

ACTION: Notice of Decision on Petition for Rulemaking Action

SUBJECT: Petition by the California Association of Physician Groups requesting amendment or repeal of subdivision (a)(3)(B) of section 1300.71 of title 28, California Code of Regulations (Rule 1300.71).

PETITIONER

The California Association of Physician Groups' (CAPG) petition for rulemaking action (Petition) was received by the Department of Managed Health Care (Department) on March 19, 2009. Pursuant to the requirements of Government Code section 11340.7, the Department provides this response to the Petition.

CONTACT PERSON

Inquiries concerning this decision may be directed to Emilie Alvarez, Regulations Coordinator, Department of Managed Health Care, Office of Legal Services, by mail at: 980 9th Street, Suite 500, Sacramento, CA 95814, by telephone at: (916) 322-6727, or by e-mail at: ealvarez@dmhc.ca.gov or regulations@dmhc.ca.gov.

AVAILABILITY OF PETITION

The Petition for the amendment or repeal of regulations is available upon request directed to the Department's Contact Person.

AUTHORITY

Under authority established in the Knox-Keene Act¹, including but not limited to Health and Safety Code sections 1343, 1344 and 1346, the Department may adopt, amend and rescind regulations as necessary to carry out the provisions of the Act.

¹ Health and Safety Code section 1340 *et seq.* References to the "Act" are to the sections of the Knox-Keene Act.

DETERMINATION ON THE PETITION

Rule 1300.71,² subdivision (a)(3)(B), which defines “reimbursement of claim,” was noticed and adopted by the Department pursuant to the Administrative Procedure Act (APA) and approved by the Office of Administrative Law (OAL) on July 24, 2003.

The actions requested to be taken in the Petition specifically concern the considerations relevant to the determination of reasonable and customary value for services performed by non-contracted providers, which are detailed in subdivision (a)(3)(B) of Rule 1300.71, and are referred to as the six “*Gould*” criteria.³

The Petition requests two alternative rulemaking actions:

1. Repeal subdivision (a)(3)(B) of Rule 1300.71; or
2. Amend subdivision (a)(3)(B) of Rule 1300.71 to include the following three additional factors:
 - (vi) average contract rates for the service of payors and providers in the general geographic area in which the service was provided;
 - (vii) rates paid pursuant to established fee schedules by governmental payors (e.g., Medicare, MediCal, Healthy Families Programs) for the service;
 - (viii) average amount for the service paid to and accepted by non-contracted providers in the general geographic area in which the service was provided;

The Petition proposes that adding the above-referenced factors to the six factors already set forth in subdivision (a)(3)(B) “will make the Regulation consistent with prevailing law, and will provide appropriate guidance to payors, providers, and dispute resolvers in this area.”

The Petition cites recent legal developments as a reason for amending Rule 1300.71:

Since the Regulation was adopted the Governor promulgated Executive Order S-13-06, the courts decided the *Bell* and *Prospect* case and the Workers Compensation Appeals Board has had an opportunity to apply the *Gould* case itself. As set forth below, these developments require the Regulation to be reexamined.

However, these legal developments do not require the Department to initiate rulemaking to amend or repeal subdivision (a)(3)(B). First, Executive Order S-13-06 directs the Department’s Director to conduct a review of the criteria included in subdivision (a)(3)(B), but does not require

² California Code of Regulations, title 28, section 1300.71 subdivision (a)(3)(B), concerns claims settlement practices.

³ *Gould v. Workers’ Compensation Appeals Board, City of Los Angeles (Gould)* (1992) 4 Cal.App.4th 1059, 1071.

changing the regulation.⁴ Second, the holdings in *Bell v. Blue Cross of California*⁵ and *Prospect Medical Group v. Northridge Emergency Medical Group*⁶ do not address the validity of factors used in determining reasonable payment of noncontracted providers, the subject matter of subdivision (a)(3)(B). Third, the Petition's reference to the application of the *Gould* case in a 2002 Workers' Compensation Appeals Board (WCAB) decision,⁷ and the workers' compensation context of the *Gould* case itself, are not legal developments that occurred after the regulation was enacted, but, rather, reflect California law in existence when Rule 1300.71 was adopted, which remains current law.⁸ Finally, Rule 1300.71 was reviewed for consistency with existing statutes, court decisions, or other provisions of law by OAL in 2003.

For the reasons stated above, the Department declines to initiate rulemaking to amend or repeal subdivision (a)(3)(B) of Rule 1300.71 based on legal developments since the regulation was adopted.

The Petition also states that subdivision (a)(3)(B) violates the APA's consistency requirement:

The considerations relevant to the determinations of "reasonable and customary value" detailed in the Regulation are not an accurate reflection of the "reasonable value" standard under California law. Specifically, the references to "the fees *charged* by the provider" and the "prevailing provider rates *charged* in the general geographic area in which the services were rendered" are not supported by either statute or case law. Accordingly, CAPG believes that the Regulation violates the consistency requirement under the APA. [Italics in Petition.]

The Department declines to initiate a rulemaking action to amend or repeal subdivision (a)(3)(B), since that subdivision is consistent with existing law. First, the *Gould* factors are supported by, and are consistent with California case law.⁹ Second, while the Petition refers to case law from other states, such law is not controlling as to the Department's determinations regarding rulemaking actions. Third, the 2002 WCAB decision cited in the Petition is consistent with the *Gould* criteria.¹⁰ Finally, OAL conducted a review of the regulation and made a determination concerning the consistency of subdivision (a)(3)(B) with existing statutes, court decisions, or other provisions of law when it approved the regulation in 2003.¹¹

The Department has determined that the factors and criteria set forth in subdivision (a)(3)(B) of Rule 1300.71 are consistent with existing statutory and case law, and that legal developments since the approval of subdivision (a)(3)(B) do not require that the regulation be reexamined.

⁴ Governor's Executive Order No. S-13-06 (July 25, 2006).

⁵ (2005) 131 Cal.App.4th 211.

⁶ (2009) 45 Cal. 4th 497.

⁷ *Kunz v. Patterson Floor Coverings, Inc. (Kunz)* (2002) 67 Cal. Comp. Cas. 1588.

⁸ Claims Settlement Practices and Dispute Resolution Mechanisms, Final Statement of Reasons, 2002-REG-10.

⁹ *Gould, supra*, 4 Cal.App.4th 1059.

¹⁰ *Kunz, supra*, 67 Cal. Comp. Cas. 1588.

¹¹ Government Code section 11349.1, subdivision (a).

For the reasons set forth above, the Department has determined not to initiate a rulemaking action to amend or repeal the regulation as requested in the Petition.

Petitioner's interest in the Department's rulemaking process is appreciated.