

TITLE 8. INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
CHAPTER 4.5. DIVISION OF WORKERS' COMPENSATION
SUBCHAPTER 1. ADMINISTRATIVE DIRECTOR -- ADMINISTRATIVE RULES
ARTICLE 5.5.1 UTILIZATION REVIEW STANDARDS

§ 9792.11 Investigation Procedures: Labor Code §4610 Utilization Review Violations

(a) To carry out the responsibilities mandated by Labor Code Section 4610(i), the Administrative Director, or his or her designee, shall investigate the utilization review process of any employer, insurer or other entity subject to the provisions of section 4610. The investigation shall include, but not be limited to, review of the practices, files, documents and other records, whether electronic or paper, of the claims administrator, and any other person responsible for utilization review processes for an employer. As used in sections 9792.11 through 9792.15, the phrase '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.

(b) Notwithstanding Labor Code section 129 (a) through (d) and section 129.5 subdivisions (a) through (d), the Administrative Director, or his or her designee, may conduct a utilization review investigation pursuant to Labor Code section 4610, which may include, but is not limited to, an audit of files and other records.

(c) The Administrative Director, or his or her designee, may conduct a utilization review investigation at any location where Labor Code Section 4610 utilization review processes occur, as follows:

(1) For utilization review organizations:

(A) A Routine Investigation shall be initiated at each known utilization review organization at least once every three (3) years. The investigation shall include a review of a random sample of requests for authorization, as defined by section 9792.6(o), received by the utilization review organization during the three most recent full calendar months preceding the date of the issuance of the Notice of Utilization Review Investigation. The investigation may also include a review of any credible complaints received by the Administrative Director since the time of the previous investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of sections 9792.11 through 9792.15.

(B) Target Investigations:

1. A Return Target Investigation of the same investigation subject shall be conducted within 18 months of the date of the previous investigation if the performance rating was less than eighty-five percent.
2. A Special Target Investigation may be conducted at any time based on credible information indicating the possible existence of a violation of Labor Code section 4610 or sections 9792.6 through 9792.12.
3. The Return Target Investigation and the Special Target Investigation may include: (i) a review of the requests for authorization previously investigated which contained violations; (ii) a review of the file or files pertaining to the complaint or possible violation; (iii) a random sample of requests for authorization received by the utilization review organization during the three most recent full calendar months preceding the date of the issuance of the Notice of Utilization Review Investigation; (iv) a sample of a specific type of request for authorization; and (v) any credible complaints received by the Administrative Director since the time of any prior investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of sections 9792.11 through 9792.15.

(2) For a claims administrator:

(A) A Routine Investigation shall be initiated at each claims adjusting location at least once every five (5) years concurrent with the profile audit review done pursuant to Labor Code sections 129 and 129.5. The investigation shall include a review of a random sample of requests for authorization, as defined by section 9792.6(o), received by the claims administrator during the three most recent full calendar months preceding the date of the issuance of the Notice of Utilization Review Investigation. The investigation may also include a review of any credible complaints received by the Administrative Director since the time of the previous investigation. If there has not been a previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of sections 9792.11 through 9792.15.

(B) Target Investigations:

1. A Return Target Investigation of the same investigation subject shall be conducted within 18 months of the date of any previous investigation if the performance rating was less than eighty-five percent.
2. A Special Target Investigation may be conducted at any time based on credible information indicating the possible existence of a violation of Labor Code section 4610 or sections 9792.6 through 9792.12.
3. The Return Target Investigation and the Special Target Investigation may include: (i) a review of the requests for authorization previously investigated which contained violations; (ii) a review of the file or files pertaining to the complaint or possible violation; (iii) a random sample of requests for authorization received by the claims administrator during the three most recent full calendar months preceding the date of the issuance of the Notice of Utilization Review Investigation; (iv) a sample of a specific type of request for authorization; and (v) any credible complaints received by the Administrative Director since the time of any prior investigation. If there has not been a

previous investigation, the investigation may include a review of any credible complaints received by the Administrative Director since the effective date of sections 9792.11 through 9792.15.

(d) The number of requests for authorization randomly selected for investigation shall be determined based on the following table:

Population of requests for authorization received during a three month calendar period	Sample Size
5 or less	all
6 - 10	1 less than total
11 - 13	2 less than total
14 - 16	3 less than total
17 - 18	4 less than total
19 - 20	5 less than total
21 - 23	6 less than total
24	17
25 - 26	18
27 - 29	19
30 - 31	20
32 - 33	21
34 - 36	22
37 - 39	23
40 - 41	24
42 - 44	25
45 - 48	26
49 - 51	27
52 - 55	28
56 - 58	29
59 - 62	30
63 - 67	31
68 - 72	32
73 - 77	33
78 - 82	34

83 - 88	35
89 - 95	36
96 - 102	37
103 - 110	38
111 - 119	39
120 - 128	40
129 - 139	41
140 - 151	42
152 - 164	43
165 - 179	44
180 - 197	45
198 - 217	46
218 - 241	47
242 - 269	48
270 - 304	49
305 - 346	50
347 - 399	51
400 - 468	52
469 - 562	53
563 - 696	54
697 - 905	55
906 - 1,272	56
1,273 - 2,091	57
2,092 - 5,530	58
5,531 +	59

(e) Complaints concerning utilization review procedures may be submitted with any supporting documentation to the Division of Workers' Compensation using the sample complaint form that is posted on the Division's website at:

<http://www.dir.ca.gov/dwc/FORMS/UtilizationReviewcomplaintform.pdf>

Complaints should be mailed to DWC Medical Unit-UR, P.O. Box 71010, Oakland, CA 94612, attention UR Complaints or emailed to DWCManagedCare@dir.ca.gov. Complaints received by the Division of Workers' Compensation will be reviewed and investigated, if necessary, to determine if the complaints are credible and indicate the possible existence of a violation of Labor Code section 4610 or sections 9792.6 through 9792.12.

(f) Administrative penalties may be assessed for any failure to comply with Labor Code section 4610, or sections 9792.6 through 9792.12 of Title 8, California Code of Regulations, except that the penalties listed in section 9792.12 (a)(6) through (14) and (b) shall only be imposed if the request was subject to the Labor Code section 4610 utilization review process.

(g) In the event an investigation of utilization review processes is done at the claims administrator's adjusting location, concurrent with a profile audit review done pursuant to Labor Code section 129 or 129.5, the administrative penalty amounts for each violation of Labor Code section 4610 or sections 9792.6 through 9792.12 of Title 8, California Code of Regulations, shall be governed by sections 9792.11 through 9792.15. Any such administrative penalty for utilization review process violations shall apply in lieu of the administrative penalty amount allowed under the audit regulations at section 10111.2(b)(8)[vi] of Title 8, California Code of Regulations. 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 sections 9792.6 through 9792.12 of Title 8, California Code of Regulations, 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 sections 9792.11 through 9792.15.

(h) The Administrative Director, or his or her designee, may also utilize the provisions of Government Code sections 11180 through 11191 to determine whether any violations of the requirements in Labor Code section 4610 or sections 9792.6 through 9792.12 of Title 8, California Code of Regulations, have occurred.

(i) Sections 9792.11 through 9792.15 of Title 8 of the California Code of Regulations shall apply to any Labor Code section 4610 utilization review investigation conducted on or after the effective date of sections 9792.11 through 9792.15 and for conduct which occurred on or after the effective date of sections 9792.11 through 9792.15.

(j) Unless the Administrative Director in his or her discretion determines that advance notice will render a Special Target or Return Target Investigation less useful, the claims administrator or utilization review organization shall be notified of its selection for an Investigation. Claims administrators and utilization review organizations shall be sent a Notice of Utilization Review Investigation. The Notice of Utilization Review Investigation shall require the investigation subject to provide the following:

(1) A description of the system used to identify each request for authorization (if applicable). To the extent the system identifies any of the following information in an electronic format, the claims administrator or utilization review organization shall provide in an electronic format a list of each and every request for authorization received at the investigation site during a three month calendar period specified by the Administrative Director, or his or her designee, and the following data elements: i) a

unique identifying number for each request for authorization if one has been assigned; ii) the name of the injured worker; iii) the claim number used by the claims adjuster; iv) the initial date of receipt of the request for authorization; v) the type of review (expedited prospective, prospective, expedited concurrent, concurrent, retrospective, appeal); vi) the disposition (approve, deny, delay, modify, withdrawal); and, vii) 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 or utilization review organization is not able to provide the list in an electronic format, the list shall be provided in such a form that the listed requests for authorization are sorted in the following order: by type of utilization review, type of disposition, and date of receipt of the initial 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), type of review (expedited prospective, prospective, expedited concurrent, concurrent, retrospective, appeal), and other abbreviations used to document individual requests for authorization and a data dictionary for all data elements provided;

(4) A description of the methods by which the medical director for utilization review ensures that the process by which requests for authorization are reviewed and approved, modified, delayed, or denied is in compliance with Labor Code section 4610 and sections 9792.6 through 9792.10, as required by sections 9792.6(l) and 9792.7(b) of Title 8 of the California Code of Regulations; and

(5) The following additional information, may be requested by the Administrative Director or his or her designee, as applicable to the type of entity investigated: i) whether utilization review services are provided externally; ii) the name(s) of the utilization review organization(s); iii) the name and address of the employer; and iv) the name and address of the insurer.

(k) The utilization review organization or claims administrator shall provide the requested information listed in subdivision (j) within fourteen (14) calendar days of receipt of the Notice of Utilization Review Investigation. Based on the information provided, the Administrative Director, or his or her designee, shall provide the claims administrator or utilization review organization with a Notice of Investigation Commencement, which shall include a list of randomly selected requests for authorization from a three month calendar period designated by the Administrative Director and complaint files (if applicable) for investigation.

(l) For utilization review organizations: Within fourteen (14) calendar days of receipt from the Administrative Director, or his or her designee, of the Notice of Investigation Commencement, the utilization review organization shall deliver to the Administrative

Director, or his or her designee, a true and complete copy of all records, whether electronic or paper, for each request for authorization listed. Copies of the records 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 all of the records produced are true, correct and complete copies of the originals, in his or her possession. After reviewing the records, the Administrative Director, or his or her designee, shall determine if an onsite investigation is required. If an onsite investigation is required, fourteen (14) calendar days notice shall be provided to the utilization review organization.

(m) For claims administrators: The Notice of Investigation Commencement shall be provided to the claims administrator at least fourteen (14) calendar days prior to the commencement of the onsite investigation. The claims administrator 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 copies, whether electronic or paper, whether located onsite or offsite, of each request for authorization 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.

(n) 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 or utilization review organization shall produce the requested records in the manner described by subdivision 9792.11(k), within one (1) working day when the records are located at the site of investigation, and within five (5) working 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.

(o) If the date or deadline in sections 9792.9(b) and 9792.9(c) of Title 8 of the California Code of Regulations to perform any act related to utilization review practices falls on a weekend or holiday, for the purposes of assessing penalties, the act may be performed on the next normal business day, as defined by Labor Code section 4600.4 and Civil Code section 9. This subdivision shall not apply in cases involving concurrent or expedited review. The timelines in sections 9792.9(b) of Title 8 of the California Code of Regulations shall only be extended as provided under section 9792.9(g) of that title.

(p) If the claims administrator or utilization review organization does not record the date a document is received, it shall be deemed received by using the method set out in section 9792.9(a)(2), except that:

(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, or utilization review organization 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: (A) within five (5) calendar days of the postmark date, if the place of mailing and place of address are both within California; (B) within ten (10) calendar days if the place of address is within the United States but outside of California; or (C) 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.

(q) Upon initiating a Special Target Investigation, the Administrative Director, or his or her designee, shall provide to the claims administrator or the utilization review organization a written description of the factual information or of the complaint containing factual information or a copy of the complaint that triggered the utilization review investigation, unless the Administrative Director or his or her designee determines that providing the information would make the investigation less useful. The claims administrator or utilization review organization shall have ten (10) business days upon receipt of the written description or copy of the complaint to provide a written response to the Administrative Director or his or her designee. After reviewing the written response, the Administrative Director, or his or her designee, shall either close the investigation without the assessment of administrative penalties or conduct further investigation to determine whether a violation exists and whether to impose penalty assessments.

(r) For utilization review organizations: The files and other records, whether electronic or paper, that pertain to the utilization review process shall be retained for at least three (3) years following either: (1) the most recent utilization review decision for each injured employee, or (2) the date on which any appeal from the assessment of penalties for violations of Labor Code section 4610 or sections 9792.6 through 9792.12 is final, whichever date is later. Claims administrators shall retain their claim files as set forth in section 10102 of Title 8 of the California Code of Regulations.

(s) Upon receipt of a notice of Routine or Target Investigation or any other request from the Administrative Director, or his or her designee, to review all files and other records pertaining to the employer's utilization review process, whether electronic or paper, that are created or held outside of California, the claims administrator or utilization review organization shall either deliver all such requested files and other records to an address in California specified by the Administrative Director, or his or her designee, or reimburse the Administrative Director for the actual expenses of each investigator who travels outside of California to the place where the records are held, including the per diem expenses, travel expenses and compensated overtime of the investigators.

(t) A preliminary investigation report will be provided to the claims administrator or utilization review organization. The preliminary investigation report shall consist of the preliminary notice of utilization review penalty assessments, the performance rating, and may include one or more requests for additional documentation or compliance. A conference to discuss the preliminary investigation report shall be scheduled, if necessary, within twenty-one calendar days from the issuance of the preliminary findings. Following the conference, the Administrative Director or his or her designee shall issue an Order to Show Cause Re: Assessment of Administrative Penalty (which shall include the final investigation report), as set forth in section 9792.15.

(u) The claims administrator or utilization review organization may stipulate to the allegations and final report set forth in the Order to Show Cause.

(v) Within forty-five (45) calendar days of the service of the Order to Show Cause Re: Assessment of Administrative Penalties, if no answer has been filed, or within 15 calendar days after any and all appeals have become final, the claims administrator or utilization review organization shall provide the following:

(1) A notice, which shall include a copy of the final investigation report, the measures actually implemented to abate such conditions, and the website address for the Division where the performance rating and summary of violations is posted. If a hearing was conducted under section 9792.15, the notice shall include the Final Determination in lieu of the final investigation report.

(2) For utilization review organizations: the notice must be served on any employer or third party claims administrator that contracted with the utilization review organization and whose utilization review process was assessed with a penalty pursuant to section 9792.12, and any insurer whose utilization review process was assessed with a penalty pursuant to section 9792.12.

(3) For claims administrators: the notice must be served on any self-insured employer and any insurer whose utilization review process was assessed with a penalty pursuant to section 9792.12.

(4) The notice shall be served by certified mail.

(5) Documentation of compliance with this section shall be served on the Administrative Director within thirty calendar days from the date the notice was served.

Authority: Sections 11180 – 11191, Government Code; Sections 133, 4610, and 5307.3, Labor Code.

Reference: Sections 129, 129.5, 4062, 4600, 4600.4, 4604.5, 4610, and 4614, Labor Code.

§ 9792.12 Administrative Penalty Schedule for Labor Code §4610 Utilization Review Violations

(a) **Mandatory Administrative Penalties.** Notwithstanding Labor Code section 129.5(c)(1) through (c)(3), the penalty amount that shall be assessed for each failure to

comply with the utilization review process required by Labor Code section 4610 and sections 9792.6 through 9792.12 of Title 8 of the California Code of Regulations, is:

- (1) For failure to establish a Labor Code section 4610 utilization review plan: \$50,000;
- (2) For failure to include all of the requirements of section 9792.7(a) in the utilization review plan: \$5,000;
- (3) For failure to file the utilization review plan or a letter in lieu of a utilization review plan with the Administrative Director as required by section 9792.7(c): \$10,000;
- (4) For failure to file a modified utilization review plan with the Administrative Director within 30 calendar days after the claims administrator makes a material modification to the plan as required by section 9792.7(c): \$5,000;
- (5) For failure to employ or designate a physician as a medical director, as defined in section 9792.6(l), of the utilization review process, as required by section 9792.7(b): \$50,000;
- (6) For issuance of a decision to modify or deny a request for authorization regarding a medical treatment, procedure, service or product where the requested treatment, procedure or service is not within the reviewer's scope of practice (as set forth by the reviewer's licensing board): \$25,000;
- (7) For failure to comply with the requirement that only a licensed physician may modify, delay, or deny requests for authorization of medical treatment for reasons of medical necessity to cure or relieve, except as provided for in Labor Code section 4604.5(d) and section 9792.9(b)(2) and (3): \$25,000;
- (8) For failure of 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), who approves an amended request to possess an amended written request for treatment authorization as provided under section 9792.7(b)(3) when a physician has voluntarily withdrawn a request in order to submit an amended request: \$1,000;
- (9) For failure to communicate the decision in response to a request for an expedited review, as defined in section 9792.6(g), in a timely fashion, as required by section 9792.9: \$15,000;
- (10) For failure to approve the request for authorization solely on the basis that the condition for which treatment was requested is not addressed by the medical treatment utilization schedule adopted pursuant to section 5307.27 of the Labor Code: \$5,000;
- (11) For failure to discuss or document attempts to discuss reasonable options for a care plan with the requesting physician as required by Labor Code section 4610(g)(3)(B),

prior to denying authorization of or discontinuing medical care, in the case of concurrent review: \$10,000;

(12) For failure to respond to the request for authorization by the injured employee's requesting treating physician, in the case of a non-expedited concurrent review: \$2,000;

(13) For failure to respond to the request for authorization by the injured employee's requesting treating physician, in the case of a non-expedited prospective review: \$1,000;

(14) For failure to respond to the request for authorization by the injured employee's requesting treating physician, in the case of a retrospective review: \$500;

(15) For failure to disclose or otherwise to make available, if requested, the Utilization Review criteria or guidelines to the public, as required by Labor Code section 4610, subdivision (f)(5) and section 9792.7(d) of Title 8 of the California Code of Regulations: \$100.

(16) For failure to timely serve the Administrative Director with documentation of compliance pursuant to section 9792.11(v)(5): \$500.

(17) For failure to timely comply with any compliance requirement listed in the Final Report if no timely answer was filed or any compliance requirement listed in the Determination and Order after any and all appeals have become final: \$500.

(b) Additional Penalties and Remediation.

(1) After conducting a Routine or Return Target Investigation, the Administrative Director, or his or her designee, shall calculate the investigation subject's performance rating based on its review of the randomly selected requests. The investigation subject's performance rating may also be calculated after conducting a Special Target Investigation. The performance rating will be calculated as follows:

(A) The factor for failure to make and/or provide a timely response to a request for authorization shall be determined by dividing the number of randomly selected requests with violations involving failure to make or provide a timely response to a request for authorization by the total number of randomly selected requests.

(B) The factor for notice(s) with faulty content shall be determined by dividing the number of requests involving notice(s) with faulty content by the total number of randomly selected requests.

(C) The factor for failure to issue notice(s) to all appropriate parties shall be determined by the number of requests involving the failure to issue notice(s) to all appropriate parties by the total number of randomly selected requests.

(D) The investigation subject's investigation performance rating will be determined by adding the factors calculated pursuant to subsections (b)(1)(A) through (b)(1)(C), dividing the total by three, subtracting from one, and multiplying by one-hundred.

(E) If the investigation subject's performance rating meets or exceeds eighty-five percent, the Administrative Director, or his or her designee, shall assess no penalties for the violations listed in this subdivision. If the performance rating is less than eighty-five percent, the violations shall be assessed as set forth below in (b)(2) through (b)(5):

(2) For the types of violations listed below in (b)(4) and (b)(5), each violation shall have a penalty amount, as specified of \$100 in (b)(4) or \$50 in (b)(5). The penalty amount specified in (b)(4) and (b)(5) shall be waived if the investigation subject's performance rating meets or exceeds eighty-five percent, or if following a Routine Investigation the claims administrator or utilization review organization agrees in writing to:

(A) Deliver to the Administrative Director, or his or her designee, within no more than thirty (30) calendar days from the date of the agreement 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 within the time frame specified in the agreement, to the site at which the violation was found for a Return Target Investigation for the purpose of verifying compliance with the abatement measures reported in subdivision 9792.12(b)(1)(A) above and agree to a review of randomly selected requests for authorization; and

(C) Reinstatement of the 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.

(3) In the event the Administrative Director, or his or her designee, returns for a Return Target Investigation, after the initial violation has become final, and the subject fails to meet the performance standard of 85%, the amount of penalty shall be calculated as described below and in no event shall the penalty amount be waived:

(A) The penalty amount for each violation shall be multiplied by two for a second investigation, but in no event shall the total penalties for the violations exceed \$100,000;

(B) The penalty amount for each violation shall be multiplied by five for a third investigation, but in no event shall the total penalties for the violations exceed \$200,000;

(C) The penalty amount for each violation shall be multiplied by ten for a fourth investigation, but in no event shall the total penalties for the violations exceed \$400,000.

(4) For each of the violations listed below, the penalty amount shall be \$100.00 for each instance found by the Administrative Director, or his or her designee:

(A) For failure to immediately notify all parties in the manner described in section 9792.9(g)(2) of the basis for extending the decision date for a request for medical treatment;

(B) For failure to document efforts to obtain information from the requesting party prior to issuing a denial of a request for authorization on the basis of lack of reasonable and necessary information;

(C) For failure to make a decision to approve or modify or deny the request for authorization, within five (5) working days of receipt of the requested information for prospective or concurrent review, and to communicate the decision as required by section 9792.9(g)(3);

(D) For failure to make and communicate a retrospective decision to approve, modify, or deny the request, within thirty (30) working days of receipt of the information, as required by section 9792.9(g)(4);

(E) For failure to include in the written decision that modifies, delays or denies authorization, all of the items required by section 9792.9(j);

(F) For failure to disclose or otherwise to make available, if requested, the Utilization Review criteria or guidelines, to the injured employee whose case is under review, as required by Labor Code section 4610(f)(5) and section 9792.8(a)(3) Title 8 of the California Code of Regulations.

(5) For each of the violations listed below, the penalty amount shall be \$50.00 for each instance found by the Administrative Director, or his or her designee:

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

(B) For failure to communicate the decision to approve to the requesting physician in the case of prospective or concurrent review, 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) For failure to send a written notice of the decision to modify, delay or deny to the requesting party, 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) For failure to communicate a decision in the case of retrospective review as required by section 9792.9(c) within thirty (30) days of receipt of the medical information that was reasonably necessary to make the determination;

(E) For failure to provide immediately a written notice to the requesting party 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 in accordance with section 9792.9(g)(2);

(F) For failure to document that one of the following events occurred prior to the claims administrator providing written notice 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 failure to explain in writing the reason for delay as required by section 9792.9(g)(2) of Title 8 of the California Code of Regulations when the decision to delay was made under one of the circumstances listed in section 9792.9(g)(1).

(6) After the time to file an answer to the Order to Show Cause Re: Assessment of Administrative Penalties has elapsed and no answer has been filed or after any and all appeals have become final, the Administrative Director, or his or her designee, shall post on the website for the Division of Workers' Compensation the performance rating and summary of violations for each utilization review investigation.

(c) The penalty amounts specified for violations under subsection 9792.12(a) and (b) 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(b)(4) and (b)(5), 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.

Authority: Sections 133, 4610, and 5307.3, Labor Code.

Reference: Sections 129, 129.5, 4062, 4600, 4600.4, 4604.5, 4610, and 4614, Labor Code.

§ 9792.13 Assessment of Administrative Penalties – Penalty Adjustment Factors.

(a) In any investigation that the Administrative Director deems appropriate, the Administrative Director, or his or her designee, may mitigate a penalty amount imposed under section 9792.12 after considering each of these factors:

(1) The medical consequences or gravity of the violation(s);

(2) The good faith of the claims administrator or utilization review organization. Mitigation for good faith shall be determined based on documentation of attempts to comply with the Labor Code and regulations and shall result in a reduction of 20% for each applicable penalty;

(3) The history of previous penalties;

(4) The frequency of violations found during the investigation giving rise to a penalty;

(5) Penalties may be mitigated outside the above mitigation guidelines in extraordinary circumstances, when strict application of the mitigation guidelines would be clearly inequitable; and

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

(b) The Administrative Director, or his or her designee, may assess both an administrative penalty under Labor Code section 4610 and a civil penalty under subdivision (e) of Labor Code section 129.5 based on the same violation(s).

(c) The Administrative Director, or his or her designee, shall not collect payment for an administrative penalty under Labor Code section 4610 from both the utilization review organization and the claims administrator for an assessment based on the same violation(s).

(d) Where an injured worker's or a requesting provider's refusal to cooperate in the utilization review process has prevented the claims administrator or utilization review organization from determining whether there is a legal obligation to perform an act, the Administrative Director, or his or her designee, may forego a penalty assessment for any related act or omission. The claims administrator or utilization review organization 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.

Authority: Sections 133, 4610, and 5307.3, Labor Code.

Reference: Sections 129, 129.5, 4062, 4600, 4600.4, 4604.5, 4610, and 4614, Labor Code.

§ 9792.14 Liability for Penalty Assessments.

(a) If more than one claims administrator or utilization review organization has been responsible for a claim file, utilization review file or other file that is being investigated, penalties may be assessed against each such entity for the violation(s) that occurred during the time each such entity had responsibility for the file or for the utilization review process.

(b) The claims administrator or utilization review organization is liable for all penalty assessments made against it, except that if the subject of the investigation is acting as an agent, the agent and the principal are jointly and severally liable for all penalty assessments resulting from a given investigation. This paragraph does not prohibit an agent and its principal from allocating the administrative penalty liability between them. Liability for civil penalties assessed pursuant to Labor Code section 129.5(e) for violations under Labor Code section 4610 or sections 9792.6 through 9792.10 of Title 8 of the California Code of Regulations shall not be allocated.

(c) Successor liability may be imposed on a claims administrator or utilization review organization that has merged with, consolidated, or otherwise continued the business of a corporation, other business entity or other person that was cited by the Administrative Director for violations of Labor Code section 4610 or sections 9792.6 through 9792.12. The surviving entity or person responsible for administering the utilization review process for an employer, 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.

Authority: Sections 133, 4610, and 5307.3, Labor Code.

Reference: Sections 129, 129.5, 4062, 4600, 4600.4, 4604.5, 4610, and 4614, Labor Code.

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

(a) Pursuant to Labor Code section 4610(i), the Administrative Director shall issue an Order to Show Cause Re: Assessment of Administrative Penalty when the Administrative Director, or his or her designee (the investigating unit of the Division of Workers' Compensation), has reason to believe that an employer, insurer or other entity subject to Labor Code section 4610 has failed to meet any of the requirements of this section or of

any regulation adopted by the Administrative Director pursuant to the authority of section 4610.

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

(1) Notice that an administrative penalty may be assessed;

(2) The final investigation report, which shall consist of the notice of utilization review penalty assessment, the performance rating, and may include one or more requests for documentation or compliance;

(c) The order shall be served personally or by registered or certified mail.

(d) Within thirty (30) calendar days after the date of service of the Order to Show Cause Re: Assessment of Administrative Penalties, the claims administrator or utilization review organization may pay the assessed administrative penalties or file an answer as the respondent with the Administrative Director, in which the respondent may:

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

(2) Contest the amount of any or all proposed administrative penalties;

(3) Contest the existence of any or all of the violations;

(4) Set forth any affirmative and other defenses;

(5) Set forth the legal and factual bases for each defense.

(e) Any allegation and proposed penalty stated in the Order to Show Cause that is not contested shall be paid within thirty (30) calendar days after the date of service of the Order to Show Cause.

(f) Failure to timely file an answer shall constitute a waiver of the respondent's right to an evidentiary 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, within ten (10) days of the date for filing the answer, the respondent may file a written request for leave to file an answer. The respondent may also file a written request for leave to assert additional defenses, which the Administrative Director may grant upon a showing of good cause.

(g) The answer shall be in writing and signed by, or on behalf of, the claims administrator or utilization review organization and shall state the respondent's mailing address. It need not be verified or follow any particular form.

(1) The respondent must file the original and one copy of the answer on the Administrative Director and concurrently serve one copy of the answer on the

investigating unit of the Division of Workers' Compensation (designated by the Administrative Director). The original and all copies of any filings required by this section shall have a proof of service attached.

(h) Within sixty (60) calendar days of the issuance of the Order to Show Cause Re: Assessment of Administrative Penalty, the Administrative Director shall issue the Notice of the date, time and place of a hearing. The date of the hearing shall be at least ninety calendar days from the date of service of the Notice. The Notice shall be served personally or by registered or certified mail. Continuances will not be allowed without a showing of good cause.

(i) 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 complaint or supplemental Order to Show Cause presents new charges, the Administrative Director shall afford the respondent a reasonable opportunity to prepare its defense, and the respondent shall be entitled to file an amended answer.

(j) At the Administrative Director's discretion, the Administrative Director may proceed with an informal pre-hearing conference with the respondent in an effort to resolve the contested matters. If any or all of the violations or proposed penalties in the Order to Show Cause, the amended Order or the supplemental Order remain contested, those contested matters shall proceed to an evidentiary hearing.

(k) Whenever the Administrative Director's Order to Show Cause has been contested, the Administrative Director may designate a hearing officer to preside over the hearing. The authority of the Administrative Director or the designated hearing officer shall include, but is not limited to: conducting a pre-hearing settlement conference; setting the date for an evidentiary hearing and any continuances; issuing subpoenas for the attendance of any person residing anywhere within the state as a witness or party at any pre-hearing conference and hearing; issuing subpoenas duces tecum for the production of documents and things at the hearing; presiding at the hearings; administering oaths or affirmations and certifying official acts; ruling on objections and motions; issuing pre-hearing orders; and preparing a Recommended Determination and Opinion based on the hearing.

(l) The Administrative Director or the designated hearing officer shall set the time and place for any pre-hearing conference on the contested matters in the Order to Show Cause, and shall give sixty (60) calendar days written notice to all parties.

(m) The pre-hearing conference may address one or more of the following matters:

(1) Exploration of settlement possibilities;

(2) Preparation of stipulations;

- (3) Clarification of issues;
 - (4) Rulings on the identity of witnesses 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.
- (n) The Administrative Director or the designated hearing officer shall issue a pre-hearing order incorporating the matters determined at the pre-hearing conference. The Administrative Director or the designated hearing officer may direct one or more of the parties to prepare the pre-hearing order.
- (o) Not less than thirty (30) calendar days prior to the date of the evidentiary hearing, the respondent shall file and serve the original and one copy of a written statement with the Administrative Director or the designated hearing officer specifying the legal and factual bases for its answer and each defense, listing all witnesses the respondent intends to call to testify at the hearing, and appending copies of all documents and other evidence the respondent intends to introduce into evidence at the hearing. A copy of the written statement and its attachments shall also concurrently be served on the investigating unit of the Division of Workers' Compensation. If the written statement and supporting evidence are not timely filed and served, the Administrative Director or the designated hearing officer shall dismiss the answer and issue a written Determination based on the evidence provided by the investigating unit of the Division of Workers' Compensation. Within ten (10) calendar days of the date for filing the written statement and supporting evidence, the respondent may file a written request for leave to file a written statement and supporting evidence. The Administrative Director or the designated hearing officer may grant the request, upon a showing of good cause. If leave is granted, the written statement and supporting evidence must be filed and served no later than ten (10) calendar days prior to the date of the hearing.
- (p) Oral testimony shall be taken only on oath or affirmation.
- (q)(1) 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.

(2) In the absence of a contrary order by the Administrative Director or the designated hearing officer, the investigating unit of the Division of Workers' Compensation shall present evidence first.

(3) The hearing need not be conducted according to the 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 the admission of the evidence improper over objection in civil actions.

(4) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but upon 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 to the Administrative Director or to the designated hearing officer.

(r) 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 9792.15(n); (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 twenty (20) days prior to the hearing; and (iv) no opposing party has, at least ten (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 Administrative Director or the designated 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. 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. If the Administrative Director or the designated hearing officer determines that good cause exists that prevents the witness from appearing at the hearing, the declaration may be introduced in evidence, but it shall be given only the same effect as other hearsay evidence.

(s) The Administrative Director or the designated hearing officer shall issue a written Determination and Order Assessing Penalty, if any, including a statement of the basis for the Determination and each penalty assessed, within sixty (60) days of the date the case was submitted for decision, which shall be served on all parties. This requirement is directory and not jurisdictional.

(t) The Administrative Director shall have sixty (60) calendar days to adopt or modify the Determination and Order Assessing Penalty issued by the Administrative Director or the designated hearing officer. In the event the recommended Determination and Order of the designated hearing officer is modified, the Administrative Director shall include a statement of the basis for the Determination and Order Assessing Penalty signed and

served by the Administrative Director, or his or her designee. If the Administrative Director does not act within sixty (60) calendar days, then the recommended Determination and Order shall become the Determination and Order on the sixty-first calendar day.

(u) The Determination and Order Assessing Penalty shall be served on all parties personally or by registered or certified mail by the Administrative Director.

(v) The Determination and Order Assessing Penalty, if any, shall become final on the day it is served, unless the aggrieved party files a timely Petition Appealing the Determination of the Administrative Director. All findings and assessments in the Determination and Order Assessing Penalty not contested in the Petition Appealing the Determination of the Administrative Director shall become final as though no petition were filed.

(w) At any time prior to the date the Determination and Order Assessing Penalty becomes final, the Administrative Director or designated hearing officer may correct the Determination and Order Assessing Penalty for clerical, mathematical or procedural error(s).

(x) Penalties assessed in a Determination and Order Assessing Penalty shall be paid within thirty (30) calendar days of the date the Determination and Order became final. A timely filed Petition Appealing the Determination of the Administrative Director shall toll the period for paying the penalty assessed for the item appealed.

(y) All appeals from any part or the entire Determination and Order Assessing Penalty shall be made in the form of a Petition Appealing the Determination of the Administrative Director, in conformance with the requirements of chapter 7, part 4 of Division 4 of the Labor Code. Any such Petition Appealing the Determination of the Administrative Director shall be filed at the Appeals Board in San Francisco (and not with any district office of the Workers' Compensation Appeals Board), in the same manner specified for petitions for reconsideration.

Authority: Sections 133, 4610, and 5307.3, Labor Code.

Reference: Sections 129, 129.5, 4062, 4600, 4600.4, 4604.5, 4610, 4614, and 5300 Labor Code.