



California Workers' Compensation Institute
1333 Broadway - Suite 510, Oakland, CA 94612 • T: (510) 251-9470 • www.cwci.org

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VIA E-MAIL – dwcrules@dir.ca.gov

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

**Re: Proposed Amendments to the Document Copy and Electronic
Transaction Fees Regulations**

Dear Ms. Gray:

These comments on proposed amendments to the Document Copy and Electronic Transaction Fees regulations are presented on behalf of members of the California Workers' Compensation Institute (the Institute). Institute members include insurers writing 80% 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, AXA XL Insurance, 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 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, 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 underscore and ~~strikeout~~. Comments and discussion by the Institute are identified by italicized text.

Priority Consideration

Although the proposed change from “fees” to “prices” is explained in the ISOR, the rationale provided does not seem relevant when historically, and by statute, the DWC has been mandated to create a schedule of fees (§§5307.1, 5307.6, 5307.9). Moreover, a change from “fees” to “prices” implies that the schedule of fees for copy services is somehow different from services covered under the Official Medical Fee Schedule (§9789.10 et seq.) or medical-legal fees (§9795). The Institute recommends retaining “fees” in the Article 12 title and throughout the text of the regulations.

Recommendation:

§ 9980. Definitions.

As used in this article:

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

(h) “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” includes separate types of records requested from a single source, regardless of the number of subpoenas issued.

Discussion:

CWCI recommends additional language defining “Date of Service” to reinforce an identifiable date that can be readily documented.

CWCI’s Forum Comments expressed concern about the industry practice of multiple subpoenas being issued for different types of records to the same custodian of records for the same injured worker (i.e., separate subpoenas for payroll records, employee handbooks, personnel records, and medical records, etc.) when one subpoena would suffice to obtain these multiple types of records from a single source. The Institute urges the Division to prohibit this practice, which has caused disputes and ultimately led to adjudication of lien claims to be resolved by the WCAB. As such, we recommend that clarifying language be added to section (h).

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 of service, the date the records were produced, a description of the billed services, the number of pages produced; and

(4) ~~The date the records were requested, and t~~The name of the individual requesting the records.

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

(1) WC 010: Flat Price Fee of \$225 for services rendered on or after January 1, 2022, regardless of the date of injury.

(2) WC 020: Flat Price Fee of \$180 for services rendered between July 1, 2015, and December 31, 2021, regardless of the date of injury.

(e) ~~Bills must be paid 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:

The Division has proposed a new definition of “Date of Service” in §9980(g), which the Institute supports. We recommend an additional requirement in subsection (b)(3) for billings to include the date that records were produced. In subsection (b)(4), the Institute recommends deleting language that has now been used to define Date of Service.

In subsection (c), the Institute recommends replacing the proposed “must use” language with “limited to,” for the purpose of clarification that no other codes may be used to bill copy and related services -- without implying that each bill must include all listed codes.

The Division intends for the increased flat fee of \$225 to apply to copy services provided on or after January 1, 2022. The Institute is concerned that bills will be submitted with code WC 010 for dates of service prior to the effective date identified in §9984. To avoid disputes, the Institute recommends adding clarifying language as to the effective dates in subsections (c)(1) and (2).

Subsection (e) contravenes existing statutory law, which should be avoided. Pursuant to Labor Code section 4622(a)(1), bills must be paid within 60 days of receipt by the claims administrator. Delays in payment of billings are properly remedied by application of existing statutory law. The Division justifies this proposed penalty section in the ISOR by reference to the 2013 BRG Study. However, that study did not contemplate a new 30-day deadline for payment nor did it suggest that additional, non-statutory penalties be applied in the form of a price increase for late payments. The Division simply does not have statutory authority to impose a new penalty, no matter how it is phrased in the regulation. 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:

§ 9982. Allowable Services.

(b) If the claims administrator fails to serve records in the employer's or insurer's possession requested by an injured worker or ~~his or her~~their representative within the timeframes set forth in Labor Code section 5307.9, or fails to serve a copy of any subsequently-received medical report or medical-legal report within the timeframes set forth in section ~~10653~~ 10635, this schedule applies to obtaining those records.

Discussion:

We recommend a change in syntax and correction of typographical errors in subsection (b).

Recommendation:

§ 9982. Allowable Services.

(d) There will be no payment for copy and related services that are:

~~(1) Provided within 30 days of a notice of intent to copy records to an employer, claims administrator, or workers' compensation insurer. When an objection is raised, the parties must meet and confer to resolve the objection for copies of records in the employer's, claims administrator's, or workers' compensation insurer's possession that are relevant to the employee's claim.~~

(1) Charges for services related to, or cancellation of, a subpoena for records in the employer's, claims administrator's, or workers' compensation insurer's possession, where those records have been provided within 30 days of an Authorization (as defined) by an injured worker or their authorized representative. For purposes of this subsection, 30 days is calculated

- A. from the date that is five (5) calendar days after the date of the proof of service where the Authorization was mailed within California with a proof of service; or
- B. from the date that is five (5) calendar days after the date of the United States postmark stamped on the envelope in which the Authorization was mailed within California without a proof of service; or
- C. from the date that is ten (10) calendar days after the date of the proof of service where the Authorization was mailed outside of California with a proof of service; or

- D. from the date that is ten (10) calendar days after the date of the United States postmark stamped on the envelope in which the Authorization was mailed outside of California without a proof of service; or
- E. for facsimile or electronic mail service, the Authorization shall be deemed to have been received by the claims administrator on the date the Authorization was received if the receiving facsimile or electronic mail address electronically date stamps the transmission when received. If there is no electronically stamped date recorded, then the date the Authorization was transmitted shall be deemed to be the date the form was received by the claims administrator. An Authorization transmitted by facsimile or electronic mail after 5:00 PM Pacific Time shall be deemed to have been received by the claims administrator on the following business day. The copy of the Authorization transmitted by a facsimile transmission or by electronic mail shall bear a notation of the date, time, and place of transmission and the facsimile telephone number or the electronic mail address to which the Authorization was transmitted.

(2) Charges for services related to, or cancellation of, a subpoena for records where a party has made a timely objection. When an objection is raised, the parties shall within 20 days of the objection meet and confer in good faith to resolve the objection prior to the filing of a petition with the Workers' Compensation Appeals Board by either party. This subsection shall not apply where the WCAB overrules the party's objection, or where the holder of the records objects to disclosure.

(3)-(2) Provided by any person or entity which is not a registered professional photocopier.

(4)-(3) Provided by a medical provider, or by an agent of the provider, when the requesting party has employed a professional photocopier to obtain or inspect the records.

(5) Charges for records submitted to Independent Medical Review for medical necessity determinations, where those records are already in possession of the injured worker or the injured worker's representative, or which are duplicative of those submitted by the claims administrator.

Discussion:

The Institute appreciates the Division's efforts in (d)(1) to cure violations of Labor Code section 5307.9 and address costs to the system for cancellations when records are subpoenaed by the injured worker or an authorized representative prior to the expiration of the 30-day period under Labor Code section 5307.9. We recommend deletion of a meet and confer requirement for payment of these services, as the services are expressly barred by statute. Additionally, we recommend that the Division take advantage of the refined definition of "Authorization" under §9980(b) by incorporating its use into this subsection. Doing so will avoid confusion for practitioners over what constitutes a "notice of intent to copy records" without implicating the entirely different rules and requirements that apply to formal subpoenas. Finally, as proposed, subsection (d)(1) fails to specify the triggering event for the commencement of the 30-day period

that expressly precludes orders for obtaining copied records. A definition of this triggering event is critical in order to avoid potential disputes between the parties as to the date of expiration of this period, which would also lead to frictional disputes that must be resolved by the WCAB. The Institute recommends additional language in subsection (d)(1) to provide this specificity as to the commencement of this protected period.

With the recommended creation of new subsection (d)(2), the Institute proposes the separation of violations of Labor Code section 5307.9 from the dissimilar concern of records being subpoenaed from a location that is unlikely to be related to the case, which necessitates an objection and then results in the issuance of a cancellation charge. Our suggestion provides for a meet and confer process here, as opposed to subsection (d)(1), because the subpoenas contemplated here are not already precluded by statute, and reasonable minds may differ on the validity of a subpoena. Informal resolution avoids the use of limited WCAB resources while still allowing the filing of a petition by either party if necessary.

We suggest adding new subsection (d)(5). Subpoenas for medical records are intended for the gathering of information for medical-legal and discovery purposes. It has become commonplace for an applicant's attorney to order records from their own file or from the treating physician to submit to Maximus for IMR. This practice results in unnecessary copy services, unsupported copy service fees, and increased administrative costs in IMR. Although billed charges may rightfully be objected to, specificity in the regulatory language would mitigate this questionable practice.

Recommendation

§ 9982. Allowable Services.

~~(e) If an employer or insurance carrier contracts for services which are not covered by this schedule, the injured worker shall be allowed to obtain the same services with their copy service provider, including summaries, tabulations, and indexing, at the rate paid by the employer or insurance carrier to their copy service provider.~~

Discussion:

The Institute agrees that it is appropriate to provide copies of records from a party's own copy service provider that include items not covered by the flat fee charge if the party has chosen to purchase them (e.g., summaries, tabulations, indexing, etc.) when these records are served on opposing parties. Nevertheless, the Institute recommends that subsection (e) be struck in its entirety. Payment for charges not covered in §9983(a) or §9984(a) should be the responsibility of the party securing the records from their own copy service provider.

Notwithstanding the extra-charge responsibility, the most concerning aspect of this section is the requirement to pay the injured worker's copy service provider for non-covered flat-fee charges at the same rate as the contractual rate between an employer, insurer, or claims administrator and their copy service provider. Application of the proposed provision would be difficult, in light of the fact that these non-covered items are not always ordered. Moreover, a contracted rate represents a proprietary business transaction between the claims administrator and its chosen vendor(s) and is not subject to disclosure. The inevitable consequence of this proposed regulation will be an escalation of disputes where invoices include these non-covered charges, leaving defendants in the position of having to prove the absence of any contracted rate on each item that is not covered by the flat fee.

Recommendation

§ 9982. Allowable Services.

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

- (4) More than **four** Certificates of No Records (CNR) on a claim, with dates of service after January 1, 2022.

Discussion:

The Institute recommends that subsection (f)(4) be limited to one certificate of no records (CNR) regardless of the number of pending claims by the injured worker. The Division has correctly acknowledged the issue of abuse by copy service providers submitting charges for CNRs when there is no basis for securing records at a particular location. If liability for multiple CNRs remains, it would perpetuate an excessive and unnecessary financial responsibility for the claims administrator and would fail to create any significant deterrence to an industry-wide abuse.

Recommendation:

§ 9983. Fees for Copy and Related Services **Priees** for Dates of Service Prior to January 1, 2022.

[No changes to existing regulations]

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, 2022, would render

consequential changes retroactive. The Institute recommends leaving the language unchanged from the existing regulation for services rendered between July 1, 2015, and December 31, 2021.

Recommendation:

§ 9984. ~~Prices~~Fees for Dates of Service on and after January 1, 2022.

The reasonable maximum prices payable for copy and related services, for dates of service on and after January 1, 2022, 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 CNR.

(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 cancelling party.

(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.

(c) In addition to the flat price allowed in subdivision (a), the following separate prices apply:

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

(5) 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 shall 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, and a flat price of \$15, inclusive of the witness fee and all services of the ROI service when a CNR is produced. These fees are included in the flat fee of \$225 pursuant to §9984(a). 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.

Discussion:

The Institute suggests that the title of §9984 be in boldface type in order to be consistent with other regulations.

Regarding subsection (b), and as acknowledged in the Initial Statement of Reasons, 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 entities even in the absence of any good faith belief that records 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. Additional requirements for the production of information in subsections (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 in subsection (c)(4) to the underlying regulation that defines "applicable sales tax." The Institute 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.

Additional language added to (c)(5) clarifies that the ROI is included in the flat fee, along with correction of a typographical error.

Recommendation:

§ 9985. Disputes.

- (a) 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 a superior court pursuant to Labor Code section 132.
- (b) Disputes over objections to a notice of intent may be resolved by filing a petition with the Workers' Compensation Appeals Board.
- (a) Disputes over objections raised under §9982(d)(1) may be resolved by filing a petition with the Workers' Compensation Appeals Board only after the 30-day period under Labor Code section 5307.9 has expired.
- (b) Disputes over the production of records under §9982(d)(2) 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.

Discussion:

We have recommended changes in §9985 to conform to our recommendation and discussion as set forth in §9982.

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