

**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 March 24, 2007**. 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](mailto: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, 17<sup>th</sup> 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
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## DOCUMENTS SUPPORTING THE RULEMAKING FILE

- Comments from various interested parties concerning the regulations have been added to the rulemaking file.
- *United States Fidelity and Guaranty Company v. DIR* (1929) 207 Cal. 144
- *Grom v. Shasta Wood Products* (2004) 69 Cal. Comp. Cases 1567

## 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 First 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**.

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

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

Additions to the regulatory text, as proposed in November 2006, are indicated by double underline, thus: added language.

### **Proposed Text Noticed for Third 15-Day Comment Period on Modified Text:**

Deletions from the regulatory text, as proposed in February 2007, are indicated by bold underline/double strike-through, thus: ~~**deleted language**~~.

Additions to the regulatory text, as proposed in February 2007, are indicated by bold double underline, thus: **added language**.

## **SUMMARY OF PROPOSED CHANGES**

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

Subdivisions (c)(1)(A), (c)(1)(B)(3), (c)(2)(a), and (c)(2)(B)(3) are revised to define the sample as “a stratified random sample of requests ...received...during the three most recent full calendar months preceding the date of the issuance on the Notice of Utilization Review Investigation” The following language is also added: “When possible, at least 50% of the randomly selected requests for authorization shall be denied requests for authorization.” The purpose of the change is to allow for 50% of the sample to include denied requests for authorization, as these types of requests are the most critical if the denials were in violation of the utilization review requirements. Also, the three month calendar period is clarified so that the investigation subject will know which three months the sample will be taken from.

Subdivisions (c)(1)(B) and (c)(2)(b) concerning Target Investigations are revised to state “within 18 months of” instead of “no less than one year from.” The investigatory unit may need to follow-up immediately to be sure the problem was corrected. However, for scheduling purposes, it may also be necessary to return more than 12 months later. At the latest, the investigatory unit will return before 18 months have elapsed.

Subdivision (j) is revised to remove the words “Target or Routine” before the word investigation, as the added words are unnecessary. The words “at least sixty days prior to the commencement of the onsite investigation” are deleted. Instead, the Notice of Utilization Review Investigation will be sent to the investigation subject with a list of the requested information. The subject is required to respond within 14 days. After reviewing the response, the Administrative Director will create a random sample of requests for authorization. That list will then be sent to the investigation subject. The subject will have an additional 14 days to produce the requests for authorization. At least 14 days notice will be provided before any on-site investigation.

Former subdivision (j)(4) is deleted as the requested information does not need to be provided to the investigatory unit. That information can be determined from the information provided.

Former subdivision (j)(5), which is now (j)(4), is revised for clarity. The utilization review regulation section numbers are corrected. Former subdivision (j)(6), new subdivision (j)(5) is revised. The words “data elements” are replaced with “information.” Six of the formerly requested informational elements are deleted, as the information will be provided in the requests for authorizations.

Subdivision (k) is revised to replace the words “request for information” with “Notice of Investigation Commencement” for clarity. The words “a three month calendar period” are replaced with “a three month calendar period designated by the Administrative Director.” As stated in subdivision (c)(1)(A) and (c)(2)(A), the three month calendar period will be most recent full calendar months preceding the date of the Notice of Utilization Review Investigation. That three month will be specified in the Notice of Investigation Commencement.

Subdivision (l) is revised with the introductory words “For utilization review organizations:” to clarify this subdivision applies on to the utilization review organizations. The last sentence in the subdivision is added to state: “If an onsite investigation is required, fourteen (14) calendar days notice shall be provided to the utilization review organization.”

Subdivision (m) is revised with the addition of the following introductory language: “For claims administrators: The Notice of Investigation Commencement shall be provided to the claims administrator at least fourteen days prior to the commencement of the onsite investigation.

In subdivision (n), the word “calendar” is replaced with “working” to allow more time for the investigation subject to provide requested records.

In subdivision (q), it is clarified that upon initiating a “Special” Target Investigation, the investigation subject shall be advised of the factual information that triggered the investigation unless divulging the information would make the investigation less useful. Alternatively, a copy of the complaint itself may be provided to the audit subject.

Subdivision (r) is revised by adding the words: “For utilization review organizations” at the beginning of the subdivision for clarity.

In subdivision (s), it is clarified that the audit subject will be required to reimburse overtime, not regular compensation, where the investigator is required to travel out-of-state.

Subdivision (t) is revised to clarify what information will be in the preliminary investigation report: “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.” The words “if necessary” are added regarding the conference, as the investigation subject may agree to pay the penalties as listed in the preliminary report and need. The words “and Notice of Hearing” are deleted from this section. The Notice of Hearing will not be provided until after the audit subject decides to contest the Order to Show Cause. The sentence stating the final report shall not contain any identifiable information has been deleted. The final report, which will be presented to the investigation subject, will contain identifiable information. However, it will not be posted on the DWC website. Instead, the performance rating and summary of violations, which will not contain identifiable information about the injured workers, will be posted on the DWC web site.

Subdivision (v) is revised. Thirty-one calendar days is increased to forty-five calendar days, to allow the audit subject additional time to prepare the required notice. The words “to every employer whose utilization review process was assessed with a penalty pursuant to section 9792.12” are deleted. Instead, to whom the notice must be sent depends of the investigation subject:

“(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.”

The above change was made because in most cases, the employer (unless it is a self-insured employer) is not the entity that contracted with the utilization review company. The revision will ensure that the party who has contracted with the utilization review company or the claims administrator will be advised of the outcome of the investigation if penalties were assessed. Also, in (v)(1) the words “final investigation report” are replaced with “performance rating and summary of violations.” The final report will contain identifiable information about the injured workers (name, date of injury, claim number) and therefore will not be posted on the DWC website. Instead, a document with the performance rating and summary of violations will be posted.

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

Subdivision (a)(6) is clarified to state: “For issuance of a decision to modify or deny a request for authorization for 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;”

Subdivision (a)(7) is revised to state “cure or relieve” instead of “cure and relieve” to be consistent with Labor Code section 4600, *United States Fidelity and Guaranty Company v. DIR* (1929) 207 Cal. 144, and *Grom v. Shasta Wood Products* (2004) 69 Cal. Comp. Cases 1567. Reference to Labor Code section 4604.5(d) is added to allow for the denial if the request is beyond the cap of 24 chiropractic, occupational therapy or physical therapy visits. The citation to section 9782.9 is corrected to 9792.9

The penalty amount in subdivision (a)(8) is reduced from \$25,000 to \$1,000 because unlike the other \$25,000 penalty violations, in this case the request was approved and the failure is due to lack of documentation.

Subdivision (a)(11) is revised to also include the words “or document attempts to discuss ... with the requesting physician.” Therefore, if the investigation subject tried to contact the requesting physician but was unable to and documented the attempts, the penalty will not be imposed.

New subdivision (a)(16) is added to state: “For failure to timely serve the Administrative Director with documentation of compliance pursuant to section 9792.11(v): \$500.” This penalty is added to because the final investigation report may require the investigation subject to provide documentation of compliance. The penalty will provide motivation for the investigation subject to comply with the requirement.

New subdivision (a)(17) is added to state: “For failure to timely comply with any compliance requirement listed in the Final Report if no timely answer was filed or the Determination and Order after any and all appeals have become final: \$500.” This penalty is added to because the final investigation report may require the investigation subject to perform certain remedial actions – such as correct a notice. The penalty will provide motivation for the investigation subject to comply with the requirement.

In section (b), the word “randomly” is added, so that it is clear that the performance rating will only be based on the random sample and will not include complaints. The sentence, “The investigation subject’s performance rating may also be calculated after conducting a Special Target Investigation” is added for clarity.

In subdivision (b)(1)(E), the sentence “The Administrative Director, or his or her designee, may assess penalties as set forth below following a Special Target Investigation.” is removed as it was confusing.

Subdivision (b)(2) has been revised to clarify that the subdivision (b) penalties shall be waived “if the investigation subject’s performance rating meets or exceeds eighty-five percent” or if the investigation subject agrees to the abatement procedure. Subdivision (b)(2)(A) is revised by adding the words: from the date of the agreement” for clarity. Subdivision (b)(2)(B) has the added language that the investigation subject must also agree to a review of randomly selected requests for authorization.

Subdivision (b)(6) was revised to indicate that the Administrative Director shall post the performance rating and summary of violations after all appeals are final instead of the final investigative report. This is revised because the final investigation report will contain identifiable information regarding the injured workers (name, claim number, date of injury) and therefore should not be posted on the website.

Subdivision (c) is revised to state the both the “a” penalties and the “b” penalties are subject to the mitigation factors to be consistent with section 9792.13 (a).

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

New subdivision (a)(5) states: “Penalties may be mitigated outside the above mitigation guidelines in extraordinary circumstances, when strict application of the mitigation guidelines would be clearly inequitable;” This same mitigation factor was part of the audit regulations. It can be applied in situations such as when natural disasters destroy records.

Former subdivision (a)(5) was renumbered (6).

Subdivision (b) was divided, and the second sentence is labeled new subdivision (c).

Former subdivision (c) is now subdivision (d). Former subdivision (d) was deleted as it was duplicative of subdivision (b).

#### **Modifications to Section 9792.14 Liability for Penalty Assessments**

The words “or audited” are removed from subdivisions (a) and (b), as these regulations only pertain to investigations.

#### **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 (a) was revised to remove reference to the Notice of Hearing.

Subdivision (b)(2) is revised. The final report is now described as: “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.”

Subdivision (b)(3) is deleted. The Notice of Hearing will issue after the answer is filed. This is set forth in subdivision (h).

In subdivision (d), a colon is added after Re. In subdivision (d)(3), “alleged” is deleted, as the final report has already issued.

In subdivision (f), “cause” is capitalized.

Re-lettered subdivision (h) provides when the Notice of Hearing will issue: “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.” The following subdivisions are re-lettered.

In re-lettered subdivision (j), “alleged” is deleted, as the final report has already issued.

The word “pre-hearing” is corrected throughout.

In re-lettered (l), the number (60) is added.

In re-lettered subdivision (o), the “d” is added to “designated.”

In re-lettered (r) the word “ten” is added.

In re-lettered subdivision (s), the word “sixty” is added.

In re-lettered subdivision (t) the following sentence is added for clarity: “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.”

Typographical and grammar errors were corrected in re-lettered subdivisions (v), (w), (x), and (y).