**STATE OF CALIFORNIA**

**DEPARTMENT OF INDUSTRIAL RELATIONS**

**DIVISION OF WORKERS’ COMPENSATION**

**INITIAL STATEMENT OF REASONS**

**Subject Matter of Regulations: Workers’ Compensation –**

**Medical-Legal Fee Schedule**

# **TITLE 8, CALIFORNIA CODE OF REGULATIONS**

# **SECTIONS 9793, 9794 & 9795**

Amend section 9793 Definitions.

Amend section 9794 Reimbursement of Medical-Legal Expenses.

Amend section 9795 Reasonable Level of Fees for Medical-Legal Expenses,

Follow-up, Supplemental and Comprehensive Medical-Legal Evaluations and Medical-Legal Testimony.

## **An important procedural note about this rulemaking:**

The Medical-Legal 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 Procedures Act (commencing at Government Code section 11340) relating to administrative regulations in rulemaking.

This rulemaking proceeding to amend the Medical-Legal Fee Schedule is being conducted under the Administrative Director’s rulemaking power under Labor Code sections 59, 133, 4603.5, 5307.3 and 5307.6.

This Initial Statement of Reasons, and the accompanying Notice of Rulemaking are 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-Administrative Procedure Act (“APA”) rulemaking proceeding.

## **BACKGROUND TO REGULATORY PROCEEDING:**

The adjudication of workers' compensation claims requires the use of written reports of Qualified Medical Evaluators (QMEs). The Qualified Medical Evaluator (QME) process is at the heart of the dispute resolution process and is the result of a series of reforms over the past 15 years. The goal has always been to improve the delivery of medical-legal evaluations expeditiously and equitably for injured workers and employers.

The most recent reform, Senate Bill 863 (SB 863), was signed into law in 2012 and was designed to simultaneously decrease costs to employers and increase benefits to injured workers. SB 863 made several changes to the medical-legal process, mainly regarding procedural issues. SB 863 limited the scope of medical-legal evaluations, denying QMEs the ability to address disputed medical treatment issues. SB 863 also established the Independent Medical Review (IMR) process, which is intended to replace the need for medical-legal exams to decide treatment issues. The reform did not change the reimbursement procedures or parameters for reimbursement of medical-legal reports. The Division of Workers’ Compensation (DWC) will propose comprehensive changes to the QME process in a future APA rulemaking.

The fees for preparing the written reports and the rules for determining the fees have been established in Title 8, California Code of Regulations (“CCR”), sections 9793, 9794 and 9795. The fees themselves were last changed in June 2006, while the rules relating to the fees were last amended in September 2013.

The purpose of section 9793 is to set forth definitions for terms used in the Medical-Legal Fee Schedule as set forth in article 5.6, Title 8, California Code of Regulations.

The purpose of section 9794 is to set forth the billing and reimbursement procedures for medical-legal expenses authorized under Labor Code section 4620, et seq.

The purpose of section 9795 is to set forth the parameters for different types of medical-legal evaluations and the fees to be allowed for the evaluations.

Empirical studies have shown that in recent years there has been a substantial increase in the incidence of hourly billing under the Medical-Legal Fee Schedule.**[[1]](#footnote-2)** In a 2018 study, the California Workers’ Compensation Institute found that between 2007 and 2017 the amounts paid for time-based billing codes increased 31.6%, 75.4%, 102.7% and 161.9% respectively.This increase in hourly billing is not matched by an increase in complexity of matters reviewed by physicians. An October 2017 report to the Commission on Health and Safety and Workers’ Compensation found that coupled with a continuing increase in the average paid amount for QME reports, the average QME earns 240% more from panel reports currently than in 2007.[[2]](#footnote-3) In the study commissioned by the California State Senate, Professor Frank Neuhauser found the increase in the average amount earned by QMEs to be of such importance as to list it in the key findings of the report.

These proposed changes provide a raise in the reimbursement rate for medical-legal reports of approximately 25%. The changes also propose a new fee schedule based upon a flat fee system as opposed to the current fee schedule which is comprised of flat fees and hourly fees. The changes will provide an increase in the flat fee payments for medical-legal reports while eliminating the increased hourly billing provisions that have been documented in the recent empirical studies of the medical-legal fee schedule.

## **Technical, theoretical, or empirical studies, reports, or documents**

The DWC relied upon the following technical, theoretical, or empirical studies, reports, decisions, or similar documents in proposing the above-identified regulations:

1. Wynn, Barbara O., Mulcahy, Andrew W. Liu, Hangsheng, Malsberger, Rosalie, Okeke, Edward N., Research Analysts, RAND Corporation, *Medical Care Provided to California’s Injured,* Chapter 8: *Medical-Legal Services,* May 2018.
2. Jones, Stacy L., Senior Research Associate, California Workers’ Compensation Institute, Research Update re: *Changes in the QME Population and Medical-Legal Trends in California Workers’ Compensation,* February 2018.
3. Wynn, Barbara O. Research Analyst, RAND Corporation, Working Paper: *California Workers’ Compensation Medical-Legal Fee Schedule - Analysis and Recommendations,* October 2018.
4. Neuhauser, Frank, Project Director - Research Specialist, University of California - Berkeley, Report to the Commission on Health and Safety and Workers’ Compensation, *Qualified Medical Evaluators: Updating Trends and Evaluations, Availability, and Equity,* October 2017.
5. California Society of Industrial Medicine and Surgery White Paper, *Physician Reporting in the California Workers’ Compensation System,* April 2015

## **Specific technology or equipment required**

No specific technology or equipment is required by these proposed regulations.

**BASES on which the ADMINISTRATIVE DIRECTOR relies in support of THE initial determination that the PROPOSED regulations will not have a significant adverse impact on business.**

Increasing the fees for a flat fee medical-legal report while eliminating the hourly billing component of the medical-legal fee schedule should have no appreciable adverse impact on business. The proposed regulations should operate to stabilize and increase the cost of medical-legal services, while providing an increase in the amount payable for a flat fee medical-legal report. The schedule based on a flat fee system should reduce frictional costs. The increase in amounts payable to Providers is expected to increase report quality and attract new physicians to the QME program.

## **Summary of proposed changes**

**Section 9793: Definitions.**

Specific Purpose of Amendments to Section 9793:

This section sets forth and defines the terms used in the regulations. The purpose of the definitions is to ensure that the meaning of the terms is clearly understood by the regulated community. The definitions of several terms in the regulation are changed to comport with the changes in the calculation of the reimbursement levels for evaluations in section 9795. The definitions are clarified and amended to take into account the recent renumbering of the Workers’ Compensation Appeals Board’s (WCAB) regulations cited in this regulation.

Necessity:

It is necessary to define the key terms used to ensure that the content and meaning of the regulations are clearly understood by the regulated community.

*Subdivision (c) -* The definition of a “Comprehensive Medical-Legal Evaluation” is further defined and criteria are added to include an actual examination and amended to reflect the new numbering for the WCAB regulations quoted in that section.

*Subdivision (g) -* The definition of a “Follow-Up Medical-Legal Evaluation” is clarified and defined to comport with the new regulations under 9795.

*Subdivision (l) -* The definition of “Reports and documents required by the administrative director” is further defined to include correspondence received by the physician from parties to the action.

*Subdivision (m) -* The definition of “Supplemental medical-legal evaluation” is amended to reflect the new numbering for the WCAB regulation quoted in that section.

*Subdivision (n) -* A new subdivision is added to define the meaning of “Record Review” for purposes of the new fee schedule. The new subdivision is necessary to allow for proper calculation of the medical-legal fee under the new schedule.

**Section 9794: Reimbursement of Medical-Legal Expenses.**

Specific Purpose of Amendment to Section 9794:

This section sets forth the billing and reimbursement procedures for medical-legal expenses authorized under Labor Code sections 4620, et seq. Subdivision (a)(1) of this section is amended to delineate exactly what charges are allowed under the Official Medical Fee Schedule (OMFS) in connection with a medical-legal evaluation or report. Subdivision (h) of this section is amended to reflect the change in numbering of the WCAB regulation cited therein. There is also a non-substantive amendment to change a duplicate, subdivision (i) to a new subdivision (k).

Necessity:

Labor Code section 4628(d) delineates allowable charges related to a medical-legal evaluation and the preparation of a medical-legal report. The Medical-Legal Fee Schedule adopted by the Administrative Director pursuant to Labor Code section 5307.6 mandates that all of these charges are subsumed in the fee schedule itself, except for any charges related to diagnostic studies, and medical tests. With respect to these charges only, they may be billed separately pursuant to the Official Medical Fee Schedule in connection with a medical-legal evaluation. Clarification of what is actually allowable as charges pursuant to the OMFS in connection with a medical-legal report is necessary because there have been attempts by providers to bill for clerical charges and other OMFS-related coding in conjunction with a medical-legal report.

**Section 9795: Reasonable Level of Fees for Medical-Legal Expenses, Follow-up,**

**Supplemental and Comprehensive Medical-Legal Evaluations, and Medical-Legal Testimony.**

Specific Purpose of Amendment to Section 9795:

The purpose of section 9795 is to set forth the parameters for different types of medical-legal evaluations and the fees to be allowed for the evaluations. Section 9795 provides fee schedule codes that are used to describe and pay for medical-legal evaluations and testimony. Under the current medical-legal fee schedule, the ability to bill hourly under ML-104 required the application of complexity factors. The proper application of these complexity factors was open to subjective interpretation, which led to disputes regarding the proper application of these complexity factors. The incidence of hourly billing has increased over recent years beyond the logical anticipation of the intent when hourly billing was first introduced into the fee schedule. The hourly billing system has been shown to be amenable to abuse. The purpose of the changes to 9795 is to implement a flat fee based medical-legal fee schedule while increasing the payment amounts to physicians under the schedule. A flat fee based fee schedule will eliminate the need to interpret regulations to determine the appropriate fees for medical-legal evaluations. Subsection (b) is modified resulting in the multiplier for setting the fees for evaluations being changed from $12.50 to $16.25. The purpose of changing the multiplier is to increase the fees for the evaluations by 25%. Setting the fees on an objective basis will reduce friction costs in the system and provide certainty for the regulated community.

*ML-100 through ML-106:* The 100 series designation for these billing codes has been deleted. The designation has been changed to a 200 series for purposes of clarification between the old and new fee schedules. In addition, the use of complexity factors has been eliminated from the schedule.

*ML-200 - Missed Appointment Fee:* A set value and definition of a missed appointment has been added to the fee schedule. A provision for payment for records reviewed in anticipation of the appointment is also provided.

*ML-201 - Comprehensive Medical-Legal Evaluation:* This billing code is added to implement the new terms of the Comprehensive Medical-Legal Evaluation. The Comprehensive Medical-Legal Evaluation is now calculated by application of a set fee for the evaluation with a three dollar per page fee for medical records reviewed in excess of 200 pages. The physician is now required to declare under penalty of perjury the total number of pages of medical records reviewed by the physician as part of the medical-legal evaluation.

*ML-202 - Follow-Up Medical-Legal Evaluation:* This billing code is added to implement the new terms of the Follow-Up Medical-Legal Evaluation. The Follow-Up Medical–Legal Evaluation is now calculated by application of a set fee for the evaluation with a three dollar per page fee for medical records reviewed in excess of 200 pages. The physician is now required to declare under penalty of perjury the total number of pages of medical records reviewed by the physician as part of the medical-legal evaluation.

*ML-203 - Fees for Supplemental Medical-Legal Evaluations:* This billing code is added to implement the new terms of the Fees for Supplemental Medical-Legal Evaluations. Fees for a Supplemental Medical-Legal Evaluations are now calculated by application of a set fee for the evaluation with a three dollar per page fee for medical records reviewed in excess of 50 pages, that were not reviewed as part of an initial or follow-up comprehensive medical-legal evaluation. The parameters for billing for a supplemental medical-legal evaluation are redefined.

*ML-204* - *Fees for Medical-Legal Testimony:* This billing code is added to implement the new terms of the Fees for Medical-Legal Testimony. The multiplier for calculating fees for medical-legal testimony is increased. The minimum paid for a scheduled deposition is increased to two hours. The physician is entitled to a minimum fee of only one hour if the deposition is canceled at least eight days before the scheduled deposition.

*ML-205* - *Fees for Review of Sub Rosa Recordings:* - This billing code is added to implement the new terms of the Fees for Review of Sub Rosa Recordings. The multiplier for calculating fees for review of sub rosa recordings is set at a level to provide the physician with $325 an hour for this service. The parameters for billing under this code are also defined.

*ML-206 – Unreimbursed Supplemental Medical-Legal Evaluation:* This billing code is added for communication purposes only. No fees or compensation are provided for under this code. The billing code is added to define the parameters of the new “Unreimbursed Supplemental Medical-Legal Evaluation”. The code defines the parameters for a supplemental medical-legal report that does not meet the requirements for billing under ML-203.

*ML-PRR Record Review:* This is a billing code used to identify charges for review of records in excess of pages included in medical-legal numerical billing codes.

*Section 9795(d):* Subsection (d) of the regulation is changed to account for the changes and renumbering of the billing codes. In addition, new modifiers are added to increase the remuneration under certain billing codes to account for an evaluation dealing with psychiatry or psychology, toxicology, or oncology as the primary focus of the evaluation.

Necessity:

Labor Code section 5307.6 requires the Administrative Director to adopt and revise a Medical-Legal Fee Schedule. In addition to the rise in the percentage of hourly billing, disputes have arisen with respect to the proper interpretation of the Medical-Legal Fee Schedule. Fee schedule complexity factors are currently subject to misuse by evaluators and payers alike. Reimbursement disputes that were few or almost non‐existent are now frequent. Adding appropriate objective criteria to the existing Medical-Legal Fee Schedule and eliminating complexity factors should alleviate this situation.

Labor Code section 4621(a) requires that medical-legal expenses only be reimbursed if they are “reasonably, actually and necessarily incurred.” Labor Code section 4620(a) and (c), and 8 CCR section 9793(h) define compensable medical-legal expenses in terms of contested medical issues, the resolution of which are essential to the resolution of a contested claim. Title 8, CCR section 41(d) requires that “all aspects of all physical and/or psychological comprehensive medical-legal evaluations shall be directly related to contested medical issues as presented by any party or addressed in the reports of treating physicians.” The statutory and regulatory framework related to medical-legal expenses applies to medical-legal evaluations produced by qualified medical evaluators, and therefore should be the guiding principles for the Medical-Legal Fee Schedule. These principles are not embodied in the current interpretation of the regulations expressed by some providers.

The empirical data evidenced in the cited studies indicates that some current interpretations of the Medical-Legal Fee Schedule regulations are being done in a manner that completely circumvents the original intent of the fee schedule. In addition, the aggregate spending for medical-legal expenses has increased by 46% from 2007 to 2012.[[3]](#footnote-4) Therefore, the implementation of a new fee schedule, which will result in objective and standardized outcomes, is essential.

*Section 9795(b)*: It is necessary to increase the multiplier to effectuate the new flat fee system that is being implemented for the Medical-Legal Fee Schedule. The multiplier has not been changed since 2006. Although an increase in the multiplier is arguably contra-indicated by at least one empirical study [[4]](#footnote-5) and the concurrent 6% increase in fees for medical-legal reporting under the OMFS over the same time period, it is anticipated that a slight raise in the multiplier coupled with a flat fee system will serve to increase fees over those received as flat fees under the former fee schedule and normalize fees that were being charged on an hourly basis.

*ML-200 - Missed Appointment for a Comprehensive or Follow-Up Medical-Legal Evaluation:* It is necessary to establish a set fee that a physician can charge for a missed appointment. This code is changed to a billing code from an “informational only” code. Establishing and standardizing a set fee for a missed appointment will provide certainty and uniformity for the regulated population. Parameters for what constitutes a missed appointment are also provided.

*ML-201* - *Comprehensive Medical-Legal Evaluation:* It is necessary to increase the multiplier for evaluations and convert to a completely flat fee payment schedule in order to make payment for medical-legal evaluations predictable and based on objective criteria. The increase in the multiplier increases the relative value payment for evaluations by approximately 25%. The flat fee of $2,015 with the addition of an excess medical records review fee will generously compensate the physician for the majority of evaluations performed in the workers’ compensation system.

*ML-202 - Follow-Up Medical-Legal Evaluation:* It is necessary to increase the multiplier for evaluations and convert to a completely flat fee payment schedule in order to make payment for medical-legal evaluations predictable and based on objective criteria. The increase in the multiplier increases the relative value payment for evaluations by approximately 25%. The flat fee of $1,316.25 with the addition of an excess medical records review fee takes into account the reduced amount of time a physician should be expected to spend in the components that make up a follow-up medical- legal evaluation, which should include reduced face-to-face time, record review, and time spent writing the report.

*ML-203 - Fees for Supplemental Medical-Legal Evaluations:* It is necessary to increase the multiplier for evaluations and convert to a completely flat fee payment schedule in order to make payment for medical-legal evaluations predictable and based on objective criteria. The increase in the multiplier increases the relative value payment for evaluations by approximately 25%. The flat fee of $650 with the addition of an excess medical records review fee takes into account the fact that there is no face-to-face time involved in the evaluation. Physicians are compensated for review of medical records not previously reviewed, and provision is made to seek reimbursement for review of medical records involving diagnostic tests ordered by the evaluating physician.

*ML-204 - Fees for Medical-Legal Testimony:* It is necessary to increase the hourly fee for testimony to bring the remuneration to a level approximately equivalent to that provided to physicians for reasonably comparable work in other areas of litigation.

*ML-205 - Fees for review of Sub Rosa Recordings:* A separate fee for the physician’s time reviewing Sub Rosa films and recordings has been added. This is an area where the hourly fee has been maintained and raised to a level commensurate with the 25% increase in the relative value payment for evaluations.

*ML-206 - Unreimbursed Supplemental Medical-Legal Evaluations:* This code is designed for communication purposes only. This code does not indicate that compensation is due for the service. This code is added for informational purposes when a supplemental report is provided to account for deficiencies in prior reporting by the physician. Disputes over whether or not a report is properly covered by this informational code can be resolved through the existing process for Independent Bill Review.

*ML-PRR - Record Review:* This is a billing code used to identify charges for review of records in excess of pages included in medical-legal numerical billing codes.

*Section 9795(d):* Itis necessary to amend this subsection of the regulation to accommodate the changes in the billing procedure codes as referenced above. It is also necessary to clarify that the modifiers do not apply to per page charges for record review in any of the procedure codes. Changes in modifiers 93 and 94 are necessary to accommodate the renumbering of the billing procedure codes. Modifier 96 is added to increase the compensation for an evaluation the primary focus of which is psychological or psychiatric. Modifier 97 is added to increase the compensation for an evaluation the primary focus of which is toxicology. This action is taken in anticipation of increasing the ranks of qualified medical evaluators in the specialty of toxicology. Modifier 98 is added to increase the compensation for an evaluation the primary focus of which is oncology. This action is taken in anticipation of increasing the ranks of qualified medical evaluators in the specialty of oncology.

## **Consideration of Alternatives**

At this time, the Administrative Director has not identified any more effective nor any equally effective yet less burdensome alternatives to the proposed amendments to the regulations.

1. *Changes in the QME Population and Medical-Legal Trends in California Workers’ Compensation,* February 2018, Page 8. [↑](#footnote-ref-2)
2. *Qualified Medical Evaluators: Updating Trends and Evaluations, Availability, and Equity,* October 2017, Page 2. [↑](#footnote-ref-3)
3. *Medical Care Provided to California’s Injured,* Chapter 8: *Medical-Legal Services,* May 2018. [↑](#footnote-ref-4)
4. *California Workers’ Compensation Medical-Legal Fee Schedule-Analysis and Recommendations,* October 2018*,* pp. 13-14. [↑](#footnote-ref-5)