November 30, 2015

The California Applicants' Attorneys Association (CAAA) appreciates the opportunity to comment on the proposed Home Health Care Services Fee Schedule that is currently posted on the DWC website, for a 45 day comment period ending November 30, 2015.

Senate Bill 863 added Labor Code §5307.8, which requires that the DWC adopt a fee schedule for home health services not covered by Medicare or the Official Medical fee schedule adopted pursuant to Labor Code § 5307.1 . Home health services range from skilled nursing and therapy services provided by home health agencies or other home care providers to unskilled personal care or chore services that may be provided by family members or other personal care aides.

Initially, the development of the fee schedule should be guided by statute. In passing Senate Bill 863, the Legislature directed the Administrative Director to adopt a schedule of reasonable maximum fees payable for home health care services for injured workers. Labor Code §5307.8 does not give the DWC authority to define the scope and type of home health care services in the fee schedule, except for the provision that payment may be disallowed where the services had been regularly performed in the same manner and to the same degree prior to the date of injury by a member of the employee's household. Additionally, Labor Code §4600, subdivision (h) further provides that an employer shall not be liable for home health care services that are provided more than 14 days prior to the date of the employer's receipt of the physician's prescription.

To the extent this proposed draft of the home health care services fee schedule exceeds statutory authority, we do object. The proposed Home Health Care Fee Schedule should only set forth a methodology for payment and maximum allowable rates for payment for the full range of home health care services that may be required by injured workers.

We offer the following specific comments to the designated sections of the proposed fee schedule.

§ 9789.90 Home Health Care - Definitions.

Section 9789.90, subdivision (d) provides that "Home health care services" includes the provision of medical and other health care services, including personal care and chore services, to the injured worker, in their place of residence, pursuant to the Medical Treatment Utilization Schedule (MTUS).

Initially, we recommend that "in their place of residence, pursuant to the Medical Treatment Utilization Schedule (MTUS)" be deleted from the definition of "Home health care services" for the following reasons.

In limited circumstances a home health care provider may need to leave the residence to pick up a prescription at a pharmacy for the injured worker, or transport them to a medical appointment. If a home health care provider is otherwise scheduled to provide services for an injured worker during any given day, and is presented with the need for a "chore service" requiring them to leave the residence they should not be denied payment.

As far as the reference to the Medical Treatment Utilization Schedule (MTUS), we believe this is unduly restrictive. Personal care and chore services are not included in the Medical Treatment Utilization Schedule (MTUS). Further, the MTUS does not provide any guidance on home health care services for the most catastrophically injured workers or the terminally ill. We fear that limiting the definition of home health care services to "pursuant to the Medical Treatment Utilization Schedule (MTUS)" will inevitably result in the denial of home health care services to the most vulnerable injured worker population. A cookie cutter approach to the provision of these services would be disastrous. While the MTUS may provide guidance in limited circumstances for soft tissue injuries, or a brief convalescence following surgery, it should not define in all cases the definition of home health care services.

While we recognize that the current version of the MTUS is not the subject of comment at this time, we observe that the MTUS Chronic Pain Management Treatment Guideline currently being applied by UR and IMR reviewers to determine eligibility for Home Health Care Services (page 51) is not consistent with the requirements of Labor Code Section 5307.27. Labor Code Section 5307.27 requires that the MTUS be evidence based, peer reviewed and based on nationally recognized standards of care. The current reference in the MTUS does not meet any of these required standards. We respectfully submit that any references to eligibility for such services, including references in the fee schedule, be consistent and compliant with the statutory requirements to avoid confusing and conflicting standards, and to satisfy the statutory mandates. We also recognize that the current MTUS Chronic Pain Management Treatment Guidelines were the subject of a 45 day Comment Period ending September 1, 2015, and that proposed revisions regarding eligibility for Home Health Care Services are set forth on page 88 of these proposed guidelines. In the context of the proposed fee schedule, definitions of eligibility for Home Health Care services must be compliant with Labor Code Section 5307.27 for the proposed MTUS guidelines as well.

§ 9789.91 Home Health Care – Eligibility for Services.

With the long inherent delays with UR and IMR, we have a serious concern with Section 9789.91, subdivision (b) providing that home health care services are subject to the utilization review and independent medical review processes set forth in Labor Code sections 4610 and 4610.5, *et seq.* When someone is discharged from a hospital and not mobile and discharge instructions come when the person is sent home, what are they going to do while they wait for UR? Therefore, we recommend that the fee schedule regulations provide that home health care shall be authorized until there is a UR denial, and if there is a denial, the determination shall lay

out alternate care to be provided, and home health care services will continue until alternate care is authorized.

Additionally with regard to adjunct treatment services, personal care and chore services such as babysitting, gardening, meal preparations, and driving, a UR reviewer is unable to evaluate the need for these services as they have no expertise outside of the application of treatment guidelines. Injured workers are entitled to these services as "necessary and reasonable in order to allow the injured worker to fully comply with the treatment prescribed by the physician", and therefore if home health care services are otherwise approved, adjunct treatment services, personal care and chore services should not be subject to UR and IMR.

As a result we recommend that subdivision (b) be stricken as the use of UR and IMR is not applicable to all types of home health services prescribed. In the alternative, there should be a clarification as to what types of home health care services would be subject to UR, that an alternative to the treatment prescribed be offered if there is a denial, and that services be authorized pending review as the consequences of an injured worker waiting months for home health care services to be authorized could be fatal.

Section 9789.91, subdivision (c) demands that the injured worker's needs for home health services be "performed using CMS's OASIS" There is absolutely no statutory authority for this as the Administrative Director is to ONLY develop a fee schedule pursuant to the statute. Whether the CMS's OASIS is used or any other method would appear to be a medical necessity issue under LC 4600 and 4610. It is up to the requesting physician to support the medical necessity of the requested treatment and this provision would conflict with existing statutes and regulations and must be stricken.

Further, CMS's OASIS is used by Medicare when assessing eligibility for services for a population (the elderly) which has very different health care needs in most instances than injured workers. Again, a cookie cutter approach to the provision of home health care services would be disastrous. In home assessments of an injured worker's needs for home health care services should be guided by the treating physician's recommendations with an individualized approach to each injured worker's specific circumstances.

Additionally, there is no provision in the fee schedule as to whom chooses the person to perform an in-home assessment of the injured worker's need for home health care as provided in subdivision (c). Any assessment must prioritize the injured worker, and be independent of the insurance company, and not be an ancillary service included within an MPN.

With regard to Section 9789.91, subdivision (d), and the statutory requirement that "an employer or their insurer shall not be liable for home health care services provided more than fourteen (14) days prior to the date of the employer's or insurer's receipt of the physician's prescription or request for authorization for home health care services ", we recommend that a form be developed as part of this public rulemaking process which physicians can use to request

authorization for home health care services . This will avoid services simply being denied because the prescription or RFA is not recognized as a proper request for home health care.

Lastly, we believe that Section 9789.91, subdivision (e) which provides that "this fee schedule does not cover family caregivers or individuals who are not employed by a home care organization or a home health care agency", should be deleted in its' entirety. The rates set forth in Section 9789.93 Table A would only allow payment to family care givers and individuals not employed by a home health care agency for chore services or attendant care services. All of the other rates on this table are for skilled services that these designated persons would not be qualified to be paid for unless they happened to be a registered nurse, dietician, clinical social worker, qualified physical or occupational therapist, speech pathologist, or certified nurse assistant. Employers and claims administrators are protected by these regulations. Protections should also be in these regulations for personal care givers and family caregivers as to the rates they will be reimbursed for their services.

§ 9789.92 Home Health Care – Payment Methodology& Billing Rules.

As required by statute, the rates or fees established for home health care services shall ***be adequate to ensure a reasonable standard of services and care for injured employees.***

There should be no arbitrary cap imposed on hours of services provided or annual maximum to be paid as each case should be assessed for the individual needs of that injured worker.

We believe that specific comments on the adequacy of the rates set forth in Section 9789.93 Table A are best addressed by the current providers of home health care services .

However, we do have a comment with regard to Section 9789.92, subdivision (c) which states that "Nothing in this section precludes an agreement for payment of home health care services, made between the provider and the insurer or claims administrator, regardless of whether such payment is less than, or exceeds, the fees set forth in this section." The Home Health Care Fee Schedule should not be a tale of two worlds. One with rates set by regulations, and one with rates set by private contracts not subject to public scrutiny for "lesser" amounts. We urge that subdivision (c) be deleted in its' entirety. There should be one fee schedule with rates clearly regulated and subject to public and transparent rulemaking authority and the public hearing process. To do otherwise may result in a "wild west" of hidden and unregulated fee contracts, which was clearly not intended by the authors of Senate Bill 863.

In conclusion, where these draft regulations delve into areas not authorized by the statutory authority for a fee schedule, we object. The statutory authority for the fee schedule does not allow for regulation of the definition of medical necessity nor for restricting the scope of home health care services to be provided. Further, as with the consequences of denial of medical care in other areas of the California workers' compensation system, this fee schedule may also result in significant cost shifting to other public and private health insurance programs, such as

Medicare, Medi-Cal, and private group health insurance plans, if home health care services currently being provided are denied. Injured workers' needs for home health care services are often in the most catastrophic injury cases, and with the inevitable denial of these services based on the current focus of this fee schedule, they will have no choice but to obtain this care somewhere else. The proposed Home Health Care Fee Schedule should only set forth a methodology for payment and maximum allowable rates for payment for the full range of home health care services that may be required by injured workers, and nothing more.