

## **§10100.2. Definitions.**

The following definitions apply in Articles 1 through 7 of this Subchapter for injuries occurring on or after January 1, 2003.

(a) Adjusting Location. The office where claims are administered. Separate underwriting companies, self-administered, self-insured employers, and/or third-party administrators operating at one location shall be combined as one audit subject for the purposes of audits conducted pursuant to Labor Code Section 129(b) only if claims are administered under the same management at that location.

(b) Administrative Director. The Administrative Director of the Division of Workers' Compensation or the Director's duly authorized representative, designee, or delegee.

(c) Audit. An audit performed under Labor Code Sections 129 and 129.5.

(d) Audit Subject. A single adjusting location of a claims administrator which has been selected for audit. If a claims administrator has more than one adjusting location, other locations shall be considered as separate audit subjects for the purposes of implementing Labor Code Sections 129(a) and 129(b). However, the Audit Unit at its discretion may combine more than one adjusting location of a claims administrator as a single targeted audit subject, or may designate one insurer, insurer group, or self-insured employer at one or more third-party administrator adjusting locations as a single targeted audit subject.

(e) Audit Unit. The organizational unit within the Division of Workers' Compensation which audits and/or investigates insurers, self-insured employers and third-party administrators pursuant to Labor Code Sections 129 and 129.5.

(f) Claim. A request for compensation, or record of an occurrence in which compensation reasonably would be expected to be payable for an injury arising out of and in the course of employment.

(g) Claim File. A record in paper or electronic form, or a combination, containing all of the information specified in Section 10101.1 of these Regulations and all documents or entries related to the provision, delay, or denial of benefits.

(h) Claim Log. A handwritten, printed, or electronically maintained listing maintained by the claims administrator listing each work-injury claim as specified in Section 10103.1 of these Regulations.

(i) Claims Administrator or Administrator. A self-administered workers' compensation insurer, a self-administered self-insured employer, a self-administered legally uninsured employer, a self-administered joint powers authority, or a third-party claims administrator for an insurer, a self-insured employer, a legally-uninsured employer or a joint powers authority.

(j) Closed Claim. A work-injury claim in which future payment of compensation cannot be reasonably expected to be due.

(k) Compensation. Every benefit or payment, including vocational rehabilitation, medical, and medical-legal expenses, conferred by Divisions 1 and 4 of the Labor Code on an injured employee or the employee's dependents.

(l) Date of Knowledge of Injury and Disability. The date the employer had knowledge or reasonably can be expected to have had knowledge of (1) a worker's injury or claim for injury, and (2) the worker's inability or claimed inability to work because of the injury.

(m) Denied Claim. A claim for which all liability has been denied at any time, even if the claim was accepted before or after the denial. A claim which otherwise meets this definition is a denied claim even if medical-legal expenses were paid.

(n) Employee. An employee, or in the case of the employee's death, his or her dependent, as each is defined in Division 4 of the Labor Code, or the employee's or dependent's agent.

(o) First Payment of Temporary Disability Indemnity. (1) The first payment of temporary disability indemnity made to an injured worker for a work injury; or (2) the first resumed payment of temporary disability indemnity following any period of one or more days for which no temporary disability indemnity was payable for that work injury; or (3) the first resumed payment of temporary disability indemnity following issuance of a lawful notice that temporary disability benefits were ending.

(p) General Business Practice. Conduct that can be distinguished by a reasonable person from an isolated event. The conduct can include a single practice in the handling of several claims and/or separate, discrete acts or omissions in the handling of a single claim.

(q) Indemnity Claim. A work-injury claim that has resulted in the payment of any of the following benefits: temporary disability indemnity or salary continuation in lieu of temporary disability indemnity, permanent disability indemnity, death benefits, or vocational rehabilitation.

(r) Insurer. Any company, group, or entity in, or which has been in, the business of transacting workers' compensation insurance for employers subject to the workers' compensation laws of this state. The term insurer includes the State Compensation Insurance Fund and the California Insurance Guarantee Association.

(s) Investigation.

(1) As conducted by a claims administrator, an investigation is the process of examining and evaluating a claim to determine the nature and extent of all legally required benefits, if any, which are due under the claim. Investigation may include formal or informal methods of gathering information relevant to evaluating the claim

such as: obtaining employment records; obtaining earnings records; informal or formal interviews of the employee, employer, or witnesses; deposition of parties or witnesses; and, obtaining expert opinion where an issue requires an expert opinion for its resolution, such as obtaining a medical-legal evaluation.

(2) As conducted by the Audit Unit, an investigation is the process of reviewing and evaluating, pursuant to Section 10106.5 of these regulations and/or Government Code Sections 11180 through 11191, the extent to which a claims administrator meets its compensation obligations under the California Labor Code or Administrative Director's regulations. An investigation may be conducted concurrently as part of an on-going audit without separate notice issued by the Audit Unit, or may be conducted independently from a specific audit in order to determine if an audit will be conducted, or to determine the nature and extent of business practices for which one or more civil penalties may be assessed pursuant to Labor Code Section 129.5(e).

(t) Joint Powers Authority. Any county, city, city and county, municipal corporation, public district, public agency, or political subdivision of the state, but not the state itself, included in a pooling arrangement under a joint exercise of powers agreement for the purpose of securing a certificate of consent to self-insure workers' compensation claims under Labor Code Section 3700(c).

(u) Knowingly committed. Acting with knowledge of the facts of the conduct. A corporation is presumed to have knowledge of facts any employee receives while acting within the scope of his or her authority. A corporation is presumed to have knowledge of information contained in its records.

(v) Medical-Only Claim. A work-injury claim in which no indemnity have been paid.

(w) Notice of Compensation Due. The Notice of Assessment issued pursuant to Labor Code Section 129(c).

(x) Open Claim. A work-injury claim in which future payment of compensation may be due or for which reserves for the future payment of compensation are maintained.

(y) Payment Schedule. Either:

(1) The two-week cycle of indemnity payments due on the day designated with the first payment as required by Labor Code Section 4650(c) or 4702(b), including any lawfully changed payment schedule; or

(2) The two-week cycle of payments of vocational rehabilitation maintenance allowance (VRMA) required by Title 8, California Code of Regulations, Division 1, Chapter 4.5, Subchapter 1.5, Article 7, Section 10125.1.

(z) Record of Payment. An accurate written or electronic record of all compensation payments in a claim file, including but not limited to:

(1) The check number, date the check was issued, name of the payee, amount, and for indemnity payments the time period(s) covered by the payment;

(2) All dates for which salary continuation as defined by Labor Code Section 4650(g) was provided instead of direct indemnity payments; the dates for which salary continuation was authorized; and documentation when applicable that sick leave or other leave credits were restored for any periods for which salary continuation was payable;

(3) A copy of each bill received which included as part of the bill a medical progress or work status report; and either a copy of each other bill received or documentation of the contents of that bill showing the date and description of the service provided, provider's name, amount billed, date the claims administrator received the bill, and date and amount paid.

(aa) Self-insured Employer. An employer, either as an individual employer or as a group of employers, that has been issued a certificate of consent to self-insure as provided by Labor Code Section 3700(b) or (c), including a joint powers authority or the State of California as a legally uninsured employer.

(bb) Third-Party Administrator. An agent under contract to administer the workers' compensation claims of an insurer, a self-insured employer, a legally uninsured employer, or a self-insured joint powers authority. The term third-party administrator includes the State Compensation Insurance Fund for locations that administer claims for legally uninsured and self-insured employers, and also includes Managing General Agents.

(cc) VRMA. Vocational rehabilitation maintenance allowance.

Note: Authority cited: Sections 59, 133, 129.5, 138.4, 5307.3, Labor Code. Reference: Sections 7, 124(a), 129(a), (b), (c), 129.5(a), (b), 3700, 3702.1, 4636, 4650(c), 5307.1, 5402, Labor Code.

### **§10103.2. Claim Log--Contents and Maintenance.**

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This section shall govern claim log maintenance on or after January 1, 2003.

(a) The claims administrator shall maintain annual claim logs listing all work-injury claims, open and closed. Each year's log shall be maintained for at least five years from the end of the year covered. Separate claim logs shall be maintained for each self-insured employer and each insurer for each adjusting location.

(b) Each entry in the claim log shall contain at least the following information:

- (1) Name of injured worker.
- (2) Claims administrator's claim number.
- (3) Date of injury.
- (4) An indication whether the claim is an indemnity or medical-only claim.
- (5) An entry if all liability for a claim has been denied at any time. All liability is considered to have been denied even if the administrator accepted liability for medical-legal expense.
- (6) If the claim log is for a self-insured employer and a Certificate of Consent to Self-Insure has been issued, the name of the corporation employing the injured worker. If the claim log consists of claims for two or more members of an insurer group, the log shall identify the insurer for each claim.
- (7) If the claim has been transferred from one adjusting location to another, the address of the new location shall be identified on the initial adjusting location's log. Claims that are transferred from one adjusting location to another shall be listed on the claim log of the new adjusting location for the year in which the claim was initially reported, not for the year in which the claim was transferred.

(c) The entries on a log provided to the Administrative Director shall reflect current information, to show at least any changes in status of a claim which occurred 45 days or more before the claim log was provided. However, once all liability for a claim has been denied the log shall designate the claim as a denial, even if the claim was later accepted.

(d) The claim log of each former self-insured employer and each self-insured employer that changes or terminates the use of a third-party administrator shall be maintained by that self-insured employer as required by subsection (a).

(e) A claims administrator shall provide a copy of a claim log within 14 days of receiving a written request from the Administrative Director.

NOTE: Authority cited: Sections 59, 129.5, 133 and 5307.3, Labor Code. Reference: Sections 124, 129, 129.5, 138.4, 3702.8 and 5401, Labor Code.

#### **§10104 Annual Report of Inventory.**

Each claims administrator shall maintain, and shall file with the Administrative Director, an Annual Report of Inventory for each of its adjusting locations. The report shall be filed annually by April 1, ~~beginning April 1, 1994.~~ It shall include the name, address, and telephone number of the adjusting location and the name and title of the person responsible for audit coordination. ~~It shall report,~~ Reports due on or after April 1, 2003 shall report, as of the preceding January 1, the numbers of indemnity, denied, and medical-only claims reported to the claims administrator during the preceding calendar year for insurers and private self-insured employers, or fiscal year for public self-insured employers. If the administrator adjusts for more than one entity at that location, the report shall give the total numbers of claims at that location and shall also identify the

numbers of claims for each self-insured employer or insurer liable for the payment of compensation. A copy of both sides of part three of the Self-Insurer's Annual Report, "Liabilities by Reporting Location," may be substituted for each self-insured employer or self-insured client of a third-party administrator in lieu of separately listing data for that entity.

Note: Authority cited: Sections 59, 129.5(b), 133, 5307.3, Labor Code. Reference: Sections 129(a), (b), 129.5(a), (b), (d), Labor Code.

### **§10105. Auditing, Discretion of the Administrative Director.**

To carry out the responsibility pursuant to Labor Code Section 129(a) and Section 129(b), the Administrative Director or his/her representative shall audit claims administrators' claim files and claim logs at such reasonable times as he/she deems necessary. The Administrative Director or his/her representative may also utilize the provisions of Government Code Sections 11180 through 11191.

NOTE: Authority cited: Sections 59, 129.5, 133 and 5307.3, Labor Code. Reference: Sections 129 and 129.5, Labor Code.

### **§10106.1. Routine and Targeted Audit Subject Selection; Complaint Tracking; Appeal of Targeted Audit Selection.**

For audits conducted on or after January 1, 2003:

(a) The Division of Workers' Compensation shall maintain and update annually a list of known adjusting locations of California workers' compensation claims. The list will be based on information provided to the Division in Annual Reports of Inventory submitted pursuant to Section 10104, data submitted to the Division's Workers' Compensation Information System pursuant to Labor Code Section 138.6, and any other sources of information available. The list shall include all known adjusting locations, located in or out of California, of insurers, self-administered self-insured employers, and third-party administrators that administer California workers' compensation claims.

(b) The Audit Unit shall select each adjusting location from the list of adjusting locations for routine profile audit review pursuant to Labor Code Section 129(b)(1) at least once every five years. Audit subjects may be selected in any order, and routine audits may be scheduled by the Audit Unit in a manner to best minimize travel expenses and utilize audit personnel efficiently.

(1) For routine audit subject selection pursuant to Labor Code Section 129(b)(1), if the adjusting location includes claims of more than one insurance underwriting company, self-insured employer, or third-party administrator at the location and all claims at that location share the same local management, the location will be considered as one audit subject.

(2) Eligibility under this subsection for removal from the pool for routine audit subject selection shall not bar the targeted selection of the audit subject pursuant to subsections (c)(2), (c)(3), (c)(4), Labor Code Section 129(b)(3), or for investigation and/or audit pursuant to Section 10106.5 of these regulations.

(c) The Audit Unit shall target audit subjects based on prior audit results pursuant to Labor Code Section 129(b)(2) and subsection (c)(1) of this regulation. Pursuant to Labor Code Section 129(b)(3), the Audit Unit may also target audit subjects based on subsections (c)(2) through (c)(5) of this regulation.

(1) Audit results shall be used independently as factual information to support selection of a claims administrator for a return, targeted audit as follows:

(A) When a final audit report is issued, the report will include a final performance rating. The final performance rating will be calculated in the same manner as the performance audit review performance rating as set forth in Section 10107.1(c)(3), except that the rating shall be determined based on audit findings from all randomly selected claims, including additional claims selected pursuant to Sections 10107.1(d)(1) and (e)(1).

(B) If the audit subject's performance rating calculated pursuant to Section 10107.1(c)(3) or (d)(3) fails to meet or exceed the worst 10% of performance ratings for all audits conducted in the three calendar years before the year preceding the current audit, the Audit Unit will return for a targeted audit of the audit subject within two years of the date the audit findings become final.

(C) In the final audit report, the Audit Unit shall notify the audit subject that a return, targeted audit will be conducted based upon its performance rating. The return target audit shall be conducted in addition to any penalties assessed as a result of the qualifying audit.

(D) Any appeal of the audit subject's selection for a targeted audit based upon the audit findings must be made in the same manner as an appeal of the Notice of Penalty Assessment as set forth in Section 10115.1, and must be made within seven days of receipt of the audit findings upon which the selection for targeted audit is based.

(2) Audit subjects shall be selected for targeted audit based on decisions or findings of the WCAB or Rehabilitation Unit as follows:

(A) The Division of Workers' Compensation will regularly submit copies of Rehabilitation Unit orders and WCAB decisions, findings, and/or awards that document claims administrators' failures to meet their obligations, including, but not limited to, penalties awarded pursuant to Labor Code Section 5814 to the Audit Unit.

(B) Approximately once per year the audit unit will establish a list of claims administrators identified for potential targeted audit based on the documentation provided pursuant to subsection (c)(2)(A). The total number of instances of the potential audit subject's failure or unreasonable delay in meeting its obligations as evidenced by findings shall be compared to the total number of claims reported at that claims adjusting location for the last year fore that potential audit subject, as indicated on the Annual Report of Inventory or the Self Insurer's Annual Report, or as indicated in the data reported by the claims administrator to the Division of Workers' Compensation as part of the Workers' Compensation Information System pursuant to Labor Code Section 138.6. The Audit Unit may obtain data runs or claim logs from the claims administrator to verify the accuracy of the claims reported.

(C) The Audit Unit shall select any number of the highest-ranking subjects from the list for targeted audits. The Audit Unit may consider the results and recency of prior audits at the adjusting location, the resources of the Audit Unit, and the need to conduct routine audits in scheduling targeted audits. The Audit Unit is not required to audit every claims administrator on the list, nor is it required to audit in the order in which claims administrators appear on the list.

(D) The Audit Unit shall send the audit subject selected for targeted audit a Notice of Audit in accordance with §10107.1(a).

(3) The Audit Unit may also target audit subjects based on complaints and/or information received by the Division of Workers' Compensation that indicate possible claims handling violations. Complaints received by the Division of Workers' Compensation may be kept confidential if confidentiality is requested by the complaining party. In tracking complaints, the Audit Unit may target audit subjects based on high numbers of complaints or other information indicating possible claims violations compared to the claims administrator's inventory of claims or based on high numbers of complaints or other information regarding possible specific practices.

(4) The Audit Unit may also select targeted audit subjects based on data from the Workers' Compensation Information System which indicates the claims administrator is failing to meet its obligations, including, but not limited to, high percentages of possible violations compared to other claims administrators. Possible violations include high percentages of apparent late first and/or subsequent indemnity payments, either overall or by class of indemnity, and/or high ratios of denied claims to indemnity claims

(5) The Audit Unit may also target an audit subject for any of the following:

(A) Failure to produce a claim for the Audit Unit within 30 days of receipt of a written request in a profile audit review conducted pursuant to Labor Code Section 129(b).

(B) Failure to pay or appeal pursuant to Section 10115 any Notice of Compensation Due issued by the Audit Unit.

(6) For target audits, the Audit Unit may randomly select claims pursuant to Section 10107.1 of these regulations and/or target claims based on information indicating the possible existence of specific claims handling practices.

(7) For target audits and/or for targeted claims in any audit, the Audit Unit is not required to audit an entire claim file, but may audit only those parts of the claim file that pertain to the complaint or to a specific type of possible violation(s).

(8) The Notice of Audit for a targeted audit selected pursuant to subsections (c)(2) through (c)(5) may be appealed as follows:

(i) Within 7 days after receiving a Notice of Audit the claims administrator may appeal its selection for audit by filing with the Administrative Director and serving on the Audit Unit a and serving request for an appeals conference or a request for a written decision without a conference.

(ii) Within 21 days after the request for a written decision or an appeals conference is filed, the appellant shall file with the Administrative Director and serve the Audit Unit with a written statement setting forth the legal and factual basis of the appeal, and including documentation or other evidence which supports the appellant's position.

(iii) If a request for an appeals conference or a request for a written decision without conference or if the written statement and documentation are not timely filed and served under Subsections (g)(i) and (g)(ii), the claims administrator shall be deemed to have waived any issue concerning its selection for audit. The claims administrator will be precluded from raising the issue at any subsequent appeals of Notices of Penalty Assessment or Notices of Compensation Due.

(iv) Service and filing are timely if the documents are placed in the United States mail, first class postage prepaid, or personally delivered between the hours of 8:00 a.m. and 5:00 p.m., within the periods specified in Subsections (h)(i) and (h)(ii). The original and all copies of any filing shall attach proof of service as provided in Section 10975.

(v) The appeal process shall be governed by Section 10115.2.

NOTE: Authority cited: Sections 59, 129, 129.5, 133, 138.6, 5307.3, Labor Code. Reference: Sections 7, 53, 111, 124, 129 and 129.5, Labor Code; and Sections 11180, 11181 and 11182, Government Code.

**§ 10107.1 Notice of Audit; Claim File Selection; Production of Claim Files; Auditing Procedure.**

For audits conducted on or after January 1, 2003:

(a) Once a subject has been selected for an audit, the Audit Unit shall serve a Notice of Audit on the claims administrator. The Notice shall inform the administrator of its selection for audit, and may include a request to provide the Audit Unit with a claim log or logs. If the Audit Unit has requested claim logs, the audit subject shall provide two copies of the specified claim log(s) within fourteen days of the date of the receipt of the Notice.

(b) At least 14 days before the audit is scheduled, the Audit Unit shall send the audit subject a Notice of Audit Commencement identifying the claims to be audited. The audit shall commence no less than fourteen days from the date the Notice was sent, unless the audit subject and Audit Unit agrees to earlier commencement.

(c) For profile audit reviews conducted pursuant to Labor Code Section 129(b)(1), the Audit Unit shall randomly select samples of indemnity claims from the most recent three years of the audit subject's claim logs or from the list of claims for those years as reported to the Division of Workers' Compensation pursuant to Labor Code Section 138.6 as part of the Workers' Compensation Information System. If any of the years have been the subject of a previous audit, claims will be randomly selected from the most recent unaudited year(s).

(1) The initial number of indemnity claims randomly selected for audit will be determined based on the following table:

<u>Population</u>	<u>Sample Size</u>
<u>5 or less</u>	<u>all</u>
<u>6 – 10</u>	<u>1 less than total</u>
<u>11 – 13</u>	<u>2 less than total</u>
<u>14 – 16</u>	<u>3 less than total</u>
<u>17 – 18</u>	<u>4 less than total</u>
<u>19 – 20</u>	<u>5 less than total</u>
<u>21 – 23</u>	<u>6 less than total</u>
<u>24</u>	<u>17</u>

<u>25 – 26</u>	<u>18</u>
<u>27 – 29</u>	<u>19</u>
<u>30 – 31</u>	<u>20</u>
<u>32 – 33</u>	<u>21</u>
<u>34 – 36</u>	<u>22</u>
<u>37 – 39</u>	<u>23</u>
<u>40 – 41</u>	<u>24</u>
<u>42 – 44</u>	<u>25</u>
<u>45 – 48</u>	<u>26</u>
<u>49 – 51</u>	<u>27</u>
<u>52 – 55</u>	<u>28</u>
<u>56 – 58</u>	<u>29</u>
<u>59 – 62</u>	<u>30</u>
<u>63 – 67</u>	<u>31</u>
<u>68 – 72</u>	<u>32</u>
<u>73 – 77</u>	<u>33</u>
<u>78 – 82</u>	<u>34</u>
<u>83 – 88</u>	<u>35</u>
<u>89 – 95</u>	<u>36</u>
<u>96 – 102</u>	<u>37</u>
<u>103 – 110</u>	<u>38</u>
<u>111 – 119</u>	<u>39</u>
<u>120 – 128</u>	<u>40</u>
<u>129 – 139</u>	<u>41</u>
<u>140 – 151</u>	<u>42</u>
<u>152 – 164</u>	<u>43</u>
<u>165 – 179</u>	<u>44</u>
<u>180 – 197</u>	<u>45</u>
<u>198 – 217</u>	<u>46</u>
<u>218 – 241</u>	<u>47</u>
<u>242 – 269</u>	<u>48</u>
<u>270 – 304</u>	<u>49</u>
<u>305 – 346</u>	<u>50</u>
<u>347 – 399</u>	<u>51</u>
<u>400 – 468</u>	<u>52</u>
<u>469 – 562</u>	<u>53</u>
<u>563 – 696</u>	<u>54</u>
<u>697 – 905</u>	<u>55</u>
<u>906 - 1,272</u>	<u>56</u>
<u>1,273 - 2,091</u>	<u>57</u>
<u>2,092 - 5,530</u>	<u>58</u>
<u>5,531 +</u>	<u>59</u>

(2) In addition to the randomly selected indemnity claims, the Audit Unit may audit any claims for which it has received a complaint or information indicating a failure

to pay indemnity, including any companion claim needed to ascertain the extent to which benefits have been provided.

(3) After reviewing the claims selected pursuant to subsection (1), the Audit Unit shall calculate the audit subject's profile audit review performance rating based on its review of the randomly selected claims. The profile audit review performance rating will be calculated as follows:

(A) The factor for the failure to pay accrued and undisputed indemnity shall be determined by

(i-a) Dividing the number of randomly selected claims violations involving the failure to pay indemnity by the number of randomly selected claims with accrued and payable indemnity, whether paid or not, to produce a frequency rate.

(i-b) Dividing the total amount of unpaid indemnity in randomly selected claims by the number of randomly selected claims with accrued and payable indemnity, whether paid or not, to produce an average amount of unpaid indemnity per file with the obligation to pay indemnity.

(i-c) Dividing the average amount of unpaid indemnity per randomly selected audited claim with the obligation to pay indemnity for the audit subject by the average amount of unpaid indemnity per randomly selected audited claim for all audit subjects for the three calendar years before the year in which the current audit is being conducted, to produce a severity rate.

(i-d) Multiplying the frequency rate by the severity rate by a modifier of 2 to determine the factor for the failure to pay accrued and undisputed indemnity.

(ii) The factor for the late first payment of temporary disability indemnity and issuance of first temporary disability notices shall be determined by dividing the number of randomly selected claims with violations involving the late first payment of temporary disability indemnity, or in claims that involve salary continuation in lieu of first temporary disability payments, the late issuance of the first temporary disability notice by the number of randomly selected claims in which temporary disability payments or first temporary disability notices were issued.

(iii) The factor for the late first payment of permanent disability indemnity, vocational rehabilitation maintenance allowance, and death benefits shall be determined by dividing the numbers of randomly selected claims with violations involving late first payments of those benefits by the numbers of randomly selected claims with payments for those benefits. In calculation of this factor, claims shall be counted for each type of exposure and late first payment.

(iv) The factor for late subsequent indemnity payments shall be determined by dividing the number of randomly selected claims with violations involving late indemnity payments subsequent to first payment by the number of randomly selected claims with subsequent indemnity payments.

(v) The factor for failure to comply with requirements for notices advising injured employees of the process for selecting Agreed Medical Examiners and/or Qualified Medical Examiners once the employees' injuries have reached a permanent and stationary status, and for failure to comply with the requirements for notices advising injured workers of potential eligibility for vocational rehabilitation pursuant to Labor Code Section 4637 shall be determined by dividing the numbers of randomly selected claims with violations involving the failure to issue the notices by the numbers of randomly selected claims with the requirement to issue the notices. In calculation of this factor, claims shall be counted for each type of exposure and violation.

(vi) The audit subject's profile audit review performance rating will be determined by adding the factors calculated pursuant to subsections (c)(3)(A)(i) through (c)(3)(A)(v).

(B) If the audit subject's profile audit review performance rating meets or exceeds the worst 20% of performance ratings for all final audit reports issued over the three calendar years before the year preceding the current audit, the Audit Unit will issue Notices of Compensation Due pursuant to Section 10110 but will assess no administrative penalties for violations found in the profile audit review.

(C) If the audit subject's profile audit review performance rating fails to meet or exceed the rating of the worst 20% of performance ratings for all final audit reports issued over the three calendar years before the year preceding the current audit, the Audit Unit will conduct a Full Compliance Audit by randomly selecting and auditing an additional sample of indemnity claims pursuant to subsection (d). Notification of the Audit Unit's intent to proceed to a Full Compliance Audit will be provided to the audit subject based on preliminary findings at a post-profile audit review conference. At that time, the audit subject may dispute whether or not a Full Compliance Audit is merited under this subsection. Following the post-profile audit review conference, the Audit Unit may continue with the Full Compliance Audit. The audit subject may appeal the issues pursuant to Section 10115.1 following the issuance of the final audit report. Failure of the audit subject to raise issues related to failing to meet or exceed the profile audit review performance standard during the post-profile audit review conference shall constitute a waiver of appeal on those issues.

(d) If the audit subjects fails to meet or exceed the profile audit review performance standard, the Audit Unit shall conduct a Full Compliance Audit by selecting and auditing an additional sample of indemnity claims.

(1) The total number of indemnity claims randomly selected for audit, including the number audited pursuant to subsection (c)(1), will be determined based on the following table:

Population	Sample Size
<u>8 or less</u>	<u>all</u>
<u>9 – 15</u>	<u>1 less than total</u>
<u>16 – 19</u>	<u>2 less than total</u>
<u>20 – 23</u>	<u>3 less than total</u>
<u>24 – 27</u>	<u>4 less than total</u>
<u>28 – 30</u>	<u>5 less than total</u>
<u>31 – 33</u>	<u>6 less than total</u>
<u>34 – 36</u>	<u>7 less than total</u>
<u>37 – 38</u>	<u>8 less than total</u>
<u>39 – 41</u>	<u>9 less than total</u>
<u>42</u>	<u>32</u>
<u>43 – 44</u>	<u>33</u>
<u>45</u>	<u>34</u>
<u>46 – 47</u>	<u>35</u>
<u>48 – 49</u>	<u>36</u>
<u>50 – 51</u>	<u>37</u>
<u>52 – 53</u>	<u>38</u>
<u>54 – 55</u>	<u>39</u>
<u>56 – 57</u>	<u>40</u>
<u>58 – 59</u>	<u>41</u>
<u>60 – 61</u>	<u>42</u>
<u>62 – 63</u>	<u>43</u>
<u>64 – 65</u>	<u>44</u>
<u>66 – 67</u>	<u>45</u>
<u>68 – 70</u>	<u>46</u>
<u>71 – 72</u>	<u>47</u>
<u>73 – 74</u>	<u>48</u>
<u>75 – 77</u>	<u>49</u>
<u>78 – 79</u>	<u>50</u>
<u>80 – 82</u>	<u>51</u>
<u>83 – 84</u>	<u>52</u>
<u>85 – 87</u>	<u>53</u>
<u>88 – 89</u>	<u>54</u>
<u>90 – 92</u>	<u>55</u>
<u>93 – 95</u>	<u>56</u>
<u>96 – 98</u>	<u>57</u>
<u>99 – 101</u>	<u>58</u>
<u>102 – 104</u>	<u>59</u>
<u>105 – 107</u>	<u>60</u>
<u>108 – 110</u>	<u>61</u>
<u>111 – 114</u>	<u>62</u>
<u>115 – 117</u>	<u>63</u>

<u>118 – 120</u>	<u>64</u>
<u>121 – 124</u>	<u>65</u>
<u>125 – 128</u>	<u>66</u>
<u>129 – 131</u>	<u>67</u>
<u>132 – 135</u>	<u>68</u>
<u>136 – 139</u>	<u>69</u>
<u>140 – 143</u>	<u>70</u>
<u>144 – 148</u>	<u>71</u>
<u>149 – 152</u>	<u>72</u>
<u>153 – 156</u>	<u>73</u>
<u>157 – 161</u>	<u>74</u>
<u>162 – 166</u>	<u>75</u>
<u>167 – 171</u>	<u>76</u>
<u>172 – 176</u>	<u>77</u>
<u>177 – 181</u>	<u>78</u>
<u>182 – 187</u>	<u>79</u>
<u>188 – 192</u>	<u>80</u>
<u>193 – 198</u>	<u>81</u>
<u>199 – 204</u>	<u>82</u>
<u>205 – 210</u>	<u>83</u>
<u>211 – 217</u>	<u>84</u>
<u>218 – 223</u>	<u>85</u>
<u>224 – 230</u>	<u>86</u>
<u>231 – 238</u>	<u>87</u>
<u>239 – 245</u>	<u>88</u>
<u>246 – 253</u>	<u>89</u>
<u>254 – 261</u>	<u>90</u>
<u>262 – 270</u>	<u>91</u>
<u>271 – 279</u>	<u>92</u>
<u>280 – 288</u>	<u>93</u>
<u>289 – 298</u>	<u>94</u>
<u>299 – 308</u>	<u>95</u>
<u>309 – 319</u>	<u>96</u>
<u>320 – 330</u>	<u>97</u>
<u>331 – 342</u>	<u>98</u>
<u>343 – 354</u>	<u>99</u>
<u>355 – 367</u>	<u>100</u>
<u>368 – 381</u>	<u>101</u>
<u>382 – 396</u>	<u>102</u>
<u>397 – 411</u>	<u>103</u>
<u>412 – 427</u>	<u>104</u>
<u>428 – 444</u>	<u>105</u>
<u>445 – 463</u>	<u>106</u>
<u>464 – 482</u>	<u>107</u>
<u>483 – 503</u>	<u>108</u>

<u>504 – 525</u>	<u>109</u>
<u>526 – 549</u>	<u>110</u>
<u>550 – 575</u>	<u>111</u>
<u>576 – 603</u>	<u>112</u>
<u>604 – 633</u>	<u>113</u>
<u>634 – 665</u>	<u>114</u>
<u>666 – 700</u>	<u>115</u>
<u>701 – 739</u>	<u>116</u>
<u>740 – 781</u>	<u>117</u>
<u>782 – 827</u>	<u>118</u>
<u>828 – 879</u>	<u>119</u>
<u>880 – 936</u>	<u>120</u>
<u>937 - 1,000</u>	<u>121</u>
<u>1,001 - 1,072</u>	<u>122</u>
<u>1,073 - 1,154</u>	<u>123</u>
<u>1,155 - 1,248</u>	<u>124</u>
<u>1,249 - 1,356</u>	<u>125</u>
<u>1,357 - 1,483</u>	<u>126</u>
<u>1,484 - 1,633</u>	<u>127</u>
<u>1,634 - 1,814</u>	<u>128</u>
<u>1,815 - 2,036</u>	<u>129</u>
<u>2,037 - 2,315</u>	<u>130</u>
<u>2,316 - 2,677</u>	<u>131</u>
<u>2,678 - 3,163</u>	<u>132</u>
<u>3,164 - 3,852</u>	<u>133</u>
<u>3,853 - 4,904</u>	<u>134</u>
<u>4,905 - 6,710</u>	<u>135</u>
<u>6,711 - 10,530</u>	<u>136</u>
<u>10,531 - 23,993</u>	<u>137</u>
<u>23,994 +</u>	<u>138</u>

(2) In addition to the randomly selected indemnity claims, the Audit Unit may audit any claims for which it has received a complaint or information indicating a failure to pay indemnity or late-paid indemnity, including any companion claim needed to ascertain the extent to which benefits have been provided.

(3) After reviewing the claims selected pursuant to subsection (1), the Audit Unit shall calculate the audit subject's full compliance audit performance rating.

(A) The audit subject's full compliance audit performance rating will be calculated pursuant to subsection (c)(3)(A), except that it shall be based on the review of all claims selected pursuant to subsection (d)(1).

(B) If the audit subject's full compliance audit performance rating meets or exceeds the worst 10% of performance ratings for all final audit reports issued over the three calendar years before the year preceding the current audit, the

Audit Unit will issue Notices of Compensation Due pursuant to Section 10110 and will assess administrative penalties only for violations involving unpaid and late paid compensation, pursuant to Labor Code Section 129.5(c)(2).

- (e) If the audit subject's full compliance audit performance rating fails to meet or exceed the rating of the worst 10% of performance ratings for all final audit reports issued over the three calendar years before the year preceding the current audit, the Audit Unit will audit all claims selected for audit for all violations, and also randomly select a sample of denied claims. Notification of the Audit Unit's intent to audit a sample of denied claims and assess penalties pursuant to Labor Code Section 129.5(c)(3) will be provided to the audit subject based on findings at a meet and confer audit review conference. At that time the audit subject may dispute whether or not it met or exceeded the Full Compliance Audit performance standard. Following the meet and confer audit review conference, the Audit Unit may continue with the Full Compliance Audit. The audit subject may appeal pursuant to Section 10115.1 following the issuance of the final audit report. Failure of the audit subject to raise issues related to failing to meet or exceed the full compliance audit performance standard during the meet and confer audit review conference shall constitute a waiver of appeal on those issues.

(1) The number of denied claims randomly selected for audit will be based on the following table:

<u>Population</u>	<u>Sample Size</u>
<u>6 or less</u>	<u>all</u>
<u>7 – 10</u>	<u>1 less than total</u>
<u>11 – 14</u>	<u>2 less than total</u>
<u>15 – 17</u>	<u>3 less than total</u>
<u>18</u>	<u>14</u>
<u>19 – 20</u>	<u>15</u>
<u>21</u>	<u>16</u>
<u>22 – 23</u>	<u>17</u>
<u>24 – 25</u>	<u>18</u>
<u>26 – 27</u>	<u>19</u>
<u>28 - 29</u>	<u>20</u>
<u>30 - 31</u>	<u>21</u>
<u>32 - 33</u>	<u>22</u>
<u>34 - 36</u>	<u>23</u>
<u>37 - 38</u>	<u>24</u>
<u>39 - 41</u>	<u>25</u>
<u>42 - 43</u>	<u>26</u>
<u>44 - 46</u>	<u>27</u>

<u>47 - 49</u>	<u>28</u>
<u>50 - 52</u>	<u>29</u>
<u>53 - 55</u>	<u>30</u>
<u>56 - 59</u>	<u>31</u>
<u>60 - 63</u>	<u>32</u>
<u>64 - 67</u>	<u>33</u>
<u>68 - 71</u>	<u>34</u>
<u>72 - 75</u>	<u>35</u>
<u>76 - 80</u>	<u>36</u>
<u>81 - 85</u>	<u>37</u>
<u>86 - 90</u>	<u>38</u>
<u>91 - 96</u>	<u>39</u>
<u>97 - 102</u>	<u>40</u>
<u>103 - 109</u>	<u>41</u>
<u>110 - 116</u>	<u>42</u>
<u>117 - 124</u>	<u>43</u>
<u>125 - 132</u>	<u>44</u>
<u>133 - 141</u>	<u>45</u>
<u>142 - 151</u>	<u>46</u>
<u>152 - 163</u>	<u>47</u>
<u>164 - 175</u>	<u>48</u>
<u>176 - 189</u>	<u>49</u>
<u>190 - 205</u>	<u>50</u>
<u>206 - 222</u>	<u>51</u>
<u>223- 242</u>	<u>52</u>
<u>243 - 265</u>	<u>53</u>
<u>266 - 292</u>	<u>54</u>
<u>293 - 323</u>	<u>55</u>
<u>324 - 360</u>	<u>56</u>
<u>361 - 405</u>	<u>57</u>
<u>406 - 461</u>	<u>58</u>
<u>462 - 531</u>	<u>59</u>
<u>532 - 623</u>	<u>60</u>
<u>624 - 749</u>	<u>61</u>
<u>750 - 931</u>	<u>62</u>
<u>932 - 1,217</u>	<u>63</u>
<u>1,218 - 1,731</u>	<u>64</u>
<u>1,732 - 2,934</u>	<u>65</u>
<u>2,935 - 8,990</u>	<u>66</u>
<u>8,991 +</u>	<u>67</u>

(2) In addition to the random samples of indemnity and denied claims and claims for which the Division received complaints or information indicating unpaid or late-

paid compensation, the Audit Unit may select for audit any claims for which it received complaints or information over the past three years that indicate the possible existence of any claims handling violations.

(f) Following the conclusion of the audit, the Audit Unit shall issue a report of audit findings which may include, but is not limited to, the following: one or more requests for additional documentation or compliance, Notices of Intention to Issue Notice of Compensation Due, Preliminary Notices of Penalty Assessments, Notices of Compensation Due, or Notices of Penalty Assessments. If any additional requested documentation is not provided within thirty days of receipt of the report, additional audit penalties may be assessed under Section 10111.1(d)(2) of these Regulations.

(g) The audit subject shall pay all expenses of an audit of an adjusting location outside the State of California, including per diem, travel expense, and compensated overtime of audit personnel.

(h) The audit subject shall make each of the claim files selected for audit available at the audit site at the time of audit commencement. If claim files are maintained in an electronic or other non-paper storage medium, the claims administrator shall, upon request, provide to the Audit Unit direct computer access to electronic claim files and/or legible printed paper copies of the claim files, including all records of compensation payments. If a randomly selected indemnity, medical-only, or denied claim has been incorrectly classified as to type by the audit subject, the Audit Unit may randomly select an additional correctly designated claim file for audit, and may also assess penalties as appropriate in the misdesignated claim initially selected. If the audit subject fails to produce a claim selected for audit, the Audit Unit may assess a penalty for failure to produce the claim pursuant to Section 10111.2(b)(3) and may also select for audit another claim of the same type to complete the random sample. If the audit subject has transferred a claim selected for audit to a different adjusting location of the company being audited, the audit subject shall nonetheless produce the claim for audit within five working days of request, unless additional time is agreed upon by both the Audit Unit and the audit subject.

(i) The Audit Unit shall have discretion to audit claims in addition to those identified with the Notice of Audit Commencement. The audit subject shall make each of the additional claims selected for audit available at the audit site as follows:

- (1) Open claims and closed claims stored on site within one working day of request;
- (2) Closed claims stored off site within five working days of request, unless additional time is agreed upon by both the Audit Unit and the audit subject.

(j) The audit subject shall provide the auditor(s) an adequate, safe, and healthful workspace during the audit, which allows the auditors a reasonable degree of privacy. If this workspace is not provided, the Audit Unit may require the audit subject to deliver the files to the nearest Audit Unit office for completion of the audit.

(k) The Audit Unit may obtain and retain copies of documentation or information from claim files to support the assessment of penalties.

(l) The audit subject shall have the opportunity to discuss preliminary findings and provide additional information at a post-audit conference.

(m) The Audit Unit may at any time request additional information or documentation related to claims handling in order to complete its audit. Such information may include documentation that, as specified by Labor Code Sections 3751(a) and 3752, compensation has not been reduced or affected by any insurance, contribution, or other benefit due to or received by or from the employee. The audit subject shall provide any requested documentation or other information within thirty days from the Audit Unit's request, unless the Audit Unit extends the time for good cause.

Note: Authority cited: Sections 59, 129.5, 133, 5307.3, Labor Code.

Reference: Sections 11180, 11180.5, 11181, and 11182, Government Code. Sections 111, 124, 129, 129.5, 3751 and 3752, Labor Code.

#### **§10108. Audit Violations--General Rules.**

The following general rules apply to audits and audit processes under Labor Code §§129, 129.5:

- (a) If the date or deadline (including any applicable extension) to perform any act falls on a weekend or holiday, the act may be performed on the last business day before or the first business day after the weekend or holiday. A payment date which is changed under this provision shall not change the normal dates for later payments in an existing two-week payment schedule.
- (b) For the purpose of imposing audit penalties, if the claims administrator does not record the date it received a document, it shall be deemed received five days after the latest date the sender wrote on the document.
- (c) Audit penalties will be based on each claim's status when the claim is audited. If, at the time of the audit, the claims administrator has failed to perform a required act, but remedies the failure prior to the issuance of the audit report, the claims administrator will nonetheless be accountable for the violation as a failure to act and audit findings related to the violation will be based on the failure to perform the act. Unless these regulations specifically provide otherwise, the penalty for an unlawful delay of more than 30 days in performing an act is the same as the penalty for not performing the act. However, the penalty may will be mitigated for good faith because the act, though late, was eventually performed. There will be no mitigation for good faith, however, if the act was performed after notification to the audit subject that the claim was selected for audit. In such cases where there is an unlawful delay of more than 30 days in performing an act and the act was performed only after the

audit subject was notified that the claim was selected for audit, violations will be calculated for frequency under ~~Section 10111.1(e)(3)~~ as though there was a failure to perform the act rather than late performance of the act. ~~For example, if unpaid indemnity was paid more than 30 days late only after the audit subject was notified that the claim was selected for audit, violations will be classified as failure to pay indemnity under Section 10111.1(e)(3)(xviii) of these regulations rather than late paid indemnity, and will be modified for frequency accordingly.~~ A lawful delay is a delay permitted by law or regulation, and for which the claims administrator has given a proper and timely notice of delay when such a notice is required. Any other delay is an unlawful delay.

- (d) Penalties will not be assessed during the period a claims administrator is actively investigating its liability for provision of benefits or payment of compensation, provided that a Notice of Delay has been timely and properly issued in accordance with §9812 or §9813. However, penalties shall still be issued for violations during the period of delay for: failure to object to medical treatment bills in accordance with §9792.5, or failure to object to or pay bills for medical legal expense in accordance with §9794.
- (e) Penalties will not be assessed for an act or omission where an injured worker's unreasonable refusal to cooperate in the investigation has prevented the claims administrator from determining its legal obligation to perform the act.
- (f) Where a penalty is provided for failure to pay mileage fees related to medical treatment or evaluation, a penalty will be imposed if payment is not made at a rate that is at least the greater of the following: (i) ~~twenty-one~~ thirty-four cents per mile, or (ii) the minimum rate adopted by the Director of the Department of Personnel Administration pursuant to Section 19820 of the Government Code for non-represented (excluded) employees at Title 2, CCR §599.631(a).
- (g) Failure, delay, or refusal to pay compensation benefits or expenses shall be subject to the applicable penalties under §10111, §10111.1, or §10111.2 unless the legal, factual, or medical basis for the failure, refusal, or delay is documented in the claim file.
- (h) The Audit Unit will not assess penalties for violations of failure to make payment of indemnity due if the total indemnity is less than ten dollars (\$10.00) aggregate per claim.
- (i) Nothing in these regulations will bar the assessment of a civil penalty under Labor Code Section 129.5(e), whether or not the audit subject meets or exceeds performance rating standards calculated pursuant to Section 10107.1(c)(3) or (d)(3).
- (j) Claims that are randomly selected for audit pursuant to Sections 10107.1(c)(1) and (d)(1) will be considered as randomly selected claims for purposes of determining whether or not an audit subject meets or exceeds performance standards pursuant to Sections 10107.1(c)(3) or (d)(3), whether or not complaints or information

indicating claims handling violations in those claims have been received by the Audit Unit. If the Audit Unit cannot ascertain the extent to which benefits have been paid on a claim randomly selected for audit without auditing a companion or master claim to that claim, the Audit Unit may add the companion or master claim to the sample. The companion or master claims will be considered as randomly selected claims for purposes of determining whether or not the audit subject meets or exceeds performance standards pursuant to Sections Section 10107.1(c)(3) and/or (d)(3).

- (k) Notwithstanding Section 10111.2(a) and (b), penalties may be assessed for failure to timely submit an accurate Annual Report of Inventory regardless of whether or not an audit has been conducted, or, if an audit was conducted, whether or not the audit subject's performance rating in the key performance areas calculated pursuant to Section 10107(c) warrants the audit of a full sample of indemnity claims pursuant to Section 10107(c)(4), or a return, targeted audit based on performance in those areas pursuant to Section 10106(c)(2).
- (l) Notwithstanding penalty amounts established pursuant to Section 10111.2, penalties for late performance of an act may not exceed penalty amounts for the failure to perform an act.
- (m) If more than one claims administrator has adjusted a claim file that is being audited or investigated, penalties will be assessed against the audit subject only for violations that occurred subsequent to the date the audit subject began adjusting the claim file, except that the audit subject will be assessed penalties for the failure to pay compensation due if the claim was open when transferred to the audit subject or re-opened subsequent to its transfer and the compensation remained unpaid. The claims administrator is required to correct any failures to issue notices which are still pertinent, to recalculate and correct any improperly calculated payments due to the worker, and to pay any interest and increase due for late paid medical payments.
- (n) Successor liability may be imposed on a claims administrator or insurer that has merged with, consolidated, or otherwise continued the business of a corporation or other business entity that is a responsible party and failed to meet its obligations under Divisions 1 and 4 of the Labor Code or regulations of the administrative director. The surviving claims administrator shall assume and be liable for all the liabilities, obligations and penalties of the prior corporation or business entity. Successor liability will be imposed if there has been a substantial continuity of business operations; and/or the new business uses the same or substantially the same work force. In such circumstances, due consideration of the appropriateness of penalties with respect to the history of previous violations pursuant to Labor Code Section 129.5(b)(3) will encompass findings related to the last audit of the predecessor claims administrator applied in conjunction with audit results of the successor claims administrator pursuant to Section 10111.2(c)(4) of these regulations.

NOTE: Authority cited: Sections 59, 129.5, 133, 138.3, 138.4 and 5307.3, Labor Code. Reference: Sections 124, 129, 129.5, 4600 and 4621, Labor Code; and Sections 7, 9, 10 and 11, Civil Code.

### **§10109. Duty to Conduct Investigation; Duty of Good Faith.**

(a) To comply with the time requirements of the Labor Code and the Administrative Director's regulations, a claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.

(b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.

(1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information, whether that information requires or excuses benefit payment. The investigation must supply the information needed to provide timely benefits and to document for audit the administrator's basis for its claims decisions. The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.

(2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.

(c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.

(d) The claims administrator must document in its claim file the investigatory acts undertaken and the information obtained as a result of the investigation.

(e) Insurers, self-insured employers and third-party administrators shall deal fairly and in good faith with all claimants, including lien claimants. Acting in good faith means investigating claims properly, paying in a timely manner the benefits that are due, fulfilling the obligations owed pursuant to the policy and the law, and being reasonable and honest.

NOTE: Authority cited: Sections 59, 129.5, 133, 5307.3, Labor Code. Reference: Article 14, Section 4, California Constitution; Sections 124, 129, 133, 4061, 4550, 4600, 4636 through 4638, 4650, 4701 through 4703.5, 5402 and 5814, Labor Code; Ramirez v. WCAB, 10 Cal.App.3d 227, 88 CR 865, 35 CCC 383 (1970); and Section 790.03(h)(3), (5), (13), Insurance Code.

### **§10111.2 Full Compliance Audit Penalty Schedules; Target Audit Penalty Schedule.**

(a) For full compliance audits conducted on or after January 1, 2003, administrative penalties will be assessed pursuant to this subsection (a) for audit subjects that fail to meet or exceed the profile audit review performance standards calculated pursuant to

Section 10107.1(c)(3) but meet or exceed the full compliance audit performance standards calculated pursuant to Section 10107.1(d)(3). However, for violations in claims with dates of injury from January 1, 1990 through December 31, 1993, penalty amounts may not exceed the amounts that would be assessed pursuant to Section 10111, and for violations in claims with dates of injury from January 1, 1994 through December 31, 2002, penalty amounts may not exceed the amounts that would be assessed pursuant to Section 10111.1:

(1) The penalty for each failure to pay the 10% self-imposed increase due because of a late indemnity payment, in accordance with Labor Code Section 4650(d) is:

If the self-imposed increase was not paid or was only partially paid, the audit penalty is based on the amount of the underlying indemnity and is as follows:

\$50 if the late-paid indemnity totals not more than 3 days;

\$100 if the late-paid indemnity totals more than 3 but not more than 7 days;

\$150 if the late-paid indemnity totals more than 7 but not more than 14 days;

\$200 if the late paid indemnity totals more than 14 but not more than 21 days;

\$300 if the late paid indemnity totals more than 21 but not more than 28 days;

\$500 if the late paid indemnity totals more than 28 days.

(2) The penalty for each failure to pay or denial of rehabilitation maintenance allowance, temporary disability indemnity, or salary continuation in lieu of temporary disability indemnity, without a factual, medical or legal basis for the failure or denial, is:

\$200 for the equivalent of 3 days or less of unpaid indemnity;

\$400 for the equivalent of more than 3 but not more than 7 days of unpaid indemnity;

\$600 for the equivalent of more than 7 but not more than 14 days of unpaid indemnity;

\$1,000 for the equivalent of more than 14 but not more than 21 days of unpaid indemnity;

\$1,500 for the equivalent of more than 21 but not more than 28 days of unpaid indemnity;

\$2,000 for the equivalent of more than 28 but not more than 35 days of unpaid indemnity;

\$3,000 for the equivalent of more than 35 but not more than 42 days of unpaid indemnity;

\$5,000 for the equivalent of more than 42 days of unpaid indemnity.

(3) The penalty for each failure to pay permanent disability indemnity based on a reasonable estimate of permanent disability, or denial of permanent disability indemnity, without a factual, medical or legal basis, is:

\$400 for up to 6 weeks of unpaid indemnity;

\$800 for more than 6 but not more than 15 weeks of unpaid indemnity;

\$1,500 for more than 15 but not more than 30 weeks of unpaid indemnity;

\$2,000 for more than 30 but not more than 50 weeks of unpaid indemnity;

\$3,000 for more than 50 but not more than 95 weeks of unpaid indemnity;

\$5,000 for more than 95 weeks of unpaid indemnity.

(4) The penalty for each failure to pay death benefits pursuant to Labor Code Section 4701 to any claimant without a factual, medical or legal basis for the failure, is:

\$200 for the equivalent of 3 days or less of unpaid indemnity or for no more than \$300 of unpaid burial expenses;

\$400 for the equivalent of more than 3 but not more than 7 days of unpaid indemnity or for more than \$300, but not more than \$600, of unpaid burial expenses;

\$600 for the equivalent of more than 7 but not more than 14 days of unpaid indemnity or for more than \$600, but no more than \$900, of unpaid burial expenses;

\$1,000 for the equivalent of more than 14 but not more than 21 days of unpaid indemnity or for more than \$900, but no more than \$1,500, of unpaid burial expenses;

\$1,500 for the equivalent of more than 21 but not more than 28 days of unpaid indemnity or for more than \$1,500, but no more than \$2,000, of unpaid burial expenses;

\$3,000 for the equivalent of more than 28 but not more than 42 days of unpaid indemnity or for more than \$2,250 of unpaid burial expenses;

\$5,000 for the equivalent of more than 42 days of unpaid indemnity.

The penalty for each failure to pay to any claimant compensation which was accrued and unpaid to the injured worker at the time of the worker's death is the same penalty which would apply for failure to pay that compensation to the injured worker.

(5) The penalty for each late first payment of temporary disability indemnity is:

\$50 if the first payment was made 1 to 7 days late

\$100 if the first payment was made 8 to 14 days late;

\$150 if the first payment was made 15 to 21 days late;

\$200 if the first payment was made 22 to 30 days late.

(6) The penalty for each late first payment of permanent disability is:

\$50 if the first payment was made 1 to 7 days late;

\$100 if the first payment was made 8 to 14 days late;

\$150 if the first payment was made 15 to 21 days late;

\$200 if the first payment was made 22 to 30 days late.

For purposes of this subsection, the first payment of permanent disability indemnity shall be considered late if not made within 14 days after the last payment of temporary disability indemnity, or within 14 days of knowledge of the existence of permanent disability, whichever last occurs.

(7) The penalty for each failure to late first payment of VRMA or death benefit is:

\$50 if the first payment was made 1 to 7 days late;

\$100 if the first payment was made 8 to 14 days late;

\$150 if the first payment was made 15 to 21 days late;

\$200 if the first payment was made 22 to 30 days late.

(8) The penalty for each underpayment of an indemnity payment (including death benefits and VRMA), when the balance of the indemnity was paid late, including late paid self-imposed increases not paid together with the late temporary disability or permanent disability indemnity payment pursuant to Labor Code Section 4650(d), is:

\$50 for late payment of the equivalent of 3 days of indemnity or less;

\$100 for late payment of the equivalent of more than 3 but no more than 7 days of indemnity;

\$150 for late payment of the equivalent of more than 7 but no more than 14 days of indemnity;

\$200 for the late payment of the equivalent of more than 14 but no more than 21 days of indemnity;

Penalty amounts for underpayments made more than 30 days late are governed by Section 10108(c).

(9) Penalty amounts assessed pursuant to subsections (a)(1) through (a)(8) will be increased by 100% if the failure to pay or late payment was in violation of an award or order of the Workers' Compensation Appeals Board or an order of the Rehabilitation Unit.

(10) Notwithstanding Labor Code Section 129.5(c)(1) and whether or not the audit subject has met or exceeded performance standards calculated pursuant to Section 10107.1(c)(3), penalties will be assessed for failure to pay, or late or partial payment of, a Notice of Compensation Due issued as a result of an audit. Penalties will be assessed as follows:

A penalty in the same amount as the total of the penalties applicable under subsections (a)(1) through (a)(4) and (a)(9) will be assessed for any compensation paid more than 15 but not more than 30 days after receipt of the Notice of Compensation Due;

A penalty in the amount of 200% of the total of the penalties applicable under subsections (a)(1) through (a)(4) and (a)(9) will be assessed for any compensation paid more than 30 but not more than 60 days late;

A penalty in the amount of 300% of the total of the penalties applicable under subsections (a)(1) through (a)(4) and (a)(9) will be assessed for any compensation not paid within 60 days.

(11) Notwithstanding Labor Code Section 129.5(c)(2) and whether or not the audit subject has met or exceeded performance standards calculated pursuant to Section

10107.1(d)(3), additional penalties will be assessed for late payment or failure of the audit subject to pay any administrative penalties assessed pursuant to this section that are not timely appealed pursuant to Section 10115.1. Penalties will be assessed as follows:

An additional penalty of 50% of the amount of each late paid penalty will be assessed for each penalty paid more than 30 but not more than 60 days from receipt of the Notice of Penalty Assessments;

An additional penalty of 100% of the amount of each applicable penalty will be assessed for each penalty not paid within 60 days of receipt of the Notice of Penalty Assessments.

(b) For full compliance audits conducted on or after January 1, 2003, administrative penalties will be assessed pursuant to subsection (a) and this subsection (b) for audit subjects that fail to meet or exceed the full compliance audit performance standards calculated pursuant to Section 10107.1(d)(3). However, for violations in claims with dates of injury from January 1, 1990 through December 31, 1993, penalty amounts may not exceed the amounts that would be assessed pursuant to Section 10111, and for violations in claims with dates of injury from January 1, 1994 through December 31, 2002, penalty amounts may not exceed the amounts that would be assessed pursuant to Section 10111.1:

(1) The penalty for each failure to investigate a claim as provided by Section 10109 of these Regulations is:

\$500 if the failure to investigate involved a claim for medical treatment only, with no reasonable expectation of liability for indemnity payments, or if the failure to investigate involved the need for medical treatment or testing, but did not involve uncompensated lost time or permanent disability;

\$1,000 if the failure to investigate involved a claim for or reasonable expectation of liability for only one of the following classes of benefits: temporary disability; permanent disability indemnity; or, vocational rehabilitation;

\$2,500 if the failure to investigate involved a claim or reasonable expectation of liability for any combination two of the following classes of benefits: temporary disability; permanent disability indemnity; or, vocational rehabilitation;

\$5,000 if the failure to investigate involved a claim or reasonable expectation of liability for death benefits, or for all of the following classes of benefits: temporary disability; permanent disability indemnity; and, vocational rehabilitation.

(2) The penalty for each denial of all liability for a claim without documentation supporting a factual, medical, or legal basis for the denial is specified in this subsection.

In order to avoid a penalty, the denial must state a legal, factual or medical basis recognized by applicable law and documented by information in the claim file. An employee's waiver of benefits in an otherwise clearly compensable case is not a ground to deny liability.

The penalty is \$2,500 for a claim involving the potential for medical treatment only, with no potential for liability for indemnity payments;

The penalty is \$4,000 for a claim involving the potential liability for medical treatment and for only one of the following classes of benefits: temporary disability; permanent disability indemnity; or, vocational rehabilitation;

The penalty is \$4,500 for a claim involving the potential liability for medical treatment and for any combination of two of the following classes of benefits: temporary disability; permanent disability indemnity; or, vocational rehabilitation;

The penalty is \$5,000 for a claim involving the potential liability for death benefits, or for all of the following classes of benefits: medical treatment, temporary disability; permanent disability indemnity; and, vocational rehabilitation.

The penalty will be reduced by 20% for good faith if there was an incomplete investigation of the claim.

The total amount assessed for a denial shall be reduced by 50% if the claim was accepted after the denial without evidence that the acceptance was the result of litigation or of the claim's selection for audit.

(3) The penalty for each failure to produce a legible paper copy of a claim file as required by Section 10107 or at the time specified by the Administrative Director is:

\$100 if the file was produced not more than 3 days late;

\$250 if the file was produced more than 3 but not more than 14 days late;

\$500 if the file was produced more than 14 but not more than 29 days late;

\$1,000 if the file was produced more than 29 days late but not more than 40 days late;

\$2,500 if the file was produced more than 40 days late but not more than 90 days late;

\$5000 if the was produced more than 90 days late or was not produced.

(4) The penalty for providing a backdated or otherwise altered or fraudulent document to the Audit Unit, or intentionally withholding a document from the Audit Unit, which would have the effect of avoiding liability for the payment of compensation or an audit penalty is: \$5,000 for each backdated, altered, or withheld document.

The claims administrator shall not be subjected to penalty under this subsection if it demonstrates by clear and convincing evidence that the backdating, alteration, or withholding of the document was due solely to unintentional clerical error.

(5) The penalty for each failure to object or pay to the injured worker, within 60 days of receiving a request, reimbursement for the reasonable expense incurred for self-procured medical treatment in accordance with Labor Code Section 4600, is:

\$100 for \$100 or less in expense;

\$200 for more than \$100, to \$500, in expense;

\$300 for more than \$500, to \$1,000, in expense;

\$500 for more than \$1,000 in expense.

(6) The penalty for each failure to pay reasonable expenses of transportation, meals, and lodging incident to reporting to an examination, together with one day of temporary disability indemnity for each day of wages lost when submitting to the examination, when notifying the employee of a medical evaluation scheduled by the claims administrator in accordance with Labor Code Sections 4600 through 4621; or to pay these expenses within 14 days of receiving notice of a medical evaluation scheduled by the Administrative Director or the appeals board; or to object or pay the injured worker for any reasonable transportation expenses incurred to obtain medical treatment or evaluation, within 60 days of receiving a request, is:

\$100 for more than \$10, to \$100, in expense;

\$200 for more than \$100, to \$300, in expense;

\$300 for more than \$300, to \$500, in expense.

\$500 for more than \$500 in expense.

(7) The penalty for each failure to document a factual basis for paying less than the maximum indemnity rate is:

\$50 if the total indemnity, paid and unpaid, totals not more than 3 days;

\$100 if the total indemnity totals more than 3 but not more than 7 days;

\$150 if the total indemnity totals more than 7 but not more than 14 days;

\$200 if the total indemnity totals more than 14 but not more than 21 days;

\$300 if the total indemnity totals more than 21 but not more than 28 days;

\$500 if the total indemnity totals more than 28 days.

(8) The penalty for each failure to comply with any regulation of the Administrative Director specified in this subsection is:

[i] For each failure to include in a claim file a copy of the Employee's Claim for Worker's Compensation Benefits, DWC Form 1, showing the date the form was provided to and received from the employee, or documentation of the date the claim form was provided to the employee if the employee did not return the form, the penalty is:

\$100 if there was any late indemnity payments, or if notice of acceptance of the claim was not issued within 90 days after the employer's date of knowledge of injury and disability, or if the claim was denied.

[ii] For each failure to issue a notice of benefits as required by Title 8, California Code of Regulations, Division 4.5, Chapter 1, Article 8, beginning with Section 9810, or by Title 8, California Code of Regulations, Division 4.5, Chapter 1.5, Article 7, beginning with Section 10122, unless penalties are assessed pursuant to subsections (b)(14) through (b)(20), the penalty is \$100.

[iii] For each Notice of Benefits that was not issued timely as provided in Title 8, California Code of Regulations, Division 1, Chapter 4.5, Subchapter 1, Article 8, beginning with Section 9810, or as provided in Title 8, California Code of Regulations, Division 1, Chapter 4.5, Subchapter 1.5, Article 7, beginning with Section 10122, unless penalties are assessed pursuant to subsections (b)(14) through (b)(20), the penalty is:

\$25 for each notice of first, resumed, changed or final payment of temporary disability indemnity, wage continuation, death benefits, permanent disability indemnity, or VRMA that was issued from 1 to 7 days late;

\$50 for each notice of first, resumed, changed or final payment of temporary disability indemnity, wage continuation, death benefits, permanent disability

indemnity, or VRMA that was issued more than 7 days late, and for each delay in decision notice which was issued from 1 to 7 days late;

\$75 for each delay in decision notice, that was, issued more than 7 days late.

[iv] For each notice of benefits required by Title 8, California Code of Regulations, Division 1, Chapter 4.5, Subchapter 1, Article 8, beginning with Section 9810, (except a materially misleading denial notice assessed under subsection (c)(17)) or by Title 8, California Code of Regulations, Division 1, Chapter 4.5, Subchapter 1.5, Article 7, beginning with Section 10122, that is materially inaccurate or incomplete, the penalty is \$25.

[v] For each failure to include in a claim file, or document attempts to obtain, any of the required contents specified in Section 10101.1(b), (c), (d), (e), (f), (g), (h), (i), (j) of these Regulations, the penalty is \$100.

[vi] For each failure to comply with any regulation of the Administrative Director, not otherwise assessed in this Subchapter, the penalty is \$100.

(9) The penalty for each failure to pay or object to a billing for a medical-legal expense, in the manner required by Section 9794, within 60 days of receiving the bill and all reports and documents required by the Administrative Director incident to the services, is:

\$100 for each bill that was paid more than 60 days from receipt with interest and a 10% increase;

\$200 for each bill that was paid more than 60 days from receipt where either interest or a 10% increase was not included;

\$300 for each bill that was paid more than 60 days from receipt where neither interest nor a 10% increase was paid.

\$500 for each bill that was not paid at the time the audit subject was notified the claim was selected for audit where no timely objection was sent.

(10) The penalty for each failure to pay or object, in the manner required by law or regulation, to a bill for medical treatment provided or authorized by the treating physician, is as follows when the bill remains unpaid at the time the audit subject is notified that the claim was selected for audit:

\$100 for each bill of \$100 or less, excluding interest and penalty;

\$200 for each bill of more than \$100, but no more than \$500 excluding interest and penalty;

\$300 for each bill of more than \$500, but no more than \$1,000, excluding interest and penalty;

\$500 for each bill of more than \$1,000, excluding interest and penalty.

(11) The penalty for each failure to pay or object, in the manner required by law or regulation, to a bill for medical treatment provided or authorized by the treating physician, is as follows when the bill was paid before the audit subject was notified that the claim was selected for audit:

\$100 for each bill that included a 10% increase and interest with the late payment of any uncontested amount of the bill, in accordance with Labor Code Section 4603.2;  
\$200 for each bill that included either a 10% increase or interest with the late payment of any uncontested amount of the bill, in accordance with Labor Code Section 4603.2;  
\$300 for each bill that included neither a 10% increase nor interest with the late payment of any uncontested amount of the bill, in accordance with Labor Code Section 4603.2.

(12) The penalty for each failure to pay or object to a vocational rehabilitation bill within 60 days of receipt, as required by Title 8, California Code of Regulations, Sections 10132 and 10132.1, is:

\$25 for each bill of \$100 or less;

\$50 for each bill of more than \$100, but no more than \$200;

\$75 for each bill of more than \$200, but no more than \$300;

\$100 for each bill of more than \$300.

(13) The penalty for each failure to maintain or provide to the Audit Unit a claim log that complies with these Regulations is:

\$25 for each failure to list on a claim log one or more of the following: employee's name; claim number; date of injury;

\$25 for each misdesignation of an indemnity claim as a medical-only claim on the claim log;

\$100 for each failure to identify self-insured employers on the log as required by Section 10103.1(b)(6) of these Regulations;

\$100 for each failure to identify the underwriting insurance company of an insurance group;

\$100 for each failure to designate a denied claim on the log;

\$100 for each claim not listed on the log;

\$250 for each failure to provide the claim log to the Audit Unit within 14 days of receipt of a written request if the claim log was provided more than 14 but no more than 30 days from receipt of the request;

\$500 for each failure for more than 30 days from receipt of a written request, to provide the claim log to the Audit Unit.

(14) The penalty for each failure to provide information regarding the Americans with Disabilities Act, the Fair Employment and Housing Act, and workers' compensation vocational rehabilitation as required by Labor Code Section 4636(a) immediately after 90 days of aggregate temporary disability indemnity is \$100 if the information was provided or the employee returned to his or her usual and customary occupation more than 10 but not more than 20 days after 90 days of aggregate total disability, and an additional \$100 for each additional delay of not more than 10 days, to a maximum penalty of \$400 if the notice was issued more than 30 days late, and \$500 if the notice was overdue more than 40 days and was not issued at the time the audit subject was notified that the claim was selected for audit.

(15) The penalty for each failure to issue notice of medical eligibility for vocational rehabilitation services (if not previously issued) within 10 days after knowledge of a physician's opinion that the employee is medically eligible, or for failure to issue notice within 10 days after 366 days of aggregate total temporary disability, is \$100 if the notice was issued not more than 10 days late, and an additional \$100 for each additional delay of not more than 10 days, to a maximum penalty of \$400 if the notice was issued more than 30 days late, and \$500 if the notice was overdue more than 40 days and was not issued at the time the audit subject was notified that the claim was selected for audit. Where the injured worker is represented by an attorney and documentation in the claim file indicates that the injured worker's attorney has received a copy of the physician's report indicating the employee is medically eligible for vocational rehabilitation, and if the knowledge is of a physician's opinion other than the injured worker's treating physician, a physician selected from a panel provided by the Industrial Medical Council, or an agreed medical examiner, the penalty shall be assessed at 20% of the amount otherwise assessed under this subsection and shall not exceed \$100.

(16) The penalty for each failure to provide the employee with a copy of the treating physician's final report together with notice of the procedure to contest the treating physician's determination, in accordance with Labor Code Section 4636(d), immediately upon receipt of that report, is \$100 for compliance more than 10 but not more than 20 days after receipt of the treating physician's final report, and an additional

\$100 for each additional delay of not more than 10 days, to a maximum penalty of \$400 if the notice was issued more than 30 days late, and \$500 if the notice was overdue more than 40 days and was not issued at the time the audit subject was notified that the claim was selected for audit. However, if a separate penalty is assessed under subsection (b)(17) for the violation, no penalty will be assessed under this subsection. If the injured worker was notified of the procedure to contest the treating physician's determination, but no copy of the treating physician's final report was provided with the notice, the maximum penalty shall be \$100 under this subsection.

(17) The penalty for each failure to notify an injured employee of the reasons he or she is not entitled to any, or to any further, vocational rehabilitation services, and the procedure for contesting the determination of non-eligibility, as required by Sections 9813(a)(3) and 10131, is \$100 if notification was issued more than 10 but not more than 20 days after the determination, and an additional \$100 for each additional delay of not more than 10 days, to a maximum penalty of \$40 if the notice was issued more than 30 days late, and \$500 if the notice was overdue more than 40 days and was not issued at the time the audit subject was notified that the claim was selected for audit.

(18) The penalty for each failure to notify an injured employee that his or her injury may have caused permanent disability and the procedures for evaluating the permanent disability, or of the employer's position that the injury has caused no permanent disability and the employee's remedies, in the manner provided by Title 8, California Code of Regulations, Division 1, Chapter 4.5, Subchapter 1, Article 8, beginning with Section 9810; is \$100 if the notice was issued up to 10 days late, and an additional \$100 for each additional delay of not more than 10 days, to a maximum penalty of \$400 if the notice was issued more than 30 days late, and \$500 if the notice was overdue more than 40 days and was not issued at the time the audit subject was notified that the claim was selected for audit.

(19) The penalty for each failure to notify a claimant of the denial of all death benefits claimed by that person (except a denial limited to all or any of: burial expense, benefits which were due to the injured worker before his or her death, or medical-legal expense), in the manner provided by Title 8, California Code of Regulations, Division 1, Chapter 4.5, Subchapter 1, Article 8, beginning with Section 9810, is \$100 if the notice was issued up to 10 days late, and an additional \$100 for each additional delay of not more than 10 days, to a maximum penalty of \$400 if the notice was issued more than 30 days late, and \$500 if the notice was overdue more than 40 days and was not issued at the time the audit subject was notified that the claim was selected for audit.

(20) The penalty for each failure to send a notice denying liability for all workers' compensation benefits, in accordance with Title 8, California Code of Regulations,

Division 4.5, Chapter 1, Article 8, beginning with Section 9810, is \$100 if the notice was issued up to 10 days late, and an additional \$100 for each additional delay of not more than 10 days, to a maximum penalty of \$400 if the notice was issued more than 30 days late, and \$500 if the notice was overdue more than 40 days and was not issued at the time the audit subject was notified that the claim was selected for audit.

(21) The penalty for each notice denying liability for all workers' compensation benefits, which was materially misleading, is \$500.

The penalty for each materially incomplete denial notice is \$100.

(22) The penalty for each termination, interruption or deferral of vocational rehabilitation services other than as provided by Labor Code Sections 4637(b), 4644(b) is \$1,000.

(23) The penalty for each failure to comply with, show good cause for non-compliance with, or contest, within 30 days of receipt, any written request or order of the Administrative Director or Audit Unit which is not specified in subsections (a)(9) or (b)(14) of this section is:

\$500 if there was compliance in more than 30 but not more than 40 days from receipt of the request or order;

\$1,000 if there was compliance in more than 40 but not more than 60 days from receipt of the request or order;

\$2,500 if there was compliance in more than 60 but not more than 90 days of receipt of the request or order;

\$5,000 for failure to comply within 90 days of receipt of the request or order.

(24) The penalty for each failure by a claims administrator to provide a claim form within one working day of receipt of a request from an injured worker or the worker's agent is:

\$500 if the claim form was provided in more than 1 but not more than 5 working days from receipt of the request, if benefits were being provided to the employee at the time of the request;

\$1,000 if the claim form was not provided within 5 working days of receipt of the request, if benefits were being provided to the employee at the time of the request;

\$3,000 if the claim form was provided in more than 1 but not more than 5 working days from receipt of the request, if benefits were not being provided to the employee at the time of the request;

\$5,000 if the claim form was not provided within 5 working days of receipt of the request, if benefits were not being provided to the employee at the time of the request.

(25) The penalty for each failure to comply with Section 10104 of this Subchapter is:

\$100 for each period of 1 to 14 days' delay in filing the Annual Report of Inventory, to a maximum penalty of \$500 for each Annual Report of Inventory;

\$500 for each Annual Report of Inventory that overstates or understates the number of claims by 10% or more.

(c) Mitigation of penalty amounts pursuant to Labor Code Section 129.5(b)(1) through (b)(7) will be applied as follows:

(1) Mitigation for gravity of the violation is included within the penalty amounts set forth in subsections (a) and (b).

(2) Mitigation for good faith of the insurer, self-insured employer, or third-party administrator will be determined based on documentation of attempts to comply with requirements of the Labor Code and the Administrative Director's regulations, and will result in a reduction of 20% for each applicable violation.

(3) Mitigation for frequency is considered as included within the numbers of penalties and their amounts established by this section and in conjunction with the frequency of violations that determines whether or not the audit subject meets or exceeds the profile audit review performance standards and/or full compliance audit performance standards pursuant to Sections 10107.1(c)(3) and (d)(3).

(4) Mitigation for history shall be determined as follows:

(A) For audits that meet or exceed the full compliance audit performance standard, penalty amounts will be reduced by 20%, after modification for good faith, if any, in instances in which the audit subject met or exceeded the profile audit review performance standards in the audit preceding the current audit. No reduction shall apply if the preceding audit occurred before January 1, 2003.

(B) For audits that fail to meet or exceed the full compliance audit performance standards, mitigation for history shall be determined pursuant to Labor Code Section 129.5(e).

- (5) Mitigation based on whether or not the audit subject has met or exceeded the profile audit review performance standard is determined pursuant to Labor Code Section 129.5(c) (1) and (c)(2).
- (6) Mitigation based on whether or not the audit subject has met or exceeded the full compliance audit performance standard is determined pursuant to Labor Code Section 129.5(c)(3).
- (7) Consideration of penalty amounts based on the size of the audit subject location pursuant to Labor Code Section 129.5(c)(3) shall be based on the number of indemnity claims reported at the audit subject's location for the last audited year. For audit subjects that fail to meet or exceed the full compliance audit performance standards calculated pursuant to Section 10107.1(d)(3), after penalty amounts are calculated pursuant to subsections (a)(1) through (c)(6) of this section, penalty amounts will be modified based on the size of the adjusting location as follows:

<u>Number of indemnity claims reported at the audit subject location in last audited year:</u>	<u>Multiply the penalty amount calculated pursuant to subsections (a)(1) through (c)(6) of this section by the following factor:</u>
<u>Less than 65:</u>	<u>1.0</u>
<u>65-99</u>	<u>1.2</u>
<u>100-249</u>	<u>1.4</u>
<u>250-499</u>	<u>1.6</u>
<u>500-749</u>	<u>1.8</u>
<u>750-999</u>	<u>2.0</u>
<u>1,000-1,499</u>	<u>2.4</u>
<u>1,500-1,999</u>	<u>2.8</u>
<u>2,000-3,499</u>	<u>3.6</u>
<u>3,500 or more</u>	<u>7.2</u>

- (8) The Audit Unit may assess penalties pursuant to subsections (a), (b), and (c) in target audits in which the claims were audited to evaluate specific practices but in which full compliance audit samples of claims were not randomly selected pursuant to Section 10107.1(c) through (e).

Note: Authority cited: Sections 59, 129, 129.5, 133, 138.3, 138.4, 139.5, 4603.5, 4627 and 5307.3, Labor Code. Reference: Sections 124, 129, 129.5, 4061, 4453, 4454, 4550, 4600, 4603.2, 4621, 4622, 4625, 4636 through 4638, 4639, 4641, 4642, 4650, 4951, 4701 through 4703.5, 4706, 4706.5 5401, 5401.6, 5402, 5800 and 5814, Labor Code and Section 2629.1(e), (f), Unemployment Insurance Code.

## **§10113. Order to Show Cause Re: Assessment of Civil Penalty and Notice of Hearing.**

(a) ~~If, based on the results of two consecutive audits, an audit subject qualifies for a non-random audit of indemnity and/or denied claims pursuant to Section 10106(f) of these regulations, a claims administrator fails to meet the full compliance audit performance standards in two consecutive full compliance audits,~~ the Audit Unit shall file a Complaint naming the audit subject and requesting the Administrative Director to issue an Order to Show Cause for the possible assessment of a civil penalty pursuant to Labor Code Section 129.5(d)(e). Nothing in these regulations shall prohibit the Audit Unit from referring any audit subject to the Administrative Director for the possible assessment of a civil penalty under Labor Code Section 129.5(d)(e) for any other reason., ~~regardless of whether or not the audit subject qualifies for referral for possible assessment of the civil penalty under this section of these regulations.~~ If the Administrative Director has reason to believe that an employer, insurer, or third-party administrator has knowingly committed ~~and~~ or performed any of the practices set forth in Labor Code Section 129.5(d)(e), (s)he shall issue an Order to Show Cause Re: Assessment of Civil Penalty and Notice of Hearing.

(b) The order shall be in writing and shall contain all of the following:

- (1) Notice that a civil penalty not to exceed \$100,000 per adjusting location may be assessed;
  - (2) The basis for the assessment, including a statement of the alleged violations;
  - (3) Notice of the date, time and place of hearing, ~~to be held not less than 60 days from the date the Order to Show Cause was served or mailed.~~ Continuances will not be allowed without a showing of good cause.
- (c) The order shall be served personally or by registered or certified mail.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code  
Reference: Sections 7, 124, 129 and 129.5, Labor Code

### **§ 10113.1. Answer to Order to Show Cause.**

(a) Within 30 days after service of the Order to Show Cause Re Assessment of Civil Penalties the claims administrator may file with the Administrative Director an Answer to the Order to Show Cause in which the claims administrator may:

(1) Admit or deny in whole or in part any of the allegations of set forth in the Order to Show Cause;

(2) Set forth any affirmative defenses.

(b) Failure to timely file an Answer shall constitute a waiver of the claims administrator's right to a hearing. Unless set forth in the Answer, all defenses to the Order to Show cause shall be deemed waived. If the Answer is not timely filed, the claims administrator may file a written request for leave to file an Answer. The claims administrator may also file a written request for leave to assert additional defenses. The Administrative Director may grant relief upon a showing of good cause.

(c) The Answer shall be in writing signed by or on behalf of the claims administrator and shall state the claims administrator's mailing address. It need not be verified or follow any particular form.

(d) The claims administrator must file the original and one copy of the Answer on the Administrative Director and concurrently serve one copy of the Answer on the Audit Unit. The original and all copies of any filings shall have a proof of service.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code  
Reference: Sections 129 and 129.5, Labor Code

### **§10113.2. Amended Complaint or Supplemental Order to Show Cause Before Submission of Case**

At any time before the hearing, the Administrative Director may file or permit the filing of an amended complaint or supplemental Order to Show Cause. All parties shall be notified thereof. If the amended or supplemental Order to Show Cause presents new charges, the Administrative Director shall afford the claims administrator a reasonable opportunity to prepare its defense thereto, and it shall be entitled to file an amended Answer.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code  
Reference: Sections 129 and 129.5, Labor Code

### **§10113.3. Administrative Director's Designation of Hearing Officer**

The Administrative Director may delegate authority to a Hearing Officer. The delegation may include the following authority: to conduct a prehearing conference; to conduct the civil penalty hearing; to issue subpoenas for the attendance of witnesses at the conference; to issue subpoena duces tecum for the production of documents; and to prepare a Recommended Determination.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code  
Reference: Sections 129 and 129.5, Labor Code

### **§10113.4. Written Statement and Supporting Evidence**

(a) Not less than 30 calendar days prior to the date of hearing, the claims administrator shall file and serve a written statement with the Administrative Director specifying its legal and factual bases for its Answer. The written statement shall also list all witnesses the claims administrator intends to call to testify at the hearing, and copies of all documents and all other evidence the claims administrator intends on introducing into evidence must be served with the written statement. If the written statement and

supporting evidence are not timely filed and served, the Administrative Director shall dismiss the Answer and issue a written Determination. If the written statement and supporting evidence are not timely filed and served, the claims administrator may file a written request for leave to file a written statement and supporting evidence. The written request for leave must be filed and served no later than the date of the hearing. The Administrative Director may grant the request for leave to file the written statement and supporting evidence and continue the hearing, upon a showing of good cause.

(b) The claims administrator must file the original and one copy of the written statement and all supporting evidence on the Administrative Director and concurrently serve one copy of the written statement and all supporting evidence on the Audit Unit. The original and all copies of any filings shall have a proof of service.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code  
Reference: Sections 129 and 129.5, Labor Code

### **§10113.5. Prehearing Conference; Subject Matter; Prehearing Order**

(a) The Administrative Director or designee shall set the time and place for the prehearing conference, and shall give reasonable written notice to all parties.

(b) The prehearing conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

(3) Clarification of issues.

(4) Rulings on identity and limitation of the number of witnesses.

(5) Objections to proffers of evidence.

(6) Order of presentation of evidence and cross-examination.

(7) Rulings regarding issuance of subpoenas and protective orders.

(8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(9) Any other matters as shall promote the orderly and prompt conduct of the hearing.

(c) The Administrative Director or designee shall issue a prehearing order incorporating the matters determined at the prehearing conference. The Administrative Director or designee may direct one or more of the parties to prepare a prehearing order.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code  
Reference: Sections 129 and 129.5, Labor Code

### **§10113.6. Subpoenas**

The Administrative Director or designee may issue subpoenas for the attendance of persons and the production of documents or other things, to compel the attendance of persons residing anywhere within the State.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code  
Reference: Sections 129 and 129.5, Labor Code

## § 10114. Hearing and Determination

- ~~(a) The Administrative Director may appoint a designee to conduct the hearing.~~  
~~(b) The Administrative Director or designee may issue subpoenas for the attendance of persons and the production of documents or other things, to compel the attendance of persons residing anywhere within the State. Any person who is subpoenaed to appear may, instead of appearing at the time specified in the subpoena, agree with the party at whose request the subpoena was issued to appear at another time or upon agreed notice. Any failure to appear according to that agreement may be treated in all respects as a failure to appear in response to the original subpoena. The facts establishing or disproving the agreement and failure to appear may be proved by an affidavit of any person having personal knowledge of the facts.~~  
~~(c) (a) The hearing shall be held at the place, time and date noticed, unless a continuance has been granted for good cause.~~  
~~(d) Oral evidence shall be taken only under oath or affirmation.~~  
~~(e) The hearing need not be conducted under the formal rules of evidence.~~  
~~(f) (b) A record of the hearing shall be made.~~  
~~(g) The Administrative Director shall issue a written Determination, including a statement of the basis for the Determination, within 60 days of the date the case was submitted for decision. This requirement is directory and not jurisdictional.~~  
~~(h) The Determination shall be served on the assessee personally or by registered or certified mail. If the Determination assesses a civil penalty, the Determination shall become final 7 days after the assessee received it, and the assessee shall pay the amount assessed within 15 days of receipt, unless the assessee has filed and served a timely Request for Conference as provided by Section 10115.3 of these Regulations.~~  
(c) Any claims administrator that fails to meet the full compliance audit performance standards in two consecutive full compliance audits shall be rebuttably presumed to have engaged in a general business practice of discharging and administering its compensation obligations in a manner causing injury to those dealing with it. With regard to any other bases for the assessment of a civil penalty, the Audit Unit will have the burden to prove a *prima facie* case that a violation of 129.5(e) occurred. The claims administrator may cross-examine the witnesses. The claims administrator may then present any testimony to rebut the Audit Unit's testimony, and the Audit Unit may cross-examine. The Designated Hearing Officer may choose to ask questions for clarification of the record.

Note: Authority cited: Sections 59, 129.5, 133 and 5307.3, Labor Code.  
Reference: Sections 7, 124 and 129.5, Labor Code.

### § 10114.1. Evidence; Examination of Witnesses

(a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence.

(c) In the absence of a contrary order by the Hearing Officer, the Audit Unit shall present its evidence first.

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(e) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

(f) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code.

Reference: Sections 7, 124 and 129.5, Labor Code.

### **§10114.2. Affidavits**

The written affidavit or declaration of any witness may be offered and shall be received into evidence provided that (i) the witness was listed in the written statement pursuant to section 10113.4, (ii) the statement is made by affidavit or by declaration under penalty of perjury, (iii) copies of the statement have been delivered to all opposing parties at least 20 days prior to the hearing, and (iv) no opposing party has, at least 10 days before the hearing, delivered to the proponent of the evidence a written demand that the witness be produced in person to testify at the hearing. The Hearing Officer shall disregard any portion of the statement received pursuant to this regulation that would be inadmissible if the witness were testifying in person, but the inclusion of inadmissible matter does not render the entire statement inadmissible.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code.

Reference: Sections 7, 124 and 129.5, Labor Code.

### **§10114.3. Oaths**

In any proceedings under this chapter the Administrative Director or his designated hearing officer, has power to administer oaths and affirmations and to certify to official acts.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code.  
Reference: Sections 7, 124 and 129.5, Labor Code.

#### **§10114.4. Determination**

(a) The Administrative Director shall issue a written Determination, including a statement of the basis for the Determination, within 60 days of the date the case was submitted for decision. This requirement is directory and not jurisdictional.

(b) The Determination shall be served on the audit subject personally or by registered or certified mail. If the Determination assesses a civil penalty, the Determination shall become final 7 days after the audit subject receives it, and the audit subject shall pay the amount assessed within 30 days after receiving the Determination, but the 30-day period shall be tolled if the audit subject files a timely appeal pursuant to Section 10953.

Note: Authority cited: Sections 59, 129, 129.5, 133 and 5307.3, Labor Code.  
Reference: Sections 7, 124 and 129.5, Labor Code.

#### **§10115.1. Appeal of Notice of Penalty Assessment--Filing and Contents.**

(a) Within 7 days after receiving a Notice of Penalty Assessment issued under Labor Code Section 129.5(a) and (c), the claims administrator may appeal all or a portion of the penalty assessments in the Notice by filing with the Administrative Director and serving the Audit Unit with a request for an appeals conference or a request for a written decision ~~by the Administrative Director~~ without a conference.

(b) If a request for a written decision or request for appeals conference is not timely filed and served, the Notice of Penalty Assessment will become final 7 days after the claims administrator received it, and must be paid in accordance with Labor Code §129.5(c) within 15 days of receipt.

(c) The request shall be in writing in a form specified by the Administrative Director and shall include at least the following information:

(1) The name and address of the person filing the request;

(2) A copy of the Notice of Penalty Assessment which is disputed.

(d) Within 21 days after the request for a written decision or appeals conference is filed, the appellant shall file with the Administrative Director and serve the Audit Unit with a written statement ~~with the Administrative Director~~ listing the assessments appealed, specifying the legal or factual basis of the appeal, and including documentation or other evidence, if any, which supports the appellant's position. If the written statement and supporting documentation are not timely filed and served, the Administrative Director shall dismiss the request for written decision or appeals conference. The Notice of Penalty Assessment becomes final on the date of the Administrative Director's notice of dismissal. Penalties shall be paid within 15 days of receipt of the notice of dismissal.

(e) The appellant is deemed to have finally waived any legal or factual basis for appeal which is not stated in a timely filed appeal or timely filed supporting statement. However, the appellant may move the Administrative Director, upon a written showing of good cause filed and served not later than thirty days after its written statement was timely filed, for leave to amend its appeal or statement to add a legal or factual basis for appeal not previously stated. The motion shall attach a copy of the proposed amendment. The motion may include a request to file additional supporting documentation, which shall also be attached. If leave to amend is granted, the proposed amendment shall be deemed filed on the date the Administrative Director's order is served.

(f) Documentation which the appellant did not file with its appeal or supporting statement (including an amended appeal and statement allowed under subsection (e)) will not be admitted into evidence in support of the appeal without a showing of good cause. Good cause requires the appellant to show that the additional documentation was not reasonably available to accompany its appeal statement, and also requires that the appellant serve a copy of the proposed additional documentation on the Audit Unit before the hearing, as soon as the document becomes available.

(g) The appellant shall mail or deliver an original and one copy of its request under subsection (a) and its statement, documentation and any motion under subsections (d) or (e) to the office of the Administrative Director at the address shown in the report of audit findings. Requests, statements, documentation and motions are timely if they were:

(1) Placed in the United States mail in a fully prepaid, sealed envelope postmarked within the times specified in subsections (a), (d) and (e); or,

(2) Delivered to the office of the Administrative Director between the hours of 8:00 a.m. and 5:00 p.m. within the periods specified in subsections (a), (d) and (e).

If a date to submit a request under subsection (a) or to submit a filing under subsections (d) or (e) falls on a weekend or holiday, that date is extended to the next business day.

(h) The appellant shall serve two copies of any request, statement, document or motion filed with the Administrative Director concurrently on the Audit Unit, by the same means of delivery as the original which was filed with the Administrative Director. The original and all copies of any filing shall attach proof of service, which may be made as provided in Title 8, California Code of Regulations, Section 10975.

(i) If a request for a written decision or an appeals conference, or a written statement in support of the appeal, contests only a portion of a Notice of Penalty Assessment, the portions of which are not appealed (or not included in the supporting statement(s)) shall become final on the same date an entire Notice of Penalty Assessment would become final if not timely appealed or supported, and appellant shall pay the uncontested assessments by the date payment would be due under subsection (b) if an entire Notice of Penalty Assessment were involved.

Note: Authority cited: Sections 59, 129.5, 133 and 5307.3, Labor Code.

Reference: Sections 129 and 129.5, Labor Code.

### **~~§10115.3. Appeal of Civil Penalty.~~**

~~(a) If an assessee disputes the Determination assessing a civil penalty after hearing, the assessee may request a conference with the Administrative Director. The request shall be in writing, shall specify the basis of the dispute, shall be in a form specified by the Administrative Director, and shall be served personally or by certified or registered mail on the Administrative Director within 7 days of the assessee's receipt of the Determination after hearing described in Section 10114(g), (h) of these Rules.~~

~~(b) If the Administrative Director determines that a conference is appropriate, (s)he will schedule a conference within 30 days of receiving the request. Within 15 days of submitting the matter for decision after the conference or within 20 days of receiving the written request for conference if a conference is not conducted, the Administrative Director shall issue a Notice of Findings and serve the claims administrator by registered or certified mail. The Notice of Findings is final for purposes of judicial review upon receipt. The time limits for action by the Administrative Director are directory and not jurisdictional.~~

~~(c) The appellant must pay any amount found due by the Administrative Director within 30 days after receiving the Notice of Findings, but the 30-day period shall be tolled if the appellant files a timely petition for writ of mandate until that proceeding has become final.~~

~~(d) The assessee may seek further review of a Notice of Findings issued under subsection (b), by filing a petition for writ of mandate in the appropriate superior court as provided by Labor Code Section 129.5(e). The deadline for filing the petition for writ is 30 days after service of the Notice of Findings.~~

~~Note: Authority cited: Sections 59, 129.5, 133 and 5307.3, Labor Code.  
Reference: Sections 7, 124 and 129.5, Labor Code.~~