 9980. Definitions.**

As used in this article:

(g) "Date of Service" means the date on which records are requested via subpoena or authorization.

Discussion:

CWCI recommends retention of language defining "Date of Service." Parties need a single, defined point of reference for a particular set of records, whether discussing invoices, cancellations, certificates of no records, and so forth. For example, in newly proposed §9981(b)(3), the Division has required inclusion of source, type, description, and a date of service. Because the date of service could be interpreted as date of request, date of production, date of delivery, etc., and in order to avoid conflict, "date of service" should be defined with terms that can be readily verified.

Recommendation:

§ 9981. Bills for Copy Services.

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

(4) The date the records were requested, and the name of the individual requesting the records. A statement 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 or objected to within thirty days of receipt by the claims administrator. If bills are not paid within this period, then that portion of the billed sum which remains unpaid will be increased by 25 percent.~~

Discussion:

In the original proposal, the Division had defined “Date of Service” in §9980(g), which the Institute supported. In this proposed revision, however, the Division has deleted the definition for “Date of Service.” Unless that definition is reinstated, as recommended above, §9981(b)(4) needs to include the date that the records were requested. Additionally, requiring the invoice to include the name of the individual (or entity) requesting the records will assist the claims administrator in determining the legitimacy of the invoice when making a payment determination.

The Institute remains opposed to the penalty contained in subsection (e), as detailed in our Priority Consideration above.

In addition, the Division’s new insertion of “or objected to” in the first sentence of subsection (e) creates a new conflict with the second sentence of (e). As currently drafted, while the claims administrator has the option of “objecting to” an invoice, it is still required to make payment within 30 days regardless of the validity of the objection in order to avoid a 25% penalty.

Recommendation:

§ 9982. Allowable Services.

(a) This schedule provides payment for copy and related services for records relevant to an injured worker’s claim. Services not covered by this schedule may be compensated under a contract or written agreement between the claims administrator and the copy service provider.

Discussion:

The Institute supports the proposed inclusion of an agreement between the claims administrator and the copy service. However, requiring such an agreement to be in writing would help avoid disputes as to the existence and terms of such agreements.

Recommendation:

§ 9984. Prices for Dates of Service On and After April 1, 2022

(c)(1) Release of information services of witness costs for the retrieval and return of physical records held offsite by a third party are included in the flat ~~fee~~ **price** for an initial set of records. Disputes over the production of records may be resolved by filing a petition with the Workers' Compensation Appeals Board, or by filing a petition with the superior court pursuant to Labor Code section 132. Release of information services of witness costs for retrieval and return of physical records held offsite by a third party are governed by Evidence Code Section 1563.

(2) Third party release of information (ROI) services that represent deponents or witnesses who are compelled to produce documents for a deposition, records-only deposition, or trial conducted as part of any workers compensation claim must be paid a flat price of \$35 when records are produced, inclusive of the witness fee and all services provided by the third party ROI service, or a flat price of \$15, inclusive of the witness fee and all services of the ROI service when a certificate of no records is produced. Third party ROI services representing deponents or witnesses will accept electronic service of all deposition notices and requests, including subpoenas and witness fees. Third party ROI services shall produce electronically the records or certificates, including all affidavits required by section 1561 of the Evidence Code, to the requesting party or their representative. These prices are included in the flat price **for an initial set of records**.

Discussion:

For purposes of consistency, the Institute suggests changing "fee" to "price." We recommend additional language in subsection (c)(2) to clarify that the costs referenced within this subsection are included in the flat price for the initial set of records under §9984(c)(2), and not any other cost item such as witness fees.

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
Carol Finuliar, Industrial Relations Counsel
CWCI Claims Committee
CWCI Medical Care Committee
CWCI Legal Committee
CWCI Regular Members
CWCI Associate Members