STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

AGENCY:	DEPARTMENT OF INSURANCE	)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
		)	
		)	(Gov. Code, sec. 11349.3)
ACTION:	Amend section 2698.91 and Adopt section 2698.92 of Title 10 of the California Code of Regulations	)	OAL File No. 06-1114-04 S

DECISION SUMMARY

The California Department of Insurance (hereinafter "Department") proposed regulatory amendments to the California Code of Regulations (CCR[1]) to specify procedures and requirements that must be followed by insurers conducting labor rate surveys of auto body repair shops . On November 14, 2006, the regulation was submitted to the Office of Administrative Law (OAL) for review. OAL notified the Department that it had disapproved the regulation on December 29, 2006. OAL disapproved the regulation because provisions of the regulation did not comply with the consistency, authority, reference, necessity, and clarity standards of the Administrative Procedure Act (APA) and for failure to comply with the procedural requirements of the APA. The rulemaking record submitted to OAL does not provide adequate information for OAL to evaluate whether or not the proposed regulation is within the scope of authority conferred and in accordance with standards prescribed by other provisions of law as required by section 11342.1 of the Government Code[2]. The format of the summary and response to comments makes it impossible for OAL to determine whether the Department's responses satisfy the requirements of section 11346.9. OAL reserves the right to review the regulation for compliance with sections 11342.1 and 11346.9 if the Department resubmits this rulemaking file pursuant to section 11349.4.

1 Citations to the California Code of Regulations in this Decision of Disapproval will employ the format of [Title #] CCR [Section #]. Thus, 10 CCR 2698.91 refers to section 2698.91 of Title 10 of the California Code of Regulations.

2 Unless stated otherwise, all section references are to the California Government Code.

DISCUSSION

BACKGROUND

In 2000 the Legislature passed and the Governor signed SB 1988 (Speier), legislation relating to insurance fraud. One provision of this legislation added section 758 to the California Insurance Code. Insurance Code section 758 (hereinafter "IC 758") imposed limitations upon permissible relationships between insurers and auto body repair shops[3] and created a rule for reporting and tracking cases in which an insurer denies the request of an auto body shop to join the insurer's direct repair program.

Of significance to this regulatory action was the enactment of subdivision (c)[4] of IC 758. This subdivision requires insurers that elect to conduct a survey of labor rates for auto body repair shops in a particular area to report the results of that survey to the Department.

In 2002 the Department adopted and OAL approved 10 CCR 2698.91 in order to implement, interpret, and make specific IC 758. 10 CCR 2698.91 defines terms used in IC 758, specifies the precise information that must be reported to the Department pursuant to IC 758, and specifies how the Department will handle the reported results of insurer labor rate surveys. All of the provisions currently in 10 CCR 2698.91 are clearly within the scope of IC 758.

On November 14, 2006, the Department submitted the present rulemaking record to OAL for review pursuant to section 11349.1. It amends 10 CCR 2698.91 and adopts 10 CCR 2698.92 as follows:

- Defines "survey" to include "any gathering of information", whether or not it comes from auto body shops, including information that results from an insurer's own auto body repair experience, regarding auto body shop labor rates.
- Defines "prevailing auto body rate" as the greater of either 1) the mean rate in a specific geographic area, or 2) the median rate in a specific geographic area.
- Requires labor rate survey results reported to the DOI to include the following information that will be made available to the public:
    - The name and address of each auto body shop that responded to the survey.

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3 Under California law, auto body repair shops are regulated by the California Bureau of Automotive Repairs. The Department has no direct regulatory jurisdiction over auto body repair shops. The regulations herein disapproved apply only to insurers.

4 IC 758(c) provides as follows: "Any insurer that conducts an auto body repair labor rate survey to determine and set a specified prevailing auto body rate in a specific geographic area shall report the results of that survey to the department, which shall make the information available upon request. The survey information shall include the names and addresses of the auto body repair shops and the total number of shops surveyed."

  - The date the survey was completed.
  - The total number of shops surveyed in each geographic area and the number of shops that responded to the survey.
  - The prevailing rate determined by the insurer for each geographic area.
  - A description of each geographic area surveyed.
  - A description of the formula used by the insurer to calculate the prevailing rate.
- Requires labor rate survey results reported to the DOI to include the following information that will not be made available to the public:
  - The labor rate of each shop that responded to the survey.
  - The name and address of each shop that didn't respond to the survey.
  - A copy of the survey questionnaire.
- Requires that insurers either do the survey in writing or "maintain written records of the information gathered by means other than writing."
- Provides that the Department shall, on request, be given "access to all records, data, computer programs, or any other information" used to determine geographic area labor rates.
- Requires survey results to be submitted to the Department within 30 calendar days of completion.
- Requires surveys to be done not less than annually if "survey data used by an insurer is changing on a regular basis."
- Prohibits insurers from including any rates in their surveys if the rates are used in any direct repair program.
- Declares that the "primary purpose of a survey . . . is to inform the public about the prevailing labor rates".
- Prohibits the use of a survey "to cap or reduce the labor rate charged on an estimate or repair order prepared by the claimant's chosen auto body repair shop or to support the reasonableness of an insurers' (sic) adjustment of a written estimate".
- Declares that "nothing in these regulations shall be construed to require an insurer to pay more than the reasonable amount necessary to perform workmanlike repairs."
- Declares that the regulations do not prevent an insurer from negotiating for a specific rate.
- Declares that the regulations do not require insurers to conduct labor rate surveys.
- Declares that if standards in 10 CCR 2698.92 are in conflict with standards in 10 CCR 2698.91, the 10 CCR 2698.92 standards shall supersede the standards of 10 CCR 2698.91.
- Provides that, if a survey complies with 10 CCR 2698.92, "the Department may consider this survey in determining whether an insurer has offered a fair and reasonable" settlement.
- Requires, "unless otherwise authorized by the Department," that a survey compliant with 10 CCR 2698.92 be submitted to the Department no less than annually.

- Provides that, in order to be statistically valid, a survey "must survey all known auto body repair shops licensed . . . in a specific geographic area."
- Provides that a survey may only include licensed auto body repair shops.
- Provides that a survey may only include auto body repair shops meeting the following criteria:
    - Have all the equipment required by Bureau of Automotive Repair regulations.
    - Have proof of workers compensation and liability insurance.
    - Have a gas/metal arc welder and technicians qualified to use it.
    - Have the ability to hoist a vehicle for inspection and repair.
    - Have a four-point anchoring system to hold a vehicle in a stationary position.
    - Have "electrical or hydraulic equipment capable of making simultaneous multiple body or structural pulls".
    - Have a pressurized spray booth.
    - Have "the ability to verify four wheel alignment through computer printout".
    - "Offer a written limited lifetime warranty against defects in workmanship".
    - Have the ability to remove and reinstall frame, suspension, engine and drive train components.
    - Have the ability to evacuate, reclaim, and recharge auto air conditioners in an EPA-compliant manner or subcontract for this service.
    - "Subscribe to a provider of structural specifications with periodic updates covering the vehicles structure for the make, model, and year of the vehicle(s) being repaired and wheel alignment specifications for the make, model, and year of the vehicle(s) being repaired."
- Provides that the "survey results shall contain the labor rate amount charged by each particular shop that responded to the survey."
- Defines 114 geographical zones of widely varying size and population, most but not all of which are defined by the city or cities they contain, and requires insurers to survey using only these zones "unless otherwise approved by the Commissioner."

On December 29, 2006, OAL notified the Department that the rulemaking file was disapproved.

DEFERRAL OF ANALYSIS REGARDING SECTION 11342.1

The broad scope of this regulation immediately suggests the question of whether or not it violates section 11342.1[5]. Section 11342.1 is a global statute designed to guard against regulatory over-reaching by a state agency. A regulation that enlarges the scope of a statute

5 The relevant provision of section 1342.1 provides as follows: "Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."

beyond what the Legislature intended violates this section and is invalid[6]. Here the Department has taken a statute saying little more than "if an insurer does a survey, it must report the results to the Department" and produced an extensive and prescriptive set of requirements for what is permitted and what is required in a survey. On the surface it certainly appears questionable that in enacting IC 758(c) the Legislature intended to grant to the Department authority to adopt this extensive regulatory scheme.

However, the record before OAL is incomplete on this issue. As will be explained hereafter in greater detail, the Department has not adequately documented the authority for and necessity of many of the components of the proposed regulation to effectuate the purposes of IC 758. Due to this inadequate documentation in the rulemaking record, OAL cannot conclude as a matter of law that the regulation exceeds the authority granted by the Legislature. Hence, OAL defers examination until such time as a more complete record is before us.

Following receipt of this Decision of Disapproval, the Department has 120 days pursuant to section 11349.4 to modify the regulation and supplement the rulemaking record in response to the decision and resubmit it to OAL. Should the Department elect to resubmit this file pursuant to section 11349.4, OAL will re-examine the issue of authority pursuant to section 11342.1. OAL reserves the right to disapprove the resubmitted regulation if upon review of the resubmitted rulemaking record it is determined that the regulation is not within the scope of authority conferred by the Legislature.

COMPLIANCE WITH SUBSTANTIVE RULEMAKING STANDARDS

Authority Under Section 11349.1(a)(2)[7]. "Authority" is defined by section 11349(b) as "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." Authority may be either "express" if it is explicitly granted by a provision of the state

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6 "If, in interpreting the statute, the court determines that the administrative action under attack has, in effect, 'alter[ed] or amend[ed] the statute or enlarge[d] or impair[ed] its scope,' it must be declared void" [citation omitted]. *Association for Retarded Citizens v. Department of Developmental Services* 38 Cal.3d 384, 391, 211 Cal.Rptr. 758, 761 (1985).

7 The APA, somewhat confusingly, uses the term "authority" in two slightly different though related ways. For purposes of section 11342.1, as discussed above, "authority" refers primarily to the question of whether the rulemaking agency has assumed regulatory power that the Legislature did not intend to grant in the enabling statute – is the agency operating within the "scope of authority conferred" by the law?. As used in sections 11349 and 11349.1 the meaning does not have the same focus upon the "scope" of the authority. For these sections the focus is more general, seeking an answer to the question of "what law gives this agency the power to adopt regulations on this subject?" Thus, citing IC 758 may satisfy the authority requirement for purposes of section 11349.1, since the section clearly grants implied authority to adopt such regulations as are necessary for its implementation, even though it would not satisfy section 11342.1 if the specific regulation being adopted exceeds the "scope of authority conferred" by the Legislature.

constitution or a state statute[8]. Authority may also be implied when the regulation is necessary to achieve the purpose of a constitutional provision or state statute[9].

The Department has added IC 790.03 as an authority citation for 10 CCR 2698.91. IC 790.03 is a broad statute defining "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance." It contains no provisions at all specifically related to auto body repair shop labor rate surveys. In fact, it contains no provisions specific to automobile insurance claims. There is no apparent direct connection between the subject matter of the proposed regulations and the subject matter of IC 790.03. Insurance Code 790.03 does not appear to be a statute that "expressly permits or obligates the [Department] to adopt, amend, or repeal the proposed regulation." Since it does not address auto body shop labor rate surveys, it also does not appear to be a statute "which impliedly permits or obligates the [Department] to adopt, amend, or repeal the regulation in order to achieve the purpose" of IC 790.03. The record before us does not support the use of IC 790.03 as an authority citation for 10 CCR 2698.91.

IC 790.03 is also cited as authority for adoption of 10 CCR 2698.92. For the same reasons that this section is an improper authority citation for 10 CCR 2698.91, it fails as an authority citation for 10 CCR 2698.92. The subject matter of these two sections is identical. The fact that IC 790.03 makes no reference to labor rate surveys and has no apparent relation to labor rate surveys makes this section an improper authority citation for both 10 CCR 2698.91 and 10 CCR 2698.92[10].

The Department cites IC 790.10[11] as authority for 10 CCR 2698.92 (though not for 10 CCR 2698.91). IC 790.10 is a general authorization for the commissioner to adopt regulations necessary to administer the Unfair Practices article[12] of the Insurance Code. Just as discussed

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8 1 CCR 14(a)(1).

9 1 CCR 14(a)(2).

10 The Department may have included IC 790.03 as an authority citation with specific focus upon IC 790.03(h), which deals with unfair claims settlement practices. Although auto labor rate surveys are used in the claims settlement process, IC 790.03(h) cannot be interpreted to authorize these regulations. IC 790.03(h), by its own terms, prohibits specified actions only when they are "knowingly commit[ed] or perform[ed] with such frequency as to indicate a general business practice." Under 10 CCR 2698.91 and 10 CCR 2698.92, any single violation of the established regulatory scheme would be illegal. A statute which proscribes the repeated and knowing commission of prohibited acts cannot logically be interpreted to authorize, either expressly or by implication, a regulation that creates single-act violations.

11 IC 790.10 provides as follows: "The commissioner shall, from time to time as conditions warrant, after notice and public hearing, promulgate reasonable rules and regulations, and amendments and additions thereto, as are necessary to administer this article."

12 Article 6.5 of Chapter 1 of Part 2 of Division 1 of the Insurance Code, comprising sections 790 to 790.15.

above with specific reference to IC 790.03, nothing in the Unfair Practices article appears to be applicable to auto body repair shop labor rate surveys. The inclusion of IC 790.10 as an authority section for 10 CCR 2698.92 is therefore improper.

The Department cites IC 758.5[13] as authority for 10 CCR 2698.92 (though not for 10 CCR 2698.91). IC 758.5 deals exclusively with how and when an insurer may recommend a particular auto body shop to a claimant. It has no provisions at all regarding labor rate surveys, either expressly or implicitly. It is not a proper authority citation for 10 CCR 2698.92.

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13 IC 758.5 provides as follows:

(a) No insurer shall require that an automobile be repaired at a specific automotive repair dealer, as defined in Section 9880.1 of the Business and Professions Code.

(b) (1) No insurer shall suggest or recommend that an automobile be repaired at a specific automotive repair dealer unless either of the following applies:

(A) A referral is expressly requested by the claimant.

(B) The claimant has been informed in writing of the right to select the automotive repair dealer.

(2) If the recommendation is accepted by the claimant, the insurer shall cause the damaged vehicle to be restored to its condition prior to the loss at no additional cost to the claimant other than as stated in the policy or as is otherwise allowed by law. If the recommendation of an automotive repair dealer is done orally, and if the oral recommendation is accepted by the claimant, the insurer shall provide the information contained in this paragraph, as noted in the statement below, to the claimant at the time the recommendation is made. The insurer shall send the written notice required by this paragraph within five calendar days from the oral recommendation. The written notice required by this paragraph shall include the following statement plainly printed in no less than 10-point type: "WE ARE PROHIBITED BY LAW FROM REQUIRING THAT REPAIRS BE DONE AT A SPECIFIC AUTOMOTIVE REPAIR DEALER. YOU ARE ENTITLED TO SELECT THE AUTO BODY REPAIR SHOP TO REPAIR DAMAGE COVERED BY US. WE HAVE RECOMMENDED AN AUTOMOTIVE REPAIR DEALER THAT WILL REPAIR YOUR DAMAGED VEHICLE. IF YOU AGREE TO USE OUR RECOMMENDED AUTOMOTIVE REPAIR DEALER, WE WILL CAUSE THE DAMAGED VEHICLE TO BE RESTORED TO ITS CONDITION PRIOR TO THE LOSS AT NO ADDITIONAL COST TO YOU OTHER THAN AS STATED IN THE INSURANCE POLICY OR AS OTHERWISE ALLOWED BY LAW. IF YOU EXPERIENCE A PROBLEM WITH THE REPAIR OF YOUR VEHICLE, PLEASE CONTACT US IMMEDIATELY FOR ASSISTANCE."

(c) Except as provided in subparagraph (A) of paragraph (1) of subdivision (b), after the claimant has chosen an automotive repair dealer, the insurer shall not suggest or recommend that the claimant select a different automotive repair dealer.

(d) Any insurer that, by the insurance contract, suggests or recommends that an automobile be repaired at a particular automotive repair dealer shall also do both of the following:

(1) Prominently disclose the contractual provision in writing to the insured at the time the insurance is applied for and at the time the claim is acknowledged by the insurer.

(2) If the claimant elects to have the vehicle repaired at the shop of his or her choice, the insurer shall not limit or discount the reasonable repair costs based on charges that would have been incurred had the vehicle been repaired by the insurer's chosen shop.

(e) For purposes of this section, "claimant" means a first-party claimant or insured, or a third-party claimant who asserts a right of recovery for automotive repairs under an insurance policy.

(f) The powers of the commissioner to enforce this section shall include those granted in Article 6.5 (commencing with Section 790) of Chapter 1 of Part 2 of Division 1.

Both 10 CCR 2698.91 and 10 CCR 2698.92 also list IC 12921 and IC 12926 as authority. These sections are proper authority citations for the purpose of demonstrating that the Department has general authority under the law to adopt regulations. Neither section, however, grants any authority specific to the issue of auto body repair shop labor rate surveys. They grant the Department general authority to adopt regulations that are necessary to implement, interpret, or make specific the provisions of the Insurance Code. Absent more specific authority, however, they do not authorize any particular regulation. In the case of these regulations the only cited statute that provides specific subject matter authority for these regulations is IC 758. The citations to IC 758.5, IC 790.03, and IC 790.10 violate the authority standard of section 11349.

Reference. Reference is, in general terms, the other side of the coin from authority. A proper authority citation identifies the statute or other law that permits the rulemaking agency to adopt the regulation. A proper reference citation identifies the law that is being implemented by the regulation. It is not uncommon for the same statute to be properly cited as both authority and reference. The precise legal definition of this concept is that "reference" is "the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation"[14].

The Department has added IC 790.03 as a reference citation for 10 CCR 2698.91, and has cited IC 758.5, IC 790.03 and IC 790.10 as reference citations for 10 CCR 2698.92. These citations are all improper for the same reasons that they were improper authority citations. None of the cited statutes addresses the subject matter of the proposed regulations. The regulations cannot "implement, interpret, or make specific" these unrelated statutes.

The Department also cites 10 CCR 2695.8(f)(3)[15] as a reference to both 10 CCR 2698.91 and 10 CCR 2698.92. While not strictly prohibited in all cases, citation of one regulation as reference for another is not favored. Pursuant to 1 CCR 14(b), reference is presumed to exist by citation to an appropriate California constitutional provision, California statute, federal statute or regulation, or California Supreme Court or appellate court decision. Citation to a California regulation enjoys no such presumption. This is particularly true when, as here, the cited

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14 Section 11349(e).

15 10 CCR 2695.8(f)(3) provides as follows:
(f) If partial losses are settled on the basis of a written estimate prepared by or for the insurer, the insurer shall supply the claimant with a copy of the estimate upon which the settlement is based. The estimate prepared by or for the insurer shall be of an amount which will allow for repairs to be made in a workmanlike manner. If the claimant subsequently contends, based upon a written estimate which he or she obtains, that necessary repairs will exceed the written estimate prepared by or for the insurer, the insurer shall:
. . .
(3) reasonably adjust any written estimates prepared by the repair shop of the claimant's choice and provide a copy of the adjusted estimate to the claimant.

regulation was adopted by the same agency that is proposing to adopt the regulation under review.

Although there is nothing in the record which precisely explains this citation, the Department would presumably argue that the extensive regulation of auto body repair shop labor rate surveys implements, interprets, or makes specific how an insurer may "reasonably adjust[]" an auto body repair claim when a claimant's repair estimate exceeds the insurer's. However, by citing this section the Department is attempting to bootstrap its regulatory reference. 10 CCR 2695.8 was determined to be a valid implementation of IC 758.5 and IC 790.03. As previously indicated, these statutes are not implemented, interpreted, or made specific by 10 CCR 2798.91 or 10 CCR 2798.92. The Department cannot obtain a secondary validation of reference to these provisions by citing as reference another regulation based upon these statutes.

Furthermore, permitting citation to this regulation would create a substantial clarity problem[16] with respect to 10 CCR 2695.8. A member of the regulated public consulting 10 CCR 2695.8 would have no way of knowing that this regulation is further implemented, interpreted, or made specific by another unreferenced regulation. Permitting 10 CCR 2695.8 to be further implemented, interpreted, or made specific by another regulation in a different article of a different subchapter would create a clarity problem in 10 CCR 2695.8 in violation of section 11349.1(a)(3).

In the case of these citations it is not proper to cite one provision of the California Code of Regulations as reference for another regulation. If the Department believes that 10 CCR 2695.8 is in need of further implementation, interpretation, or clarification, it is within the Department's own power to amend that section.

In summary, the rulemaking record does not demonstrate that these regulations implement, interpret, or make specific any of the provisions of IC 758.5, IC 790.03, IC 790.10, or 10 CCR 2695.8(f)(3). The only reference citation dealing with the subject matter of these regulations is IC 758. The citations to IC 758.5, IC 790.03, IC 790.10, or 10 CCR 2695.8(f)(3) violate the reference standard of the APA.

Necessity. In order for a regulation to be valid, it must be necessary to effectuate the purpose of the law being implemented, interpreted, or made specific[17]. Necessity must be demonstrated in

16 Section 11349(c) requires that regulations be "displayed so that the meaning of the regulations will be easily understood by those persons directly affect by them". If the meaning of one regulation can only be determined by reference to another regulation, and there is nothing in the primary regulation indicating this, then the regulation cannot be considered to be displayed in a way that makes the meaning "easily understood."

17 Section 11349(a)

the rulemaking record by substantial evidence. In order to demonstrate necessity the rulemaking record must contain information explaining the specific purpose of each provision of the regulation and explaining why each provision is required to carry out its purpose[18].

In the case of these regulations, many of the provisions fail to meet the necessity standard with respect to effectuating the purpose of IC 758. As indicated above, IC 758 is the only statute cited in the regulation which is an appropriate reference for this regulation. Information in the rulemaking file which does not demonstrate that a provision is necessary to effectuate the purpose of IC 758, therefore, is irrelevant.

The Initial Statement of Reasons (ISOR) contains descriptions of the impact of each provision, but in most cases these are primarily statements of general purpose, rather than facts based upon substantial evidence. Also, in many cases they do not explain why the provisions are necessary to effectuate the purpose of IC 758.

For example, the ISOR describes the necessity for 10 CCR 2698.91(f), which adopts a rule governing submission of survey results, by saying that the provision "is necessary to better implement the statutory provisions and simplify the submission and publication of the statutory requirements." This rule, among other things, requires survey results to be submitted to the Department within 30 days of completion and it requires, in certain cases, that "the survey shall be submitted no less than annually." Neither the description of this rule in the ISOR nor information found elsewhere in the rulemaking record establishes, by substantial evidence, the need for these precise provisions in order to effectuate the purposes of IC 758.

Another example is found in the amendment of 10 CCR 2698.91(b), which redefines "prevailing auto body rate" to be the greater of the mean rate determined by the survey or the median rate determined by the survey. The ISOR contains no evidence supporting the specific rationale for this distinction. Why is it necessary for the prevailing rate to be the higher of these two figures rather than the lower of the two figures? The ISOR contains only the circular statement that this is necessary "in order that the rate described above does not fall below the average of rates in the area." Conclusory statements such as this do not constitute substantial evidence that the rule is necessary to effectuate the purpose of the statute.

Proposed 10 CCR 2698.92(c) says that "[t]o be a statistically valid survey, the insurer must survey all known auto body repair shops" in the survey area. The rulemaking record provides no evidence demonstrating that a statistically valid survey cannot be accomplished by surveying fewer than "all known" auto body repair shops in a given geographic area.

10 CCR 2698.92 (e) lists specific characteristics that an auto body repair shop must have in order

18 10 CCR 10(b)

to be included in a survey. Although the rulemaking record contains some explanation as to how this list of characteristics was developed, it does not contain substantial evidence demonstrating that an auto body repair shop which did not have each characteristic would necessarily have labor rates which are not reflective of the prevailing rate of the market.

Proposed 10 CCR 2698.92(j) defines 114 different geographic zones. Under the regulations an insurer would be permitted to use only these zones "unless otherwise approved by the Commissioner." There is no evidence in the rulemaking record supporting the necessity for standardizing geographic zones in order to effectuate the purposes of IC 758. Furthermore, even the rulemaking record did include this evidence, there is also no evidence regarding the necessity for these particular zones. The zones are based mostly, but not exclusively, upon city boundaries. There is no evidence in the rulemaking record supporting the necessity of excluding most unincorporated areas of the state from allowable areas for surveys. The size of the geographic zones varies dramatically, from zones with a total population of only a few thousand people (e.g., Zone 001) to zones with populations of several million people (e.g., Zone 091 and Zone 097). There is no evidence at all in the rulemaking file, substantial or otherwise, demonstrating why the definition of these particular zones is necessary to effectuate the purposes of IC 758.

An adequate showing of necessity for this section would provide substantial evidence demonstrating why standardized geographic zones for all insurer labor rate surveys are necessary to effectuate the purpose of IC 758. If the regulation defines each zone, the demonstration of necessity must be made for each defined zone. Alternatively, if it can be demonstrated that standardized geographic zones are necessary to effectuate the purposes of IC 758, the record of the rulemaking record could establish the necessity for each individual zone by describing the methodology employed in defining these zones and providing substantial evidence that this methodology is necessary in order to effectuate the purpose of IC 758.

The deficiencies in demonstrating necessity listed above are exemplary; they do not comprise a complete list of all inadequate showing of necessity. Should the Department resubmit this rulemaking file pursuant to section 11349.4, it must demonstrate by substantial evidence that each provision of the regulation is necessary to effectuate the purpose of the reference statute or statutes.

Clarity. Regulations must be written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them[19]. The proposed regulations contain provisions which do not satisfy this standard.

10 CCR 2698.91(j) says that "[n]othing in these regulations shall be construed to require an

19 Section 11349(c).

insurer to pay more than the reasonable amount necessary to perform workmanlike repairs." The regulatory impact of this provision is unclear in the overall context of these regulations. The definition of "prevailing rate" as modified in 10 CCR 2698.91(b) is the higher of the median or the mean rate revealed in a survey. If an insurer finds in a survey that workmanlike repairs can be performed by an auto body repair shop which charges a labor rate equal to the *lower* of the median or the mean rate found in the survey, may the insurer refuse to pay the higher "prevailing" rate revealed by the survey based upon 10 CCR 2698.91(j)? It appears that doing so would violate the capping prohibition found in 10 CCR 2698.91(i). This provision, therefore, does not satisfy the clarity requirement of section 11349(c).

10 CCR 2698.91(k) presents a similar clarity problem. It provides that "[n]othing in these regulations shall be construed to preclude an insurer from voluntarily negotiating and/or contracting with an automobile repair facility for a specific rate." May a claims adjuster employed by an insurer who has been requested to pay $80/hour for labor from an auto body repair shop say "I know that I can get the work done nearby for $70/hour. Will you accept $75?" This exchange would appear to violate the capping or reduction restriction in 10 CCR 2698.91(i), but if this type of exchange is not permitted, what is the meaning of 10 CCR 2698.91(k)? This provision, when evaluated in conjunction with 10 CCR 2698.91(i), does not satisfy the clarity standard.

10 CCR 2698.92(c) requires insurers to survey "all known auto body repair shops" licensed by the Bureau of Automotive Repair in a specific geographic area. 10 CCR 2698.92(d), however, provides that an insurer shall not be required to verify an auto body repair shop's license status. If an insurer knows of an auto body repair shop which, unknown to the insurer, is not licensed by the Bureau of Automotive Repair, may that shop be included in the survey? The regulation does not provide an answer to that question adequate to satisfy the clarity standard.

10 CCR 2698.92(a) provides that "where the standards in this section and Section 2698.91 conflict, the provisions of this section shall supersede the provisions of Section 2698.91." The meaning of this section is unclear. For example, 10 CCR 2698.92(b) creates a standard that "a survey compliant with this section must be submitted to the Department no less than annually." 10 CCR 2698.91(l) provides that "[n]othing in these regulations shall require an insurer to conduct an auto body labor rate survey." Does 10 CCR 2698.92(a) invalidate 10 CCR 2698.91(l) by giving supremacy to 10 CCR 2698.92(b)? If the annual submission requirement is deemed to be a "standard", it does. However, 10 CCR 2698.92(e) refers to auto body repair shops that "meet the following specific standards". Does the term "standards" in 10 CCR 2698.92(a) mean only those subjects specifically identified as "standards" in 10 CCR 2698.92(e)? The regulation is ambiguous on this point and thus fails to satisfy the clarity standard.

Should the Department resubmit this rulemaking file pursuant to section 11349.4, it must ensure

that each provision of the regulation is written or displayed so that the meaning of the regulation may be easily understood by those persons directly affected by them.

Consistency. Pursuant to section 11349(d), all regulations must be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of the law." At least two provisions of this regulation fail to satisfy the consistency standard.

IC 758 applies only if an insurer conducts a labor rate survey. There is nothing in that statute which may be construed to compel an insurer to conduct a labor rate survey under any circumstances. 10 CCR 2698.92(b) provides that "[u]nless otherwise authorized by the Department, a survey compliant with this section must be submitted to the Department no less than annually." 10 CCR 2698.91(f) similarly mandates an annual survey "[i]n cases where the survey data used by an insurer is changing on a regular basis." By mandating that insurers perform surveys, both of these provisions are inconsistent with IC 758 and, thus, fail to satisfy the consistency requirement of section 11349.

COMPLIANCE WITH REQUIRED APA PROCEDURE

The rulemaking file demonstrates cases in which the Department failed to follow required APA procedure.

Document Relied Upon: The ISOR says that 10 CCR 2698.92(e), the section establishing criteria for a body shop that may be included in a survey, was based partly upon the "Minimum Recommended Requirements for a 'Class A' Collision Center" which was "published by the Collision Industry Conference (CIC) in 2005." This is clearly a document relied upon, but it is not in the rulemaking file as required by section 11347.3(b)(7), and apparently it was never made available to the public. The Final Statement of Reasons incorrectly says that the Department "did not rely upon any technical, theoretical and/or empirical study, report, or similar document in proposing this regulation.

Certificate of Closure: The Certificate of Closure in the file is dated November 11, 2006. The Final Statement of Reasons and the Updated Informative Digest are both dated November 13, 2006. The rulemaking record may not contain documents which, as indicated by their dates, were added to the file after the file is certified by the rulemaking agency to be closed.

Summary and Response to Comments: A rulemaking agency is required, pursuant to section 11346.9(a)(3) to prepare a summary and response to each objection and recommendation received in connection with the rulemaking[20]. The summary and response in this rulemaking file

20 Section 11346.9(a)(3) provides as follows: Every agency subject to this chapter shall do the following:
(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

are presented in a manner that does not comply with the requirements of section 11346.9 and which makes it functionally impossible to evaluate the Department's substantive compliance, or lack thereof, with the summary and response requirement.

The summary and response are presented in a 3-column table format with the first column identifying the commenter, the second providing the comment, and the third providing the Department's response. The Department reprints each comment verbatim rather than attempting to summarize them.

There is nothing intrinsically wrong with the 3-column presentation. Likewise, OAL historically permits agencies, if they choose, to present comments verbatim rather than requiring each comment to be summarized. Regardless of the form of the presentation, however, an agency must identify each "objection or recommendation" and provide a specific response to that objection or recommendation. When an agency presents verbatim comments in its summary and response document, it necessarily includes everything presented by the commenter, including matters that are not objections or recommendations. When this method of presentation is used, the rulemaking agency is obliged to underline, highlight, bracket, or otherwise identify each specific objection or recommendation within a comment and cross-reference this to a specific response from the agency. If this cross-referencing is not done it is impossible to determine whether the rulemaking agency has made an appropriate response to any particular recommendation or objection.

In this case the Department did not do this. It listed comments verbatim in one column with a related discussion by the Department in the adjacent column. There is, however, no explicit identification of each objection or recommendation and no specific response as required by section 11346.9(c). Should the Department resubmit this regulation pursuant to section 11349.4, it must identify each specific objection or recommendation offered by a commenter and cross-reference each such comment to a specific response, as required by section 11346.9(c).

Because of the format of the presentation of the comments and the Department's response, it is not possible for OAL to determine whether or not the Department's substantive response to the public comments is adequate. If does not explicitly identify which response is associated with

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(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

which objection or recommendation, OAL cannot determine whether the Department satisfied the requirement that it provide a substantive response to each objection or recommendation. OAL reserves the right to conduct such an analysis if the Department resubmits this rulemaking pursuant to section 11349.4.

CONCLUSION

As explained above, OAL disapproves the regulatory action for failure to comply with the authority, reference, necessity, consistency and clarity standards of the APA and for failure to comply with procedural requirements of the APA. OAL reserves the right to review the regulations and the rulemaking record upon resubmittal for compliance with section 11342.1 of the Government Code in order to determine whether the regulation is within the scope of the authority conferred by law upon the Department and in accordance with standards prescribed by other provisions of law. OAL also reserves the right to evaluate the summary and response to public comments to ensure compliance with section 11346.9(c). If you have any questions, please do not hesitate to contact me at (916) 323-6221.

DATE: January 5, 2007

WILLIAM L. GAUSEWITZ
Director

Original: John Garamendi, Insurance Commissioner
cc: Teresa Campbell