June 27, 2017

Hon. George Parisotto
Acting Administrative Director
Division of Workers Compensation
1515 Clay Street 17th Floor
Oakland, CA 94612

Hon. Raymond Meister, M.D.
Acting Administrative Director
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Dear George and Ray,

Among the many issues and questions arising during yesterday's review of the proposed DWC QME Online Training Module, was that of the DWCs recent change in interpreting how QMEs and AMEs are expected to use the medical-legal fee schedule (MLFS - 8CCR Sections 9793, 9794 and 9795) to determine the correct level of service for billing purposes.

The DWC's stakeholder group convened to develop the module and review its production made several suggestions regarding improving the message of how to correctly bill for these medical-legal expenses.

As a result and in deference to the fact that the DWC is applying "interpretations" developed by DWC staff internally which did not undergo the requisite public input prior to being applied, a disclaimer will appear at the beginning of training module's billing segment. The purpose of the disclaimer is to alert the public to this fact. Suitable language to express that purpose is under development.

To reiterate, the disclaimer is made necessary because the Division's recently adopted interpretation(s) were developed and implemented outside the requirements of Labor Code Section 5307.6 which requires public hearings. Additionally, no accusations of misapplication of the fee schedule have been upheld by a court or administrative hearing.

Therefore, we are of the opinion that these interpretations comport with the definition of an "underground regulation" pursuant to Gov't. Code §11340.5 (a)

The presence of these interpretations as an underground regulation is substantiated in fact by determinations adopted by the Administrative Director, pursuant to Labor Code 4603.6, the Independent Bill Review (IBR) process.

Since the beginning of the IBR program, Maximus has reviewed a significant number of IBR cases[1] in which the main issue to be decided was in fact, whether the tenants of the MLFS were properly applied to the services rendered, resulting in a correct fee charged by the medical-legal evaluator. Specifically, whether billing code, ML 104, was properly used and the resulting fee properly paid.

Maximus' determination must take into account several factors including the content of the report, any supporting documentation and the evaluator's application of the requirements for proper billing. This involves an assessment of the complexities presented by the case as well as proper accounting for and recording of the time required to complete all components of the report. Our analysis of MLFS IBR decisions since January 2016, indicates that in 100% of the cases in which ML 104 was at issue and Maximus verified the required complexity factors were met (often including causation and apportionment), the subsequent recommended payment to the provider included preparation of the medical-legal report. These findings uphold, without exception, that report preparation is an appropriate, reimbursable activity when billing ML 104. To our knowledge, these determinations of the Administrative Director were never challenged by the claims administrator, and so stand correct as a matter of fact.

When presented with three examples of such cases, Mr. West expressed great surprise that it would, in his opinion, have acted independent of that training. He also expressed the desire to revisit the IBRO in order to "retrain" them in the "proper interpretation."

We assert that a visit by DWC staff, with the expressed intention to "retrain" the State's Independent Bill Review Organization based on any interpretation of the medical-legal fee schedule that are themselves, not codified, will be a violation of Gov't. Code Section 11342.00 which prohibits use of regulations that "should be" but have not yet been implemented pursuant to the Administrative Procedures Act.

[1] See Attachment A - IBR ML 104 Determinations

Attachment "A"

IBR ML 104 Determinations

Case Number	Application Received	Decided Date	Outcome	Applicable Fee Schedule
CB17-0000491	3/29/2017	5/8/2017	Overturned	Medical-Legal Fee Schedule
CB17-0000447	3/22/2017	4/18/2017	Overturned	Medical-Legal Fee Schedule
CB17-0000369	3/9/2017	4/5/2017	Overturned	Medical-Legal Fee Schedule
CB17-0000057	1/13/2017	3/28/2017	Overturned	Medical-Legal Fee Schedule
CB16-0002389	12/29/2016	1/24/2017	Overturned	Medical-Legal Fee Schedule
CB16-0002368	12/28/2016	1/18/2017	Overturned	Medical-Legal Fee Schedule
CB16-0002132	11/14/2016	12/21/2016	Overturned	Medical-Legal Fee Schedule
CB16-0002083	11/3/2016	12/6/2016	Overturned	Medical-Legal Fee Schedule
CB16-0002012	10/25/2016	11/21/2016	Overturned	Medical-Legal Fee Schedule
CB16-0001922	10/13/2016	11/10/2016	Overturned	Medical-Legal Fee Schedule
CB16-0001868	10/7/2016	10/31/2016	Overturned	Medical-Legal Fee Schedule
CB16-0001830	10/4/2016	10/26/2016	Overturned	Medical-Legal Fee Schedule
CB16-0001706	9/14/2016	10/13/2016	Overturned	Medical-Legal Fee Schedule
CB16-0001567	8/25/2016	9/27/2016	Overturned	Medical-Legal Fee Schedule
CB16-0001530	8/19/2016	9/30/2016	Overturned	Medical-Legal Fee Schedule
CB16-0001193	7/12/2016	8/15/2016	Overturned	Medical-Legal Fee Schedule
CB16-0001093	6/30/2016	7/27/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000800	5/13/2016	6/7/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000423	3/14/2016	4/6/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000376	3/3/2016	3/30/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000371	3/3/2016	3/29/2016	Overturned	Medical-Legal Fee Schedule

Case Number	Application Received	Decided Date	Outcome	Applicable Fee Schedule
CB16-0000185	2/9/2016	2/29/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000167	2/4/2016	2/29/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000080	1/19/2016	2/23/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000058	1/14/2016	2/8/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000054	1/12/2016	2/8/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000053	1/12/2016	2/8/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000049	1/12/2016	2/5/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000044	1/11/2016	2/5/2016	Overturned	Medical-Legal Fee Schedule
CB16-0000043	1/11/2016	2/24/2016	Overturned	Medical-Legal Fee Schedule

Attachment "B"

IBR and the Medical-Legal Fee Schedule

I. Applicable Statutes

Gov't Code § 11340.5

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

NOTE: Such use of a regulation that "should be" (will be) adopted but hasn't (wasn't) adopted, constitutes implementation of an "underground regulation."

Gov't Code § 11342.600

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

Audit Guidelines excluded unless disclosure of the guideline would

Labor Code Section 4603.6

(f) The determination of the independent bill reviewer shall be deemed a determination and order of the administrative director. The determination is final and binding on all parties unless an aggrieved party files with the appeals board a verified appeal from the medical bill review determination of the administrative director within 20 days of the service of the determination. The medical bill review determination of the administrative director shall be presumed to be correct and shall be set aside only upon clear and convincing evidence of one or more of the following grounds for appeal:
(1) The administrative director acted without or in excess of his or her powers.
(2) The determination of the administrative director was procured by fraud.
(3) The independent bill reviewer was subject to a material conflict of interest that is in violation of Section 139.5.

(4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.
(5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review and not a matter that is subject to expert opinion.

(g) If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent bill review by a different independent review organization. In the event that a different independent bill review organization is not available after remand, the administrative director shall submit the dispute to the original bill review organization for review by a different reviewer within the organization. In no event shall the appeals board or any higher court make a determination of ultimate fact contrary to the determination of the bill review organization.

(h) Once the independent bill reviewer has made a determination regarding additional amounts to be paid to the medical provider, the employer shall pay the additional amounts per the timely payment requirements set forth in Sections 4603.2 and 4603.4.

Labor Code Section 5307.3.

The administrative director may adopt, amend, or repeal any rules and regulations that are reasonably necessary to enforce this division, except where this power is specifically reserved to the appeals board.

No rule or regulation of the administrative director pursuant to this section shall be adopted, amended, or rescinded without public hearings. Any written request filed with the administrative director seeking a change in its rules or regulations shall be deemed to be denied if not set by the administrative director for public hearing to be held within six months of the date on which the request is received by the administrative director.

NOTE: The requirement for public hearings pursuant to Labor Code Section 5307.3 includes the MLFS defined by Labor Code Section 5307.6

II. Applicable Regulations

8 CCR §9792.5.13. Independent Bill Review - Review.

(a) If the request for independent bill review involves the application of the Official Medical Fee Schedule (OMFS) for the payment of medical treatment services or goods as defined in Labor Code section 4600, the independent bill reviewer shall apply the provisions of sections 9789.10 to 9789.111 to determine the additional amounts, if any, that are to be paid to the provider.

(b) If the request for independent bill review involves the application of a contract for reimbursement rates under Labor Code section 5307.11 for the payment of medical treatment services as defined in Labor Code section 4600, the independent bill reviewer shall apply the contract to determine the additional amounts, if any, that are to be paid to the provider.

(c) If the request for independent bill review involves the application of the Medical-Legal Fee Schedule (M/L Fee Schedule) for services defined in Labor Code section 4620, the independent bill reviewer shall apply the provisions of sections 9793-9795 and 9795.1 to 9795.4 to determine the additional amounts, if any, that are to be paid to the provider.

(d) In applying this section, the independent bill reviewer shall apply the provisions of the OMFS, the M/L Fee Schedule, and, if applicable, the contract for reimbursement rates under Labor Code section 5307.11, as if the bill is being reviewed for the first time. The independent bill review shall also apply as necessary all billing, payment, and coding rules adopted under this Article.

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8 CCR §9792.5.14. Independent Bill Review - Determination.

(a) Within sixty (60) days of the assignment of a dispute to an independent bill reviewer under section 9792.5.9(g), the reviewer shall issue a written determination, in plain language, if any additional amount of money is owed the provider under the request for independent bill review. The determination shall state the reasons for the determination and the information received and relied upon by the independent bill reviewer in rendering the determination.

(b) If the independent bill reviewer finds any additional amount of money is owed to the provider, the determination shall also order the claims administrator to reimburse the provider the amount of the filing fee in addition to any additional payments for services found owing.

(c) The independent bill reviewer shall serve the determination on the provider, the claims administrator and the Administrative Director.

(d) The determination issued by the independent bill reviewer shall be deemed to be the determination of the Administrative Director and shall be binding on all parties.

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8 CCR §9792.5.15. Independent Bill Review - Implementation of Determination and Appeal.

(a) Upon receiving the determination of the Administrative Director that an additional amount of money is owed to the provider on a bill for medical treatment services submitted pursuant to Labor Code sections 4603.2 or 4603.4, or bill for medical-legal expenses submitted pursuant to Labor Code section 4622, the claims administrator shall, unless appealed under subdivision (b), pay the additional amounts set forth in the determination per the timely payment requirements set forth in Labor Code sections 4603.2 and 4603.4.

(b) Pursuant to Labor Code section 4603.6(f), the provider or the claims administrator may appeal a determination of the Administrative Director under section 9792.5.14 by filing a petition with the Workers' Compensation Appeals Board.

(c) If the final determination of the Administrative Director is reversed by the Workers' Compensation Appeals Board, the dispute shall be remanded to the Administrative Director. The Administrative Director shall:
(1) Submit the dispute to independent bill review by a different IBRO, if available;

(2) If a different IBRO is not available after remand, the Administrative Director shall submit the dispute to the original IBRO for review by a different reviewer in the organization.
