STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

NOTICE OF MODIFICATION TO TEXT OF PROPOSED REGULATIONS AND NOTICE OF ADDITION OF DOCUMENT TO RULEMAKING FILE

Subject Matter of Regulations: Workers' Compensation – Official Medical Fee Schedule: Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule

TITLE 8, CALIFORNIA CODE OF REGULATIONS
Sections 9789.30 et seq.

NOTICE IS HEREBY GIVEN that the Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in him by Labor Code sections 59, 133, 4603.5, 5307.1 and 5307.3 proposes to amend text or modify the proposed text of the following sections of Article 5.3 of Division 1, Chapter 4.5, Subchapter 1, of title 8, California Code of Regulations, relating to the Official Medical Fee Schedule – Hospital Outpatient Departments and Ambulatory Surgical Centers:

Section 9789.30	Definitions [Amend]
Section 9789.31	Adoption of Standards [Amend]
Section 9789.32	Applicability [Amend and modify proposed amendments]
Section 9789.33	Determination of Maximum Reasonable Fee [Amend]
Section 9789.34	Table A [Amend]
Section 9789.35	Table B [Amend]
Section 9789.39	Federal Regulations and Federal Register Notices [Amend]

NOTICE IS HEREBY GIVEN that an additional document relied upon by the Division in proposing the regulations has been added to the rulemaking file and is available for public inspection and comment.

IMPORTANT PROCEDURAL NOTES ABOUT THIS RULEMAKING:

1. The Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule component of the Official Medical Fee Schedule "establish(es) or fix(es) rates, prices, or tariffs" within the meaning of Government Code section 11340.9(g) and is therefore not subject to Chapter 3.5 of the Administrative Procedure Act (commencing at Government Code section 11340) relating to administrative regulations and rulemaking.

2. The Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule component of the Official Medical Fee Schedule is established by the authority of Labor Code section 5307.1. Subsection (g) provides the Official Medical Fee Schedule - Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule shall be adjusted to conform to any relevant changes in the

Medicare payment systems, and the Administrative Director shall determine the effective date of the changes, and shall issue an order, exempt from Sections 5307.3 and 5307.4 and the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), informing the public of the changes and their effective date. All orders issued shall be published on the Internet Web site of the Division of Workers' Compensation.

This rulemaking proceeding to amend the Hospital Outpatient Departments and Ambulatory Surgical Centers Fee Schedule is being conducted under the Acting Administrative Director's rulemaking power under Labor Code sections 133, 4603.5, 5307.1 and 5307.3. This regulatory proceeding is subject to the procedural requirements of Labor Code sections 5307.1 and 5307.4. However, amendments adjusting the fee schedule regulations to conform to relevant changes in the Medicare payment system for calendar years 2015 and 2016 are being made in accordance with Labor Code section 5307.1 subsection (g), and are not subject to the rulemaking requirements of sections 5307.3 and 5307.4 and the rulemaking provisions of the Administrative Procedure Act referenced above.

This Notice is being prepared to comply with the procedural requirements of Labor Code section 5307.4 and for the convenience of the regulated public to assist the regulated public in analyzing and commenting on this non-APA rulemaking proceeding.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed amendments to the regulations or to the added document, to the Department of Industrial Relations, Division of Workers' Compensation. The written comment period closes at **5:00 p.m., on July 6**, **2016.** The Department of Industrial Relations, Division of Workers' Compensation will consider only comments received at the Department of Industrial Relations, Division of Workers' Compensation by that time.

Submit written comments prior to the close of the public comment period to:

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

Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov .

Comments sent to other e-mail addresses or other facsimile numbers will not be accepted.

Comments sent by e-mail or facsimile are subject to the deadline set forth above for written comments.

AVAILABILITY OF TEXT OF REGULATIONS AND RULEMAKING FILE

Copies of the original text, the amended text with modifications clearly indicated, added document relied upon, and the entire rulemaking file, are currently available for public review during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays, at the offices of the Division of Workers' Compensation. The Division is located at 1515 Clay Street, 17th Floor, Oakland, California. Please contact the Division's regulations coordinator, Ms. Maureen Gray, at (510) 286-7100 to arrange to inspect the rulemaking file.

FORMAT OF PROPOSED MODIFICATIONS

Proposed Text Noticed for initial comment period ending on June 17, 2015:

Deletions from the original codified regulatory text noticed for the initial comment period ending on June 17, 2015, are indicated by single strike-through: ~~deleted language~~.

Additions to the original codified regulatory text noticed for the initial comment period ending on June 17, 2015, are indicated by single underlining: added language**.**

Proposed Text Noticed for Second 30-Day Comment Period on Modified Text:

Deletions from the proposed revisions noticed for the initial comment period ending on June 17, 2015, are indicated by strike-through underlining: ~~deleted language.~~

Deletions from the original codified regulatory text noticed for the second 30-day comment period ending on July 6, 2016, are indicated by double strike-through: ~~deleted language~~

Additions to the proposed revisions or original codified regulatory text noticed for the second 30-day comment period ending on July 6, 2016, are indicated by double underlining: added language.

SUMMARY OF PROPOSED CHANGES

Modifications to Section 9789.30-Definitions

Subdivision (d) is added to provide the definition of the "Ambulatory Surgical Center Payment System". "Ambulatory Surgical Center Payment System" means Medicare's payment system for specific ambulatory surgical center covered surgical procedures published in the Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems final rule for the relevant payment year.

Subdivisions (e) through (q) and (s) through (ab); formerly (d) through (t) and (v) through (aa), respectively, are re-lettered.

Subdivision (r) is moved from subdivision (u) and added as subdivision (r) to place "Hospital Outpatient Prospective Payment System (HOPPS)" in alphabetical order within this section for greater clarity.

Subdivision (u) formally (s) is amended to clarify "Other Services" means Hospital Outpatient Department Services rendered on or after September 1, 2014, but before the date this amendment is filed with the Secretary of State, to hospital outpatients and payable under the CMS hospital outpatient prospective payment system that are not: 1. Surgical procedures; 2. Emergency room visits; 3. Facility Only Services; or 4. An integral part of the surgical procedure, emergency room visit or Facility Only Service. This subdivision is also amended to add that for services rendered on or after the date this amendment is filed with the Secretary of State, "Other Services" means "Hospital Outpatient Department Services rendered to hospital outpatients and payable under the CMS hospital outpatient prospective payment system that are not: 1. Surgical procedures; 2. Emergency room visits; or 3. An integral part of the surgical procedure or emergency room visit.

Subdivision (u) is deleted and added as subdivision (r) to place "Hospital Outpatient Prospective Payment System (HOPPS)" in alphabetical order within this section for greater clarity.

Subdivision (ab) formally (aa) is amended to add a 101.01 percent multiplier for Hospital Outpatient Department Services that are Other Services rendered on or after the date this amendment is filed with the Secretary of State. This subdivision is also amended to set the multiplier for Hospital Outpatient Department Services that are surgical procedures or emergency room visits to 117.8 percent for services rendered on or after the date this amendment is filed with the Secretary of State. It is proposed that maximum allowances for "Other Services" be based on 100 percent[1] of Medicare's Hospital Outpatient Prospective Payment system (HOPPS) instead of 120 percent of the OMFS Physician fee schedule RBRVS relative values[2]. Basing payment for all Hospital Outpatient Department Services on Medicare's HOPPS would reduce payment system complexities and regulatory burden. Without a budget neutrality adjustment to the multiplier for Hospital Outpatient Department Services that are surgical procedures or emergency room visits, there would be an overall increase in maximum allowable fees for Hospital Outpatient Department Services. Therefore, based upon a RAND impact analysis, in order to remain budget neutral to current system payments, the multiplier for Hospital Outpatient Department Services that are surgical procedures or emergency room visits was adjusted to 117.8 percent for services rendered to on or after the date this amendment is filed with the Secretary of State. Finally, the title for "Facility Only Services" column in the table was amended to clarify that the services are rendered to hospital outpatients, and that "(A) Medicare multiplier" is not applicable to this category of services.

Modifications to Section 9789.31 – Adoption of Standards

Subdivision (d) is amended to include the date range this subdivision (adoption and incorporation of the Medicare Physician Fee Schedule "Relative Value File") is applicable.

Subdivision (e) is added to adopt and incorporate by reference certain addenda published in Medicare's Ambulatory Surgical Centers Payment System published in the Federal Register for services rendered on or after the date this amendment is filed with the Secretary of State.

Subdivisions formerly known as (e) and (f) are re-lettered to (f) and (g), respectively.

[1] Not including an extra percentage reimbursement for high cost outlier cases.
[2] 120 percent of the Medicare practice expense component for non-facility services or the technical component for services that are payable under both the OPPS and the RBRVS.

Modifications to Section 9789.32-Applicability

Subdivision (a) is amended to reflect the proposal that maximum reasonable fees for all services provided on an outpatient basis and payable under the Medicare Hospital Outpatient Prospective Payment System shall be determined according to this fee schedule (sections 9789.30 through 9789.39), for services rendered on or after the date this amendment is filed with the Secretary of State.

In particular, this subdivision is amended as follows:

- Set forth the applicable range of dates of service;
- Status Indicator "Q4" is added to conform to changes Medicare made in its CY 2016 final rule, in accordance with Labor Code section 5307.1 subsection (g).

Subdivision (b) is amended to re-letter subdivision formerly known as subdivision (o) of section 9789.30 to what is now subdivision (p).

Subdivision (c) is amended to indicate that this subdivision is inapplicable for dates of service on or after the date this amendment is filed with the Secretary of State. Former subdivisions 9789.32(c)(1)(B)(iii), 9789.32(c)(2), 9789.32(c)(3), 9789.32(c)(4), 9789.32(c)(5), and 9789.32(c)(6), are re-lettered and re-organized for greater clarity. These sections are removed from subdivision 9789.32(c) and are part of what is now subdivision 9789.32(d). Therefore, reference to "ambulatory surgical centers" is deleted from the first paragraph in subdivision 9789.32(c) because the amended subdivision (c) is not applicable to ambulatory surgical centers.

Subdivision (c)(1)(B) is amended to set forth the dates of service that this subdivision is applicable to.

Subdivision (c)(1)(B)(iii) is modified to delete the language proposed in the first 30-day comment period. It is now proposed that the maximum reasonable fees for all services provided on an outpatient basis and payable under the Medicare Hospital Outpatient Prospective Payment System shall be determined according to this fee schedule (sections 9789.30 through 9789.39), for services rendered on or after the date this amendment is filed with the Secretary of State.

Subdivision (d)(1) formerly proposed (c)(1)(B)(iv) is amended to re-number and create a new subdivision (d) for clarity.

Subdivision (d)(4) is amended to add, "For instance, when laboratory tests are not packaged under the OPPS and are listed on the OMFS Pathology and Laboratory fee schedule, they are paid according to the OMFS Pathology and Laboratory fee schedule. This amendment is made to conform to changes Medicare made in its CY 2016 final rule, in accordance with Labor Code section 5307.1 subsection (g).

Subdivision (e) formally (d) is amended to re-letter the subdivision; to conform citation references as amended; and to clarify how this subdivision is applied by dates of service. The following language is added to conform to the proposal that the maximum reasonable fees for all services provided on an outpatient basis and payable under the Medicare Hospital Outpatient Prospective Payment System shall be determined according to this fee schedule (sections 9789.30 through 9789.39), for services rendered on or after the date this amendment is filed with the Secretary of State:

"For services rendered on or after XXX XX, 2016 [Date amendment is filed with the Secretary of State. Date to be inserted by OAL.], only hospitals as defined in Section 9789.30(p) may charge or collect a facility fee for Hospital Outpatient Department Services rendered to a hospital outpatient and payable under the HOPPS. Ambulatory surgical centers as defined in Section 9789.30(c) may charge or collect a facility fee for only surgical services or services that are an integral part of the surgical service provided on an outpatient basis and payable under the HOPPS. Facility fees are not payable to an ambulatory surgical center for any services that are not an integral part of a surgical service. Only ambulatory surgical centers may charge or collect a facility fee for its services."

Subdivisions (f), (g), (h), and (i) formally (e), (f), (g), and (h) are re-lettered.

Modifications to Section 9789.33 – Determination of Maximum Reasonable Fee

Subdivision (a) is amended to conform to the proposal that the maximum reasonable fees for all services provided on an outpatient basis and payable under the Medicare Hospital Outpatient Prospective Payment System shall be determined according to this fee schedule (sections 9789.30 through 9789.39), for services rendered on or after the date this amendment is filed with the Secretary of State; and to conform citation references as amended. In particular:

- The first paragraph in subdivision (a) is amended to state the following, "In accordance with section 9789.32, the maximum allowable payment for hospital outpatient department or ambulatory surgical center facility fees for services provided on an outpatient basis and payable under that Medicare (CMS) HOPPS, shall be determined based on the following. In accordance with Section 9789.30(ab), an extra percentage reimbursement shall be used in lieu of an additional payment for high cost outlier cases."

- 5th column heading for "Facility Only Services" is amended to clarify that the services are "Hospital Outpatient Department Services (as defined in Section 9789.30(q)) that are Facility Only Services (as defined in Section 9789.30(k))."
- A 6th column is added to address "Hospital Outpatient Department Services (as defined in Section 9789.30(q)) that are Other Services (as defined in Section 9789.30(u))."
- A new row is added for services rendered on or after the date this amendment is filed with the Secretary of State, to conform the fee schedule to relevant changes in the Medicare payment system for calendar years 2015 and 2016, in accordance with Labor Code section 5307.1 subsection (g), and to provide revised multipliers in accordance with section 9789.30(ab).
- Dates of services are added for clarity.

Subdivision (a)(1) is amended to re-letter citation references to conform as amended.

Subdivision (a)(3) is amended to conform the fee schedule to relevant changes in the Medicare payment system for calendar year 2015, in accordance with Labor Code section 5307.1 subsection (g) and to re-letter citation references to conform as amended. This subdivision is amended to state the following, "Procedure codes for drugs and biologicals with status code indicator "K" unless packaged into a procedure with a status indicator code J1, in which case no additional fee is allowable:

APC payment rate x workers' compensation multiplier pursuant to Section 9789.30(ab), by date of service."

Subdivision (a)(4) is amended to conform the fee schedule to relevant changes in the Medicare payment system for calendar year 2015, in accordance with Labor Code section 5307.1 subsection (g); to re-letter citation references to conform as amended; and to replace the term "APC payment" with "APC relative weight x adjusted conversion factor" which was incorrectly referenced in the payment formula. This subdivision is amended to state the following, "For services rendered on or after March 1, 2009: Procedure codes for blood and blood products with status code indicator "R" unless packaged into a procedure with a status indicator code J1, in which case no additional fee is allowable:

APC relative weight x adjusted conversion factor x workers' compensation multiplier pursuant to Section 9789.30(ab), by date of service. See section 9789.39(b) for APC relative weight by date of service."

Subdivision (a)(5) is amended to replace the term "APC payment" with "APC relative weight x adjusted conversion factor" which was incorrectly referenced in the payment formula, and to re-letter citation references to conform as amended.

Subdivision (b) is amended to re-letter citation references to conform as amended.

Subdivision (b)(1)(E) is amended to replace the term "APC payment" with "APC relative weight x adjusted conversion factor" which was incorrectly referenced in the payment formula.

Subdivision (b)(1)(F) is amended to replace the term "APC payment" with "APC relative weight x adjusted conversion factor" which was incorrectly referenced in the payment formula.

Modifications to Section 9789.34 is amended to update Table A to conform to relevant changes in the Medicare Hospital Outpatient Payment System for calendar year 2016, in accordance with Labor Code section 5307.1 subsection (g).

Modifications to Section 9789.35 is amended to update Table B to conform to relevant changes in the Medicare Hospital Outpatient Payment System for calendar year 2016, in accordance with Labor Code section 5307.1 subsection (g).

Modification to Section 9789.39 – Federal Regulations and Federal Register Notices by Date of Service

Subdivision (a) is amended to conform the fee schedule to relevant changes in the Medicare payment system for calendar years 2015 and 2016, in accordance with Labor Code section 5307.1 subsection (g), by adopting and incorporating by reference amendments made to Title 42, Code of Federal Regulations.

Subdivision (b) is amended to conform the fee schedule to relevant changes in the Medicare payment system for calendar year 2016, in accordance with Labor Code section 5307.1 subsection (g) for the following categories:

- Applicable Federal Register Notices
- APC Payment Rate

- APC Relative Weight
- Emergency Department HCPCS Codes
- HOPPS Addenda
- Inpatient hospital prospective payment tables
- Labor-related Share
- Market Basket Inflation Factor
- Conversion Factor adjusted for inflation factor
- Wage Index

This subdivision is also amended to conform to the proposal that the maximum reasonable fees for all services provided on an outpatient basis and payable under the Medicare Hospital Outpatient Prospective Payment System shall be determined according to this fee schedule (sections 9789.30 through 9789.39), for services rendered on or after the date this amendment is filed with the Secretary of State; and to conform citation references as amended. In particular:

- The Ambulatory Surgical Centers Payment System Addenda AA and EE are adopted and incorporated by reference.
- Identification of Facility Only Service codes will no longer be applicable for services rendered on or after the date this amendment is filed with the Secretary of State. These codes will now fall within the Other Services category as defined by section 9789.30(u).
- Medicare Physician Fee Schedule Relative Value File will no longer be applicable for services rendered on or after the date this amendment is filed with the Secretary of State.
- Surgical Procedure HCPCS codes are defined as HCPCS codes listed on CMS' Ambulatory Surgical Center Payment System Addenda AA or EE, but, excluding HCPCS codes listed on Medicare's (CMS') HOPPS Addendum E as an inpatient only procedure. This amendment conforms the definition of surgical procedures to Medicare's definition of surgical procedures that are payable under Medicare's (CMS') HOPPS.

ADDITIONAL DOCUMENTS ADDED TO THE RULEMAKING FILE

1. Wynn, Barbara, *What would be an appropriate adjustment factor if all hospital outpatient services were paid under the OPPS?*, RAND, 2016.