

State of California
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

**NOTICE OF MODIFICATION TO TEXT OF
PROPOSED REGULATIONS**

Subject Matter of Regulations: Utilization Review Enforcement

TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 9797.11 – 9792.15

NOTICE IS HEREBY GIVEN that the Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her by Labor Code sections 133 and 4610, proposes to modify the text of the following proposed amendments to Title 8, California Code of Regulations:

Section 9792.11	Investigation Procedures: Labor Code § 4610 Utilization Review Violations
Section 9792.12	Penalty Schedule for Labor Code § 4610 Utilization Review Violations
Section 9792.13	Assessment of Administrative Penalties – Penalty Adjustment Factors
Section 9792.14	Liability for Penalty Assessments
Section 9792.15	Administrative Penalties Pursuant to Labor Code § 4610 – Order to Show Cause, Notice of Hearing, Determination and Order and Review Procedure

PRESENTATION OF WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION OF WRITTEN COMMENTS

Members of the public are invited to present written comments regarding these proposed modifications. **Only comments directly concerning the proposed modifications to the text of the regulations will be considered and responded to in the Final Statement of Reasons.**

Written comments should be addressed to:

Maureen Gray, Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The Division's contact person must receive all written comments concerning the proposed modifications to the regulations no later than **5:00 p.m. on December 12, 2006**. Written comments may be submitted by facsimile transmission (FAX), addressed to the contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail), using the following e-mail address: dwcrules@hq.dir.ca.gov.

AVAILABILITY OF TEXT OF REGULATIONS AND RULEMAKING FILE

Copies of the original text and modified text with modifications clearly indicated, and the entire rulemaking file, are currently available for public review during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays, at the offices of the Division of Workers' Compensation. The Division is located at 1515 Clay Street, 17th Floor, Oakland, California.

Please contact the Division's regulations coordinator, Ms. Maureen Gray, at (510) 286-7100 to arrange to inspect the rulemaking file.

The specific modifications proposed include changes to the text of the proposed amendments Title 8, California Code of Regulations:

Section 9792.11	Investigation Procedures: Labor Code § 4610 Utilization Review Violations
Section 9792.12	Penalty Schedule for Labor Code § 4610 Utilization Review Violations
Section 9792.13	Assessment of Administrative Penalties – Penalty Adjustment Factors
Section 9792.14	Liability for Penalty Assessments
Section 9792.15	Administrative Penalties Pursuant to Labor Code § 4610 – Order to Show Cause, Notice of Hearing, Determination and Order and Review Procedure

DOCUMENTS SUPPORTING THE RULEMAKING FILE

- Comments from various interested parties concerning the regulations have been added to the rulemaking file.

FORMAT OF PROPOSED MODIFICATIONS

Proposed Text Noticed for 45-Day Comment Period:

The new text is indicated by underlining, thus: underlined language.

Proposed Text Noticed for This 15-Day Comment Period on Modified Text:

Deletions from the regulatory text, as proposed in April 2006, are indicated by underline/single strike-through, thus: ~~deleted language~~.

Additions to the regulatory text, as proposed in April 2006, are indicated by a bold italics underline, thus: **added language**.

SUMMARY OF PROPOSED CHANGES

Modifications to Section 9792.11 Investigation Procedures: Labor Code § 4610 Utilization Review Violations

Subdivision (a) is amended to include a definition of “utilization review organization.” The proposed revision states: “‘utilization review organization’ includes any person or entity with which the employer, or an insurer or third party administrator, contracts to fulfill part or all of the employer’s utilization review responsibilities under Labor Code section 4610 and Title 8 of the California Code of Regulations, sections 9792.6 through 9792.15.”

Former subdivision (c) is deleted. The proposed revised subdivision (c) sets forth the three types of investigations that may be conducted. The revised subdivision states:

(c) The Administrative Director, or his or her designee, may conduct a utilization review investigation at any location where part or all of an employer’s utilization review processes occur, as follows:

(1) A Routine Investigation shall be initiated at each known utilization review organization, or in the case of employer’s performing utilization review on the employer’s business site, no less frequently than once every three (3) years. A Routine Investigation of an employer’s utilization review processes also may be initiated at any claims adjusting location concurrently with a routine, target or full audit done pursuant to Labor Code section 129 or 129.5. A Routine Investigation of the utilization review processes handled at each claims adjusting location shall be done no less frequently than once every five (5) years.

(2) A Non-Routine Investigation may be conducted at any time:

(A) in the discretion of the Administrative Director or his or her designee, based on factual information or a complaint containing facts, indicating the possible existence of a violation of Labor Code section 4610 or sections 9792.6 through 9792.12 of these regulations, or

(B) to determine abatement of utilization review violations previously found.

(3) A Non-Routine Investigation based on factual information or a complaint containing facts may include:

(A) a review of the file or files pertaining to the alleged violation; and

(B) where the initial file review reveals violations, in the discretion of the Administrative Director or his or her designee, a sample of additional files to determine the prevalence of such violations.

(4) A Non-Routine Investigation to determine abatement may include:

(A) a review of a new sample of files containing utilization review decisions made after the date of the investigation that resulted in findings that required abatement; and

(B) a review of the files already investigated; and

(5) During any Non-Routine Investigation, the Administrative Director, or his or her designee, also may include investigation into any complaints received by the Administrative Director since the time of any prior investigation.

Subdivision (d) is revised to clarify which penalties will be assessed if the investigation is done concurrent with a Labor Code section 125 or 125.9 audit. Administrative penalties for utilization review process violations shall apply in lieu of the administrative penalties allowed under the audit regulations at section 1011.2. In addition, any report of findings from the investigation and any Order to Show Cause re: Assessment of Administrative Penalties prepared by the Administrative Director, or his or her designee, based on violations of Labor Code section 4610 or Title 8 of the California Code of Regulations sections 9792.6 through 9792.12, shall be prepared separately from any audit report or assessment of administrative penalties made pursuant to Labor Code section 129 and 129.5. The Order to Show Cause re: Assessment of Administrative Penalties for violations of sections 9792.6 et seq of Title 8 of the California Code of Regulations shall be governed by the provisions sections 9792.11 through 9792.15 of Title 8.

Subdivision (e) is revised to reference California Code of Civil Procedure sections 1822.50 et seq, which allows for the issuance of an inspection warrant.

Subdivision (f) is amended to state that the proposed sections shall apply to investigations and conduct occurring on or after the effective date of the regulations.

Former subdivision (g) was deleted as it was replaced by the changes made to subdivision (c).

Subdivision (g) reflects corrected citations to the audit regulations which may apply to the procedures used during the utilization review process investigations.

Subdivision (h) is revised as follows:

(i) (h) Any claims administrator, **utilization review organization** or other person performing utilization review services for an employer, **that possesses or is able to obtain the employer's current legal name, address and phone number**, shall provide **this information to the Administrative Director, or his or her designee, the current legal name, address, and phone number of the employer**, upon request.

Proposed subdivision (i) requires the claims administrator or utilization review organization to notify the affected employers of specific facts concerning a final report of findings of violations. It states:

(i) Upon receipt of any final report of findings of violations of Labor Code 4610 or sections 9792.6 through 9792.12 of Title 8 of the California Code of Regulations from the Administrative Director, or his or her designee, the claims administrator, utilization review organization or other person performing utilization review services for an employer shall notify affected employers by the following means:

(1) The notice shall include a summary of the Division's findings on investigation, the measures actually implemented to abate such conditions, whether an objection or appeal is being filed from any Order to Show Cause re: Administrative Penalties and the website address for the Division where the final investigation report is posted.

- (2) For each utilization review file, claim or request that was the basis for a specific finding of violation, the affected employer for that case, claim or request shall receive the notice required by section 9792.11(i)(1) above by certified mail; and
- (3) The Administrative Director or his or her designee shall post a copy of the final report on the website for the Division of Workers' Compensation.

Former subdivision (j) is deleted.

Proposed subdivision (j) provides that unless the Administrative Director in his or her discretion determines that advance notice will render an investigation less useful, the claims administrator, utilization review organization or other person performing utilization review processes for an employer will be notified no less than thirty (30) calendar days in advance of the date for commencement of an onsite routine or non-routine investigation. Upon receipt of the notice of a routine or non-routine investigation, the claims administrator, utilization review organization or other person performing utilization review processes for the employer shall, within seven (7) calendar days, deliver to the Administrative Director, or his or her designee, all requested information and records, including but not limited to:

- (1) A description of the system used to uniquely identify each utilization review request, which includes but is not limited to each request for authorization for treatment services or pharmaceutical drugs or durable medical equipment or diagnostic tests or exams, and the method used to track the status of the request;
- (2) A description of all media used to transmit, share, record or store information received and transmitted in reference to each request, whether printed copy, electronic, fax, diskette, computer drive or other media;
- (3) A legend of any and all numbers, letters and other symbols used to identify the disposition (e.g. approve, deny, modify, delay or withdraw) for individual utilization review requests;
- (4) A summary depicting the total number of utilization review requests communicated to and the total number of utilization review dispositions issued from the site of the investigation, which summary also shall display the number of dispositions by type resulting in approval, denial, modification, delay or withdrawal of the request, respectively. In the cases involving the withdrawal of a request during the reporting period specified by the Administrative Director, or his or her designee, the summary shall include the number of instances, displayed by type of person making the withdrawal, according to those withdrawn by the requesting physician, withdrawn by the injured employee or employee's attorney, withdrawn by the claims adjuster and withdrawn by any other person;
- (5) A depiction of the organization's hierarchy, which may be satisfied by a copy of the organizational chart, which depiction shall include but not limited to the place of the medical director within the organization, and of the line of authority from the highest management level of the organization to the medical director responsible for all utilization review decisions. The depiction or chart provided also shall include the hierarchy and line of authority from the medical director to all other persons involved in receiving, processing, evaluating, reviewing and responding to requests for authorization;
- (6) A description of the methods by which the medical director for utilization review is advised of and able to be responsible for all decisions made in the utilization review process, as required by sections 9792.6(l) and 9792.7(b) of Title 8 of the California Code of Regulations;
- (7) A list of each and every utilization review case or request received at the investigation site during the time period specified by the Administrative Director, or his or her designee. The list shall be in an electronic format acceptable to the Administrative Directive, or his or her

designee, and shall include at a minimum the following data elements: i) a unique identifying number for each file, case or request; ii) the claim number used by the claims adjuster; iii) the initial date of receipt of the request for medical treatment; iv) the type of review (prospective, concurrent, retrospective, expedited, appeal); v) the disposition (approve, deny, delay, modify, withdrawal); and, vi) if applicable, the type of person who withdrew the request (requesting physician, claims adjuster, injured employee or his or her attorney, or other person). In the event the claims administrator, utilization review organization or other person subject to Labor Code section 4610 is not able to provide the list in an electronic format, the list shall be provided in such a form that the listed files, cases or requests are sorted in the following order: by type of utilization review; type of disposition; and date of receipt of the initial request.

(8) The following additional data elements, if available, may be requested by the Administrative Director or his or her designee: i) the name of the utilization review organization or person subject to Labor Code section 4610; ii) whether utilization review services are provided externally; iii) whether utilization review services are provided by more than one contractor; iv) if a third party administrator is being used, the employer or insurer name and address; v) the name and address of the employer; vi) the name and address of the claims adjuster handling the claim that gave rise to the request for medical treatment; vii) the date the request was sent by the claims adjuster to the utilization review organization (if applicable); viii) the date of the decision by the utilization review organization or other person performing utilization review services for the employer; ix) the name of the requesting physician; x) the date the requesting physician was notified of the decision; and xi) the medical treatment, product or service requested.

Subdivision (k) provides that, the Administrative Director, or his or her designee, shall provide the claims administrator, utilization review organization or other person subject to Labor Code section 4610, with a list of no less than thirty-two (32) specific individual utilization review files, cases or requests, for investigation. Within seven (7) calendar days of receipt from the Administrative Director, or his or her designee, of the list of utilization review files, cases or requests for investigation, the claims administrator, utilization review organization or other person performing utilization review services for the employer shall:

(1) Deliver to the Administrative Director, or his or her designee, a true and complete copy of all records, whether electronic or paper, for each utilization review file, case or request listed. The records may be copied and tendered, or provided in their original form, to the Division, and shall be delivered with a statement signed under penalty of perjury by the custodian of records for the location at which the records are held, attesting that the all of the records produced are true, correct and complete copies of the originals, or are the original records, in his or her possession;

(2) In the case of a utilization review investigation being conducted concurrently with a routine, target or full audit pursuant to Labor Code sections 129 or 129.5, the employer shall produce for the Administrative Director, or his or her designee, on the first day of commencement of the onsite investigation, the true, correct and complete original records, whether electronic or paper, whether located onsite or offsite, for each utilization review case, file or request identified by the Administrative Director or his or her designee, together with a statement signed under penalty of perjury by the custodian of records for the location at which the records are held, attesting that all of the records produced are true, correct and complete copies of the originals, or that the records are the originals.

Subdivision (l) is revised to state:

(l) Beginning on the first day of any onsite investigation, the claims administrator, utilization review organization or other person subject to Labor Code section 4610 shall make the original files, whether electronic or paper, of all records previously copied pursuant to subdivision 9792.11(j) above, available for review by the Administrative Director, or his or her designee. In the event the Administrative Director, or his or her designee, determines additional records or files are needed for review during the course of an onsite investigation, the claims administrator, utilization review organization or other person performing utilization review for an employer shall produce the requested records in the manner described by subdivision 9792.11(j) above, within one (1) calendar day when the records are located at the site of investigation, and within five (5) calendar days when the records are located at any other site. Any such request by the Administrative Director, or his or her designee, also may include records or files pertaining to any complaint alleging violations of Labor Code sections 4610 or sections 9792.6 through 9792.12 of Title 8 of the California Code of Regulations. The Administrative Director, or his or her designee, may extend the time for production of the requested records for good cause.

Subdivision (m) is revised to include the words: “and except in cases involving concurrent or expedited review” the reference to section 9792.9(b) and (c). The sentence structure was changed for clarity.

Subdivision (n) was revised to include the term “utilization review organization” and by referring to the method set out in section 9792.9(a)(2). The following exceptions were added: “(1) where the request for authorization is made by mail through the U.S. postal service and no proof of service by mail exists, the request shall be deemed to have been received by the claims administrator, utilization review organization or other person subject to the requirements of Labor Code section 4610 on whichever date is earlier, either the receipt date stamped by the addressee or within five (5) calendar days of the date stated in the request for authorization or where the addressee can show a delay in mailing by the postmark date on the mailing envelope then within five (5) calendar days of the postmark date, if the place of mailing and place of address are both within California, within ten (10) calendar days if the place of address is within the United States but outside of California, and within twenty (20) calendar days if the place of address is outside of the United States; and (2) where the request for authorization is made by express mail, overnight mail or courier without any proof of service, the request shall be deemed received by the addressee on the date specified in any written confirmation of delivery.”

Subdivision (o) was revised to include the words “utilization review organization,” to correct the reference to section 9792.11(c)(2), to correct the sentence syntax and to include an exception to providing information that triggered the investigation. The exception states: “The Administrative Director, or his or her designee, may refuse to provide such a written description, whenever the Administrative Director or his or her designee determines that providing the information would make the investigation less useful.”

Subdivision (p) was added to require that the files and other records pertaining to the utilization review process be retained for five years.

Subdivision (q) requires that upon receipt of the notice of investigation any documents or records pertaining to the utilization review process that are maintained outside of California must be

delivered to California or the claims administrator or utilization review organization must reimburse the Administrative Director for the actual expenses of each investigator who travels outside of California..

The authorities are revised to refer to section 11180-11191, Government Code. The references are revised to refer to sections 1822.50 et seq Code of Civil Procedure.

Modifications to Section 9792.12 Penalty Schedule for Labor Code § 4610 Utilization Review Violations

This section was revised to increase in the penalties for the single instance violations listed in section 9792.12(a) and provide for a waiver of penalties for the violations listed in 9792.12(b) if the violations are abated. If, upon a return investigation, one or more violations of the same sections exist, the penalty amount shall be calculated as follows: the maximum of the basic penalty times 10% of the total number of utilization review requests answered in the 30 days preceding notice of the follow-up investigation. For a second follow-up investigation, the formula is the basic penalty times 20% of the total number of utilization review requests answered in the 30 days preceding the investigation, and for the third follow-up investigation, the formula is the basic penalty times 40% of the total number of utilization review requests answered in the 30 days preceding the investigation. The penalties may be mitigated based on the factors listed in section 9792.13.

Specifically, in subdivision (a), the words “Mandatory Administrative” are added before the word “penalty.” The words “amount that shall be assessed” are added for clarity. Reference is added to sections 9792.6 through 9792.12.

Subdivision (a)(1) is revised as follows”

(1) A maximum of \$50,000 for failure to establish a utilization review process, **and to file with the Administrative Director a written plan that describes the utilization review process, plan and or for failure to maintain a utilization review process, in compliance with Labor Code section 4610, including the failure to include that complies with all of the following required information requirements of Labor Code section 4610:**

(A) **The plan states, and at any time upon request, the claims administrator, utilization review organization or other person performing utilization review services for the employer, can provide the name, medical license number, and current areas of certified specialty and practice, of the employed or designated permanent or acting medical director for the plan, who holds an unrestricted license to practice medicine in the state of California issued pursuant to section 2050 or section 2450 of the Business and Professions Code. and who is employed, within the meaning of Labor Code section 3351 or Labor Code section 3353, with the express written authority and responsibility for all utilization review decisions made for the employer, as required by section 9792.6(l) and in compliance with section 9792.7(b), Title 8 of the California Code of Regulations.**

(B) **The plan states, and at any time upon request, the claims administrator, utilization review organization or other person performing utilization review services**

for the employer, can provide ~~A~~ a written description of the process whereby requests for authorization are reviewed, and decisions on such requests are made, and a description of the process for handling expedited reviews.

(C) The plan states, and at any time upon request, the claims administrator, utilization review organization or other person performing utilization review services for the employer, can provide ~~A~~ a written description of the specific criteria utilized in the review and throughout the decision-making process, including treatment protocols or standards used in the process for both routine and non-routine reviews, and as otherwise required by section 9792.7 of Title 8 of the California Code of Regulations.

(D) The plan states, and at any time upon request, the claims administrator, utilization review organization or other person performing utilization review services for the employer, can provide ~~A~~ a written description of the qualifications and functions of the all personnel involved in decision-making and or in implementation of the utilization review plan and process.

(E) The plan states, and at any time upon request, the claims administrator, utilization review organization or other person performing utilization review services for the employer, can provide ~~A~~ a written description, if applicable, of any prior authorization process in the utilization review plan or process.

New subdivision (a)(2) provides the following penalty:

“(2) A maximum of \$ 50,000 for failing to employ a physician as a medical director in section 9792.6(1) of Title 8 of the California Code of Regulations, whether employed in a permanent or acting capacity, who has the express authority and responsibility for all utilization review decisions issued on the employer’s behalf, as required by sections 9792.6(1) and 9792.7(b) of Title 8.”

Former subdivision (a)(2) is deleted.

The penalty amount in subdivision (a)(3) is increase to \$25,000 and the term “or professional competence” is deleted.

Subdivision (a)(4) is revised to state:

~~(6) (4)~~ A maximum of ~~\$5,000~~ \$ 25,000 if a *non-physician reviewer (person other than a reviewer, expert reviewer or medical director as defined in section 9792.6 of Title 8 of the California Code of Regulations)* makes a decision to delay, ~~modify~~ or deny a treatment authorization request *without obtaining the opinion of a reviewer for that case.*

Subdivision (a)(5) is added to state:

(5) A maximum of \$ 25,000 if a *non-physician reviewer (person other than a reviewer, expert reviewer or medical director as defined in section 9792.6 of Title 8 of the California Code of Regulations)* modifies a request for treatment without possessing at the time of approving the modification an amended written request for treatment authorization as provided under section 9792.7(b)(3) of Title 8 of the California Code of Regulations.

Subdivision (a)(6) is revised to state:

~~(9)~~ **(6)** A maximum of ~~\$5,000~~ **\$ 25,000** for failing to authorize and to provide all medical treatment, as required by Labor Code section 5402(c), consistent with the medical treatment utilization schedule adopted pursuant to Labor Code section 5307.27 or the ACOEM practice guidelines, until either the claim has been accepted, rejected or the dollar threshold in Labor Code section 5402(c) has been paid.

Subdivision (a)(7) is added to state:

(7) A maximum of \$ 15,000, in the event of a request for an expedited review, as defined in section 9792.6(g) of Title 8 of the California Code of Regulations, for the failure to make and communicate the decision in a timely fashion, as required by section 9792.9 of Title 8.

Subdivision (a)(8) is revised to state:

~~(5)~~ **(8)** A maximum of ~~\$5,000~~ **\$ 10,000** if the request for authorization is denied solely on the basis that the requested treatment condition for which treatment was requested is not addressed by ACOEM or, after a the medical treatment utilization schedule has been adopted pursuant to section 5307.27 of the Labor Code, on the sole basis that it is not addressed by that medical treatment utilization schedule, when after the requesting physician has provided the specific clinical rationale for the requested treatment and has provided or referred to relevant page(s) of other evidence-based medical treatment guidelines that are generally recognized by the national medical community and are scientifically based.

Subdivision (a)(9) is revised to increase the penalty to \$10,000.

Former subdivision (a)(4) is deleted.

Subdivision (a)(10) is increase to \$10, 000 and the words “injured” employee’s “requesting treating” physician are added.

Subdivision (a)(11) is revised to increase the penalty to \$5000 and to include the words: “or for failure to file, within thirty (30) days after making a material modification to the plan.”

Subdivision (a)(12) is added to state:

(12) A maximum of \$ 1,000, in the event that a request for authorization is approved pursuant to Labor Code section 4610 or sections 9792.6 through 9792.12 of Title 8 of the California Code of Regulations, without providing the requesting physician at the time of approval with either an authorization number or a unique identifying number that links the approved medical treatment authorization to a specific claim made by an injured employee.

Former subdivision (b)(1)0 through(14) are deleted and replace with new subdivisions. The new subdivisions are as follows:

(b) Additional Penalties and Remediation.

(1) For the types of violations listed below, each violation shall have a basic penalty amount, as specified of \$ 100 in (b)(3) or \$ 50 in (b)(4). The basic penalty amount shall be waived only the first time the violation is found at the investigation site and only upon the condition that the

employer, claims administrator, utilization review organization or other person performing utilization review for that location, agrees in writing to:

- (A) Deliver to the Administrative Director, or his or her designee, within no more than thirty (30) calendar days or the number of days otherwise specified, written evidence, tendered with a declaration made under penalty of perjury, that explains or demonstrates how the violation has been abated in compliance with the applicable statute or regulations and the terms of abatement specified by the Administrative Director; and
- (B) Grant the Administrative Director, or his or her designee, entry, upon request and regardless of advance notice, to the site at which the violation was found for a Non-Routine Investigation for the purpose of verifying compliance with the abatement measures reported in subdivision 9791.12(b)(1)(A) above; and
- (C) Reinstatement of the full basic penalty amount previously waived for each such instance, in the event the violative condition is not abated within the time period specified by the Administrative Director, or his or her designee, or in the event that such abatement measures are not consistent with abatement terms specified by the Administrative Director, or his or her designee; and
- (D) That whenever the full basic penalty amount has been reinstated pursuant to subdivision 9791.12(b)(1)(D) above, also to reimburse to the Administrative Director the reasonable costs of any Non-Routine Investigation visit conducted for the purpose of verifying compliance with the specified abatement measures. Any such reimbursement shall include the expenses for travel, per diem and compensation paid to investigation team personnel, including overtime if any.

(2) In the event the Administrative Director, or his or her designee, returns to the same investigation site, after the initial violation has become final, and finds one or more violations of the same section of Labor Code section 4610 or sections 9792.6 through 9792.12 of Title 8 of the California Code of Regulations, the amount of penalty, assessed for each instance of same violation found, shall be calculated as described below and in no event shall the penalty amount be waived:

- (A) A maximum of the basic penalty amount times 10% of the total number of utilization review requests answered in the 30 days preceding notice of, or onset of, a non routine (follow up) or second investigation at this location, plus reimbursement to the Division of its reasonable costs of investigation;
- (B) A maximum of the basic penalty amount times 20% of the total number of utilization review requests answered in the 30 days preceding notice of, or onset, of a non routine (follow up) or third investigation at this location, plus reimbursement to the Division of its reasonable costs of investigation;
- (C) A maximum of the basic penalty amount times 40% of the total number of utilization review requests answered in the 30 days preceding notice of, or onset of, a non routine (follow up) or third investigation at this location, plus reimbursement to the Division of its reasonable costs of investigation.

(3) For each of the violations listed below, the basic penalty amount shall be a maximum of \$ 100.00 for each instance found by the Administrative Director, or his or her designee, at that location:

(A) If the request for authorization is modified or denied by a physician reviewer who fails to state the portion of the medical criteria or guidelines relied on that is relevant to the injured employee's condition and to the requested treatment, or the reviewer fails to state the clinical reasons for the decision and the reviewer's conclusion regarding medical necessity;

(B) Failure to notify the requesting physician and the injured worker and his or her attorney, if any, immediately and in writing, as required by section 9792.9(g)(2) of Title 8 of the California Code of Regulations, that the time for decision is being formally extended, as well as stating which of the grounds in section 9792.9(g)(1) of Title 8 for an extension applies;

(C) In the case of a denial of authorization on the basis of a lack of necessary and reasonable information, for failure to document contemporaneously, as required by section 9792.9(l) of Title 8 of the California Code of Regulations, the request for additional medical information made to the requesting physician or to the provider of goods or services identified in the request for authorization;

(D) Upon receipt of information that gave rise to a formal delay pursuant to section 9792.9(g)(1)(A), 9792.9(g)(1)(B) or 9792.9(g)(1)(C), or upon receipt of information that gave rise to a delay pursuant to section 9792.9(b)(2)(A) of Title 8 of the California Code of Regulations, for failure of the claims administrator to make a decision to approve or for failure by the reviewer to make a decision to modify or deny the request for authorization, within five (5) working days of receipt of the information for prospective or concurrent review, or for failure to communicate the decision as required by section 9792.9(g)(3) of Title 8.

(E) In the case of retrospective review, after receipt of information that gave rise to a formal delay pursuant to section 9792.9(g)(1)(A), 9792.9(g)(1)(B) or 9792.9(g)(1)(C) of Title 8 of the California Code of Regulations, for failure by the claims administrator to make a decision to approve or for failure of the reviewer to make a decision to modify or deny the request, within thirty (30) working days of receipt of the information, as required by section 9792.9(g)(4) of Title 8.

(F) For failure, by the claims administrator, utilization review organization or other person performing utilization review services for an employer, to include in the written decision that modifies, delays or denies authorization, all of the following items required by subdivision 9792.9(j) of Title 8 of the California Code of Regulations:

(1) The date on which the decision was made;

(2) A description of the specific course of proposed medical treatment or the medical services for which authorization was requested;

(3) A specific description of the medical treatment service approved, if any;

(4) A specific description of the course of medical treatment and each medical service delayed, modified or denied in whole or part.

(5) A clear and concise explanation of the reasons for the decision to delay, modify or deny each item requested.

(6) A written disclosure or copy of the relevant portion of the medical criteria or guidelines relied upon pursuant to section 9792.8(a)(3) of Title 8 of the California Code of Regulations by the reviewer, whether done by the medical director, expert reviewer or reviewer, in making the decision to modify, delay or deny requested treatment;

(7) The clinical reasons provided by the reviewer, whether the medical director, expert reviewer or reviewer, regarding medical necessity;

(8) A clear statement in compliance with section 9792.9(j)(7) of Title 8 of the California Code of Regulations regarding the time limits and the process for resolving disputes in accordance with Labor Code section 4062;

(9) The mandatory language required by section 9792.9(j)(8) of Title 8 of the California Code of Regulations; and

(10) The name and specialty of the reviewer, expert reviewer or medical director that made the decision to modify, delay or deny the requested treatment, along with his or her telephone number in the United States, and hours of availability in accordance with section 9792.9(k) of Title 8 of the California Code of Regulations.

(G) For each failure by the claims administrator, utilization review organization or other person performing utilization review services for an employer to disclose or otherwise to make available, if requested, the Utilization Review criteria or guidelines, to the injured employee whose case is under review or to the public, as required by Labor Code section 4610, subdivision (f)(5) and, respectively, sections 9792.8(a)(3) and 9792.7(d) of Title 8 of the California Code of Regulations.

(4) For each of the violations listed below, the basic penalty amount shall be a maximum of \$ 50.00 for each instance found by the Administrative Director, or his or her designee, at that location:

(A) Failure by non-physician or physician reviewer to notify the requesting physician timely, as required by section 9792.9(b)(2) of Title 8 of the California Code of Regulations, that additional information is needed in order to make a decision in compliance with the timeframes contained in section 9792.9(b);

(B) In the case of prospective or concurrent review, failure to communicate the decision to approve to the requesting physician, by phone or fax within 24 hours of the decision,

as required by Labor Code section 4610(g)(3)(A) and in accordance with section 9792.9(b)(3) of Title 8 of the California Code of Regulations;

(C) In the case of decisions to modify, delay or deny in whole or in part any requested treatment, for the failure to send a written notice of the decision to the requesting physician, to the provider of goods or services identified in the request for authorization, and to the injured employee and to his or her attorney if any, within twenty four (24) hours of making the decision for concurrent review, or within two business days for prospective review, as required by Labor Code section 4610(g)(3)(A) and section 9792.9(b)(4) of Title 8 of the California Code of Regulations;

(D) In the case of retrospective review, for the failure to communicate a decision as required by section 9792.9(c) Title 8 of the California Code of Regulations, to the requesting physician who provided the medical services and to the injured worker and his or her attorney, if any, or to the non-physician provider of goods or services identified in the request, within thirty (30) calendar days of receipt of the medical information that was reasonably necessary to make the determination;

(E) For each failure by the claims administrator to provide immediately a written notice to the requesting physician, to the injured employee, and to his or her attorney if any, that a decision on the request for authorization cannot be made within fourteen (14) days for prospective and concurrent reviews, or within thirty (30) days for retrospective reviews for one of the reasons stated in Labor Code section 4610(g)(5) and in accordance with section 9792.9(g)(2) of Title 8 of the California Code of Regulations;

(F) For each instance in which a claims administrator, in reliance on Labor Code section 4610(g)(5), delays making or communicating a timely decision or extends the time for decision pursuant to section 9792.9 of these regulations on a request for authorization for medical services, and the claims administrator cannot provide documentation showing one of the following events occurred prior to or at the time the claims administrator communicated this reason for delay under Labor Code section 4610(g)(5):

- 1) the claims administrator had not received all of the information reasonably necessary and requested;
- 2) the employer or claims administrator has requested a consultation by an expert reviewer;
- 3) the physician reviewer has requested an additional examination or test be performed;

(G) For each instance in which the claims administrator communicates, in reliance on Labor Code section 4610(g)(5), a written decision to delay or to extend the time for making a decision on a request for authorization for medical services, but fails to state one or more of the following, as appropriate, to explain the reason for delay as required by section 9792.9(g)(1) of Title 8 of the California Code of Regulations:

- 1) the necessary medical information reasonably requested but not received; or
- 2) the name and specialty of the expert reviewer to be consulted; or
- 3) the additional test(s) or examination(s) to be performed that is reasonable and consistent with professionally recognized standards of medical practice; AND
- 4) the anticipated date on which a decision will be made.

(5) The Administrative Director, or his or her designee, may post on the website for the Division of Workers' Compensation the name and final penalty amount(s) paid by each claims administrator, utilization review organization or other person performing utilization review services for the employer. For the purposes of this subdivision, the final penalty amount means the actual amount paid or the amount due and payable after any or all appeals have become final.

(6) The phrase 'reasonable costs' of investigation of the Administrative Director, or his or her designee, for the purposes of section 9792.12 shall include the actual per diem expenses, travel expenses and compensation paid for the investigation team personnel, including overtime if any, for the time spent on site during the investigation.

(c) The penalty amounts specified for violations under subsection 9792.12(a) above may, in the discretion of the Administrative Director, be reduced after consideration of the factors set out in section 9792.13 of Title 8 of the California Code of Regulations. Failure to abate a violation found under section 9792.12(a), in the time period or in a manner consistent with that specified by the Administrative Director, or his or her designee, shall result in the assessment of the full original penalty amount proposed by the Administrative Director for that violation.

Modifications to Section 9792.13 Assessment of Administrative Penalties – Penalty Adjustment Factors

Subdivision (a) is revised to replace the word “cases” with “any case.” The words “Basic or graduated” penalty “amount” are added for clarity.

Subdivision (a)(3) is clarified by referencing sections 9792.6 through 9792.12.

The following subdivisions are added:

(a)(7) The rate of violation found during the investigation giving rise to a penalty;

(a)(8) The impact of the penalties assessed in relation to the business revenues of the entity or person subject to Labor Code section 4610; and

(a)(9) In the event an objection or appeal is filed pursuant to subsection 9792.15 of these regulations, whether the employer, claims administrator, utilization review organization or other person performing utilization review services abated the alleged violation within the time period specified by the Administrative Director or his or her designee.

Former subdivision (b) is deleted and replace with new subdivision (b) as follow:

(b) Upon finding in three separate investigations at the same location that a claims administrator, utilization review organization or other person performing utilization review services for any employer, has violated the same section under Labor Code section 4610 or sections 9792.6 through 9792.12 of Title 8 of the California Code of Regulations, the Administrative Director, or his or her designee, shall pursue any remedy that may be obtained pursuant to Business and Professions Code sections 17200 et. seq. as well as any other statute or regulation that may apply.

Subdivision (d) is revised to include the following sentence:

The claims administrator, utilization review organization or other person assessed a proposed penalty pursuant to sections 9792.12 of Title 8 of the California Code of Regulations shall have the burden of proof in establishing both the refusal to cooperate and that such refusal prevented compliance with the relevant applicable statute or regulation.

Modifications to Section 9792.14 Liability for Penalty Assessments

Subdivision (a) is revised to include the term “utilization review organization.”

Subdivision (b) is revised to include the term “utilization review organization.” Syntax changes are made for clarity.

Subdivision (c) is revised to include the term “utilization review organization.” The phrase “or other person that is was cited by the Administrative Director for violations of Labor Code section 4610 or sections 9792.6 through 9792.12” is added. The words “or person” and “for an employer” are added.

Modification to Section 9792.15 Administrative Penalties Pursuant to Labor Code § 4610 – Order to Show Cause, Notice of Hearing, Determination and Order and Review Procedure

Subdivision (d) is revised to include the term “utilization review organization.”

Subdivision (e) is revised to include the term “utilization review organization” and the words “or person subject to Labor Code section 4610.”

Subdivision (e)(5) is revised to delete the phrase: “Any allegation and proposed penalty stated in the Order to Show Cause that is not appealed shall be paid within thirty (30) calendar days after the date of service of the Order to Show Cause.”

Subdivision (f) is added to state: (f) Any allegation and proposed penalty stated in the Order to Show Cause that is not appealed shall be paid within thirty (30) calendar days after the date of service of the Order to Show Cause.

The remaining subdivisions are re-lettered.

Subdivision (h) is revised to include the term “utilization review organization” and the words “or person.”

The syntax in subdivision (k) is corrected.

Subdivision (m)(4) is revised to include the words “the” and “of witnesses.”

Subdivision (o) is revised to include the word “thirty.”

Subdivision (r) is revised to include the sentence : Upon timely demand for production of a witness in lieu of admission of an affidavit or declaration, the proponent of that witness shall

ensure the witness appears at the scheduled hearing and the proffered declaration or affidavit from that witness shall not be admitted.

Subdivision (t) is revised to include the words: signed and served by the Administrative Director, or his or her designee.

The word “the” is deleted from subdivision (u).