California Society of Industrial Medicine and Surgery
CSIMS

May 15, 2018

Division of Workers' Compensation
P.O. Box 420603
San Francisco, CA 94142-0603
Attn: DWC Forums

RE: DWC Forum - Reimbursement of Medical-Legal Expenses Regulations

Via USPS and email (DWCForums@dir.ca.gov)

The California Society of Industrial Medicine and Surgery (CSIMS) submits the following comments on the DWC Forum concerning Reimbursement of Medical-Legal Expenses Regulations:

Introduction

The DWC *Newsline* No.: 2018-35 dated May 3, 2018, indicates that the proposed revisions to the Medical-Legal Fee Schedule (MLFS) attempt to establish the following goals:

- Objective standards for the application of complexity factors in the fee schedule;

- Provisions that align the Medical-Legal Fee Schedule with the statutory scheme for reimbursement of medical-legal expenses;

- Elimination of provisions that refer to medical-legal evaluations no longer being performed;

- Clarification of when billing under the Official Medical Fee Schedule can be accomplished in conjunction with billing under the Medical-Legal Fee Schedule.

- There are no changes to the amount of fee schedule payments. The proposals clarify the use of the complexity factors relating to causation, medical research, record review and apportionment. The factors that indicate the presence of extraordinary circumstances in a medical-legal evaluation are more clearly defined. The language required in a report to define extraordinary circumstances is explained. Realistic limits on certain areas of billing are implemented.

A careful review and analysis of the proposed revisions leads CSIMS to the conclusion that most of the stated goals will not be satisfied. Rather than resolving some alleged "ambiguities" in the current MLFS, the proposed revisions are likely to lead to more confusion, friction, litigation, delayed resolution of complex medical-legal issues, and will reduce the quality and usefulness of medical-legal reports. They may also reduce the supply of physicians willing to provide this vital service.

We recognize that the proposed regulations are, in part, a temporary response to the settlement of litigation in *Howard, et al. v. DIR* concerning underground regulations. We understand that the Division contemplates more extensive revisions to the MLFS sometime after the release of one or more studies by RAND Corporation later this year. As such, the comments herein will focus primarily on the interim proposal rather than the more extensive future revisions. We would be remiss, however, not to recognize the importance of producing high-quality medical-legal reports that constitute substantial medical evidence. Any revisions to the MLFS should aim to enhance, not reduce, the quality of these reports.

Comments on Specific Changes to the MLFS

1. Addition of §9794(a)(3). The proposed subdivision (3), in effect, provides that other than permitted by subdivision (1), "no other charges shall be billed under the Official Medical Fee Schedule in connection with a medical-legal evaluation or report." Although DWC staff indicates that they intend to limit billing under the OMFS to medical-legal diagnostic tests, the overly-restrictive proposed language could prevent appropriate billing for medical-legal consultations. Current regulations (§§31.7 and 32(b)) concerning medical-legal consultations are ambiguous and incomplete. If a medical-legal consultation, because of its content, is not eligible for reimbursement under the MLFS, it should be reimbursable under the OMFS. The proposed language of subdivision (3) is defective because a medical-legal consultation is an expense incurred "in connection with a medical-legal evaluation or report" and it is also in conflict with the second paragraph of §9795(a).

2. Amendment to §9795(b). The proposed additional language, while petty, is consistent with long-established DWC policy.

3. Several provisions limiting report preparation to three hours. Several sections (ML 101, 104, and 106) propose to place an upper limit of three hours on report preparation. This limitation is ambiguous and is of great concern because the regulation fails to define what the term "report preparation" encompasses. It also fails to recognize that some specialties such as mental health, internal medicine, and neurology require a more extensive discussion and analysis than some other specialties. Furthermore, we know of no empirical evidence, and DWC has presented none, to substantiate any limitation on the time spent on report preparation. As such, the three-hour limit on report preparation appears arbitrary and capricious. At a minimum, the revised fee schedule should clarify that "report preparation" does NOT include any time spent face-to-face with the applicant or on record review or medical research or the review of diagnostic testing results.

Any consideration of a cap on the time required for report preparation needs an analytical understanding of the time that is currently being billed in the various specialties. If the extent and nature of the times currently billed is not well defined, any attempt to limit those times can only be seen as fundamentally without logic or merit. A clear statistical definition of the status quo should be a prerequisite for any effort to impose a cap or limit. We recommend that the DWC start collecting statistics on average time for report preparation, by specialty.

4. Complexity Factors at Beginning of Report. The DWC proposes to amend the first paragraph of ML 103 in §9795 to read:

"In a separate section at the beginning of the report, the physician shall clearly and concisely specify which of the following complexity factors were actually and necessarily incurred for the production of the medical-legal report and were required for the evaluation, and the circumstances uniquely specific to the actual evaluation being performed which made these complexity factors applicable to the evaluation."

For the most part, the new language is probably nonsubstantive. For decades, the MLFS has put the burden of proof on the evaluator to specify the complexity factors at the beginning of the report. However, payors are likely to argue that the "new" language imposes a higher standard on evaluators going forward when, in reality, it does not. We fear it will create opportunities for arbitrary and spiteful billing disputes. The "new" language should be deleted.

5. Limitation on Research. Proposed §9795 ML 103(3) denies complexity point credit for research of a particular article if the evaluator cited the same article in another report within the past 12 months. This restriction is problematical because many research articles discuss a number of issues and may involve multiple diagnoses and multiple possible outcomes. An evaluator may consult a meta-analysis document for a particular medical condition in one case but need to re-review the same document months later with regard to a similar, but not identical, diagnosis in another case. Stated otherwise, a particular piece of research may serve different purposes in different factual situations. What should an evaluator do in such a situation? Obviously, the evaluator should explain the necessity of doing research in the first place and should cite any research materials relied upon in the preparation of the report.

6. Stand-alone factors may not be combined. Proposed §9795 ML 103(4) and (5) add language providing that "Any complexity factor used as a stand-alone may not be used in combination . . . ." This clarifies our understanding of the current fee schedule.

7. Mandatory research for use of the three complexity points. Proposed §9795 ML 103(5) requires a report to include face-to-face time, record review, and some research in order to receive "three complexity factors." While this change codifies DWC's recent interpretation of the fee schedule, CSIMS has always taken the position that DWC's interpretation was erroneous. Subdivision (5) of ML 103 was added several years after the addition of

subdivision (4) because the Administrative Director realized that in many cases the volume of medical records is extensive and requires many hours to review but there may not be sufficient complexity factors to reach the ML 104 level. Other cases may require extensive research. As such, subdivision (5) was added to create some flexibility in complicated cases to recognize that differing factual situations may require different combinations of face-to-face time, record review, and/or research. There was never any discussion of mandating all three factors in order to earn three complexity points.

An unintended consequence of this proposed amendment is that in close cases, it will encourage evaluators to conduct research that they might not otherwise do. No requirement for the use of all factors was ever contemplated by the Administrative Director and such makes no sense. The proposed regulation narrowly redefines the notion of extraordinary complexity in a fashion that fails to embrace other, and in fact more significant, contributory factors such as the number of injuries and the number of body parts, all of which are reflected in the amount of records and time necessary to review them, irrespective of any need for research.

8. Limitation on Causation as a complexity factor. Proposed §9795 ML 103(6) denies credit for discussing causation unless "the physician and the parties agree prior to the start of the evaluation that the issue of medical causation is a disputed medical fact the determination of which is essential to the adjudication of the claim for benefits and the parties agree that the physician may use causation as a complexity factor in billing the evaluation." [emp. added] Such a limitation is myopic and unreasonable. Frequently, one party but not both, will request a discussion of causation. If one party believes causation is a disputed issue, they should not be precluded from having it considered, evaluated and discussed. Otherwise, the Division is limiting a party's right to discovery. Furthermore, prior to 2015, the fee schedule also permitted a discussion "if a bona fide issue of causation is discovered in the evaluation." This language should be reinstated because in order to accomplish substantial justice, the evaluator must be permitted to discuss both occupational and non-occupational injuries that have not been recognized by the parties. Finally, even if both parties agree that there is an issue of causation that needs to be evaluated, what if the defense refuses to agree that the evaluator may use causation as a complexity factor? If the evaluator declines to discuss causation, there is a risk the report will not constitute substantial medical evidence. If the evaluator discusses causation, there is a risk that he/she will not receive proper compensation for the effort. Either way, the proposed revision of ML 103(6) is biased, unreasonable and short-sighted.

9. Apportionment. The proposed revision of §9795 ML 103(7) may be nonsubstantive and may bring some clarity to the interpretation of the subdivision. Others may have different responses to the proposal.

10. The missing carriage return in §9795 ML 104(3). The last sentence of the proposed revision in this subdivision reads, as follows:

> When billing under this subdivision of the code for extraordinary circumstances, the physician shall include in his or her report (i) a clear, concise explanation of the extraordinary circumstances related to the medical condition being evaluated which justifies the use of this procedure code, and (ii) verification under penalty of perjury of the total time spent by the physician in each of these activities: reviewing the records, face-to-face time with the injured worker, preparing the report and, if applicable, any other activities.

As we have pointed out to the Division on numerous occasions, the Division's own rule making file clearly establishes that the foregoing paragraph has always applied to ML 104 in its entirety. The proposed revision would limit the paragraph's application solely to ML 104(3). It makes no sense for it not to apply to the other subdivisions of ML 104. All ML 104 reports, not just those qualified under subdivision (3), should explain their extraordinary circumstances and should be verified under penalty of perjury.

11. Needed adjustment of MLFS Conversion Factor. The revisions to §9795fail to propose an adjustment to the $12.50 conversion factor in subdivision (b) that has been in place since 2006. Inflation, alone, would justify an increase to nearly $16; but considering that numerous court cases since then have significantly increased the standards necessary to produce a report that constitutes substantial medical evidence would just a much higher conversation factor. All medical-legal reports are more comprehensive today than they were 12 years ago.

CSIMS appreciates this opportunity to comment on the proposed revisions to the MLFS and urges the Division to consider seriously the comments made herein.