California Workers' Compensation Institute
1111 Broadway Suite 2350, Oakland, CA 94607 • Tel: (510) 251-9470 • Fax: (510) 251-9485

January 25, 2011

VIA E-MAIL to dwcrules@dir.ca.gov

Maureen Gray, Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

RE: Outpatient Facility Fee Schedule – Written Testimony on Proposed Amendments to Outpatient Facility Fee Schedule Regulations

Dear Ms. Gray:

This written testimony on changes proposed to the regulations governing Outpatient Facility Fee Schedule (OFFS) allowances for Ambulatory Surgical Centers (ASCs) is 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 $36B of annual payroll (20% of the state's total annual self-insured payroll).

Because these proposed regulations are complex and go beyond a mere schedule of fees, the Institute believes that they are subject to APA requirements and warrant a 45-day notice of public hearing. It is important that the Office of Administrative Law review these regulations for statutory compliance. The Institute believes the regulations are in conflict with the statutory requirements.

The Division stated in its DWC Newsline 10-24:

> *"When the Official Medical Fee Schedule was enacted in 2004, Medicare's ASC fee schedule was outdated. Therefore, DWC decided to adopt the same fee schedule for ASCs as outpatient hospitals, which is 120% of the Medicare rate for outpatient surgery. In 2008, Medicare updated its rates for ASC services, and DWC is now considering basing its ASC fee schedule on the Medical ASC fee schedule. This proposal is part of DWC's 12-point plan to monitor and help control medical costs in California's workers' compensation system."*

The Institute urges the Division to move forward with its 12-point plan commitment to revise the Official Medical Fee Schedule (OMFS) by setting maximum reasonable reimbursement for ambulatory surgery center (ASC) facility fees at 120% of the Medicare allowance for ASCs as outlined by Barbara Wynn of RAND in her presentation at the stakeholder meeting held on May 27, 2010:

ASC FS Proposal May 2010:
http://www.dir.ca.gov/dwc/ForumDocs/StakeholderMeetingNotes/ASC/DWCASCPresentation.pdf

The Legislature limits fees by requiring in Labor Code section 5307.1 that "estimated aggregate fees do not exceed 120 percent of the estimated aggregate fees paid for the same class of services in the relevant Medicare payment system." The latest draft amendments would lower maximum facility fees for ASCs from 122% to 102% of the Medicare allowance for outpatient hospital departments. Even though this would reduce maximum ASC facility fees by 16.4%, it would cause the expected aggregate fees to exceed the statutory limit by 75%.

As noted in the Division's Initial Statement of Reasons, starting in January, 2008, Medicare pays ASC facility services (the same class of services) according to its ASC Fee Schedule. Payments under Medicare's ASC fee schedule in 2009 averaged about 59% of payments under its Hospital Outpatient Department fee schedule. ASC payments average 206% of the Medicare ASC payment rate under the current California OMFS Outpatient Facility Fee Schedule. The statutory limitation of 120% of the estimated aggregate fees paid for the same class of services (i.e., ASC services) in the relevant Medicare payment system, limits average ASC payments to the equivalent of 122% of Medicare's ASC allowances (allowing 2% for outlier payments), or 59% of Medicare's Hospital Outpatient Department fee schedule allowances. The proposed schedule of 102% of Medicare's Hospital Outpatient Department fee schedule allowances results in estimated aggregate ASC fees about 73% higher than the statutory limitation.

For consistency, the Institute recommends the Division apply the same benchmark for ASC services that applies to other OMFS services. Maximum fees for inpatient and outpatient hospital facilities, laboratory services, pathology services, durable medical equipment, prosthetics, orthotics, supplies, and ambulance services are set at 120% of the Medicare allowances. The Institute recommends that the Division adopt maximum reasonable facility fees for ASCs at the same 20% premium over the Medicare ASC allowances. Adopting the Medicare-plus ASC schedule will permit the administrative director to update the schedule by administrative order, to conform to Medicare changes, as described in subsection (g) of Labor Code section 5307.1.

The Initial Statement of Reasons states that *"the Administrative Director has discretion in setting the OMFS allowance level (as long as it does not exceed 120 percent of the Medicare hospital outpatient department fee schedule)."* The Institute does not agree with this characterization. Subsection (c) of Labor Code section 5307.1 set maximum facility fees for services currently performed in an ASC or in a hospital outpatient department at no more than 120% of the fees paid by Medicare for the same services performed in a hospital outpatient department. Labor Code section 5307.1(c), however, permits the administrative director to adopt different factors from those used in the Medicare payment system, *"provided estimated aggregate fees do not exceed 120*

percent of the estimated aggregate fees paid for the same class of services in the relevant Medicare payment system." Subsection (f) of Labor Code section 5307.1 allows the administrative director to establish fees adequate to ensure a reasonable standard of services and care for injured employees *"within the limits provided by this section."* This section (Labor Code section 5307.1) limits fees to those that will result in *"estimated aggregate fees* (that) *do not exceed 120 percent of the estimated aggregate fees paid for the same class of services in the relevant Medicare payment system."* The Administrative Director is proposing to lower the multiplier to 100 percent of Medicare's hospital outpatient payment rate, which is approximately 171 percent of Medicare's ASC payment rate.

In its latest analysis, MedPAC has found no shortage of ASCs willing to accept reimbursement at Medicare rates[1], and none is expected in the workers' compensation venue if maximum reasonable fees for ASCs exceed Medicare's by 20%. Predictably, as with every proposed fee schedule revision, those with direct financial interests in these services have warned that they will no longer provide services to injured employees if fee schedule maxima are reduced to 120% of Medicare's. The threatened access problems have not materialized in the case of other California workers' compensation fee schedule reductions, and we do not expect them to do so when maximum fees for ASCs are set 20% higher than Medicare's.

The Institute recommends deleting the alternative payment methodology for high-cost outlier cases. It causes unnecessary administrative burdens and expenses, and the fact that the provision is seldom elected speaks to the adequacy of the 2% add-on to compensate for outlier cases.

Please contact me for further clarification or if I can be of any other assistance.

Sincerely,

Brenda Ramirez
Claims and Medical Director

BR/me

cc: Carrie Nevans, DWC Acting Administrative Director
Destie Overpeck, DWC Chief Legal Counsel
CWCI Regular members
CWCI Associate Members
CWCI Claims Committee
CWCI Medical Care Committee
CWCI OMFS Committee

[1] Report to the Congress, Medicare Payment Policy, March 2010, MedPAC http://www.medpac.gov/documents/mar10_entirereport.pdf