

# Maryland Workplace Health Care Association, Inc.

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May 15, 2004

To: Ms. Judith Johnson ([jjohnson@wcc.state.md.us](mailto:jjohnson@wcc.state.md.us))  
Secretary  
Maryland Workers' Compensation Commission  
10 East Baltimore Street  
Baltimore, Maryland 21202-1641

Fr: Christopher B. Costello, Executive Director

Re: Written Comments and request to present oral comments on June 10, 2004

Subj: Procedural Regulations, Title; Independent Agencies  
Subtitle 09 Workers' Compensation Commission, Chapter 03 Guide of Medical and surgical Fees,  
Authority: Labor and Employment Article, ~ 9.309, 9-663 & 9-731

Oppose: Application of the Medical Fee Guide Paragraph (7) (a)

## Statutory References:

- 1) **State Government 10-101 Definitions (g) (1) (iii)**  
"Regulation" means a statement or an amendment or repeal of a statement that is adopted by a unit to:  
"detail or carry out a law that the unit administers;  
(h) *Substantively*.- "Substantively" means in a manner substantially affecting the rights, duties, or obligations of:  
(i) a member of a regulated group or profession.."
- 2) **State Government 10-111.1 (b)**  
"Opposition to adoption [of a proposed regulation]  
Factors Considered:  
(1) "conformity with **statutory authority** of the promulgating unit"  
(2) "Reasonably complies with the **legislative intent** of the statute under which the regulation was promulgated.
- 3) **Labor and Employment – Workers' Compensation**  
Sec. 9-663 Provision of Medical Services and Treatment  
(a) "In addition to the compensation provided under this subtitle, if a covered employee has suffered an accidental personal injury, compensable hernia or occupational disease, the employer or its insurer promptly shall provide to the covered employee, as the commission may require:  
(1) medical, surgical, or other attendance or treatment;  
(2) hospital and nursing services;  
(3) medicine;  
(4) crutches and other apparatus; and  
(5) artificial arms, feet, and legs and other prosthetic appliances"
- 4) **Sec. 9-663 Regulatory Power of the Commission**  
(a) Regulations  
(1) The Commission shall adopt regulations setting standards for the assessment of fines under sec. 9-664 Part IX of this subtitle  
(2) The Commission **may** adopt regulations about:  
(i) the provision of medicine and medical, nursing, and hospital services to a covered employee;  
(ii) payment for the medicine and services; and  
(iii) the exercise by the Chairman of the Commission of the powers granted under Sec. 9-662 of this subtitle  
(b) Regulations of charges for services and treatment

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- (1) the Commission may regulate fees and other charges for medical services or treatment under this subtitle

## **Statutory References** *(continued)*:

- (2) each fee or other charge for medical service or treatment under this subtitle is limited to the amount that prevails in the same community for similar treatment of an **injured individual** with a standard of living that is comparable to that of the covered employee.
- (3) At least every two (2) years the Commission shall:
  - (i) review its guide of medical and surgical fees for completeness and reasonableness; and
  - (ii) make appropriate revisions to the guide of medical and surgical fees.

## **Court of Appeals References:**

- 1) Queen v. Agger 287 Md.342, 412 A2d 733 (1980)
- 2) Falik v. Prince George's Hospital & Medical Center, 322 Md. 409, 588 A.2d 324 (1991)

## **Introduction**

Please accept these written comments in the spirit with which they were prepared, which was to promote the provision of timely, appropriate health care for injured workers. The members of the Maryland Workplace Health Care Association, Inc. (MWHCA) sincerely believe that the quality of health care for injured workers should never be compromised to achieve a political or economic objective. Given a full and fair opportunity, a public policy that provides reasonable reimbursement for the services of the workplace health care provider will prove to be the most efficient, cost effective means to heal and return the injured employees to employment.

## **Summary**

MWHCA members enthusiastically support the “prompt payment” provision of the proposed regulations and many would realize a long overdue relief from the inadequate fees if the proposed regulations were adopted. Unfortunately, the weight of the enumerated digressions from statutory requirements and legislative intent contained in the proposed regulations compel us to express our concerns. Unless amended, these proposed regulations might not withstand legislative and/or judicial scrutiny and in which case they would likely create more serious problems than they could ever hope to resolve.

Our opposition is not a rejection to the use of software used by Medicare for medical reimbursement, known as Resource Based Relative Value System (RBRVS). If the Workers’ Compensation Commission (WCC) decides to discontinue the current process of maintaining a Maryland specific Fee Guide, RBRVS may be the best alternative. However, WCC must recognize that RBRVS was not designed specifically for workers’ compensation health care pricing. Therefore, the use of RBRVS should not be approved without appropriate adjustment, which the proposed regulations are lacking.

RBRVS does not relieve the WCC of the statutory obligation to conduct a survey of similar health care services provided to injured individuals every two years. Such a survey must be: a) free of any arbitrary constraints or bias, and b) commissioned for the specific purpose of determining the prevailing [maximum] fees for health care provided to injured workers in the community. However, the survey commissioned for the proposed revisions fails to meet either

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the statutory requirements or the legislative intent of the Maryland Workers' Compensation Law for that purpose.

## Recommendations

The proposed regulations would be greatly improved if:

- 1) Eliminate the "cost neutral" constraint imposed on the survey conducted for the proposed regulations and any future Fee Guide adjustments; and
- 2) Incorporate the existing Fee Guide as a minimum prevailing fee for the initial RBRVS Fee Guide.

## Primary Reasons for Opposition

1) Imposition of a "cost neutral" conversion factor<sup>1</sup> (109 %) for determining The Maximum Reimbursement Allowable (MRA). Such a constraint precludes any objective approximation of prevailing fees for similar treatments of injured individuals in the community and is thus contrary to the statutory requirements or the legislative intent under which the proposed regulations have been promulgated.

The reason given by the WCC to justify the "cost neutral" factor is the desire to keep health care costs from increasing. However, there is no such authorization in the Law or any appellate decision that would permit much less require such a presumption.

Maryland's Workers' Compensation Law – Labor and Employment Article, Section 9-663, permits the WCC to regulate payments for "medical services or treatment," but requires that such regulation approximate "the amount that prevails in the same community for similar treatment of an injured individual."

Clearly, the statute refers to specific criteria, which the WCC is required to follow but failed to incorporate into its selection of RBRVS or the formulation of the MRA.

- The Fee Guide should serve the interests of the injured workers to insure that they receive prompt and appropriate health care;
- The Fee guide must be based on an unbiased comparison of fees paid for similar treatment of injured individuals
- That the WCC conduct the comparison or survey every two years.

2) The WCC choose not to recognize the fees paid using the current Medical Fee Guide as representative of prevailing fees when promulgating the proposed regulations. The existing Fee Guide is, without question a reliable, if not the most reliable, source of information regarding the amount paid for health care of injured workers in Maryland for the past nine years. It seems incongruous to MWHCA that the WCC would adopt RBRVS in such a way as to reduce existing fees for any health care providers. In doing so, the WCC creates a situation where health care fees in many categories of critical importance to injured workers, will be significantly reduced below levels where they have been frozen for many years. The available data clearly indicates

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<sup>1</sup> RFP Medical Fee Guide Revision Plan November 22, 2002

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that the use of a “single multiplier” and “cost neutral” calculation fails to maintain health care fees for many services at levels prevailing in the community for similar services provided to injured workers. The following table provides just a few examples where the proposed regulations would reduce fees significantly below the existing fee guide.

<b>CATEGORY</b>	<b>CPT Code</b>	<b>DISCRIPTION</b>	<b>GUIDE</b>	<b>M-CARE</b>	<b>%VAR</b>
<b>E&amp;M</b>	<b>99283</b>	<b>Emerg. Visit</b>	<b>\$92</b>	<b>\$59</b>	<b>&lt;55&gt;</b>
<b>General Medicine</b>	<b>93010</b>	<b>EKG</b>	<b>\$15</b>	<b>\$9</b>	<b>&lt;66&gt;</b>
<b>Physical Medicine</b>	<b>97750</b>	<b>P.T. Test</b>	<b>\$45</b>	<b>\$26</b>	<b>&lt;75&gt;</b>
<b>Radiology</b>	<b>72148</b>	<b>MRI</b>	<b>\$643</b>	<b>\$521</b>	<b>&lt;25&gt;</b>
<b>Surgery</b>	<b>29881</b>	<b>Art-Scope Knee</b>	<b>\$1,600</b>	<b>\$521</b>	<b>&lt;154&gt;</b>
	<b>49505</b>	<b>Hernia</b>	<b>\$827</b>	<b>\$464</b>	<b>&lt;78&gt;</b>
	<b>56316</b>	<b>Lap-Scope Hernia</b>	<b>\$511</b>	<b>\$371</b>	<b>&lt;38&gt;</b>
	<b>63030</b>	<b>Lumbar Lam-tomy</b>	<b>\$1,800</b>	<b>\$873</b>	<b>&lt;106&gt;</b>

In each of these examples, the proposed regulations would reduce the fees for health care below the existing Fee Guide, which is the prevailing rate of reimbursement for such services and has been for almost ten years. This result is directly attributed to the WCC decision to impose a “cost neutral” precondition on the survey in question.

3) Applying RBRVS without appropriate adjustments to allow for the difference between health care provided for Medicare patients and that required for treatment of injured workers. In so doing the WCC ignores the statutory requirement that the Fee Guide reflect the amounts paid for “similar treatment.” Medicare provides access to a large pool of patients, requires minimal record keeping and is not subject to denial by an employer or insurer. A procedure covered by Medicare requires only a standardized report of service, which is prepared and transmitted electronically, and paid automatically within 30 days. As a result Medicare rates of reimbursement are generally lower. Conversely, workers’ compensation related health care is the most difficult and expensive to provide with low patient volumes.

The level of difficulty and the specialized nature of workers’ compensation related health care explains why relatively few health care providers choose to accept workers’ compensation patients and why such care requires higher levels of reimbursement. Workers’ compensation providers are required to obtain pre-authorization for each and every treatment in addition to maintaining extensive detailed medical records and provide numerous detailed reports on such issues as light duty and return to work, which are not required for a Medicare patient. Unlike Medicare these records and reports must be maintained manually and transmitted via mail or Fax. Even after the health care provider has recorded all the pertinent information and transmitted the required reports, there are many additional consultations, records and reports for nurse case managers and adjusters. Equally time consuming and expensive for workers’ compensation related health care are the extensive delays and other complications associated with the billing and collection of fees which cannot be processed electronically and require detailed, patient specific information.

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## **Conclusion**

Even a rudimentary application of economic principles raises the likely possibility that the specific services for which fees are reduced may become “price in-elastic.”<sup>2</sup> If that occurs, the proposed regulations would impose hardships on injured workers and employers. Workers may experience increasing delays and difficulty is obtaining care with longer periods of time between injury and return to work. In such cases, employers’ indemnity costs will increase.

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<sup>2</sup> As payments are reduces, the availability [supply]of the product or service declines