

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 February 22, 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.

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.
- January 30, 1998 Memo to Rulemaking File regarding Random Samples of Files for Audits
- *State Compensation Insurance Fund, Petitioner v. Workers' Compensation Appeals Board, (Sandhagen)* (2006) 144 Cal. App. 4th 1050, 71 Cal. Comp. Cases 1541

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 2007, are indicated by underline/double strike-through, thus: ~~deleted language~~.

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

SUMMARY OF PROPOSED CHANGES

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

Subdivision (b) is amended to delete references to the audit regulations. The reference to the regulations was unnecessary and confusing. The word “process” was deleted from the phrase “utilization review process investigation.” The change was made to be consistent with the use of the phrase “utilization review investigation” throughout the regulations.

Subdivision (c) is revised to replace the words “part or all of an employer’s” with “Labor Code section 4610” for clarity purposes. Subdivision (c) is further revised into two sections – one for utilization review organizations and one for claims administrators. Under each section is a description of the Routine Investigation and Target Investigation, which includes the Return Target Investigation and the Special Target Investigation. The term “Non-Routine Investigation” has been replaced with the terms “Return Target and Special Target Investigation.” A Routine Investigation shall include a review of randomly selected requests for authorization, as defined by section 9792.6(o), received by the investigation subject during a three month calendar period. 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 the regulations. A Return Target Investigation shall be conducted no less than one year from the date of the previous investigation of the same investigation subject if the performance rating was less than eighty-five percent. 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 9792.10. The Return Target Investigation and the Special Target Investigation may include (1) a review of the requests for authorization previously investigated which contained violations; (2) a review of the file or files pertaining to the complaint or possible violation; (3) a random sample of requests for authorization received by the utilization review organization during a three month calendar period; (4) a sample of a specific type of requests for authorization; and (5) 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.

The utilization review organizations shall be subject to a Routine Investigation at least once every three years, and claims administrators shall be subject to the Routine Investigation once every five years concurrent with the profile audit review done pursuant to Labor Code sections 129 and 129.5.

Subdivision (d) is added to set forth a statistically valid sample size for the randomly selected requests for authorization from a three month calendar period. This table was originally developed for the audit regulations (Title 8, California Code of Regulations, section 10107.1(c)(1)) with the assistance of the Audit Simplification Subcommittee and Dr. Neil Maizlish, Research Manager for DWC. The numbers are based on an expected violation rate (expected frequency) not over 10%, reliability plus or minus 5%, and a confidence level of 80%. The sample size for each of the population ranges in the table was generated using a software program obtained from the Centers for Disease Control (CDC) called Epi Info (latest release is version 3.3.2). The application within the program used to generate the numbers is titled *Population Survey*, which is found under the Utilities Menu by selecting StatCalc, Sample Size & Power, Population Survey. The Epi Info software verifies an expected frequency of 10%, worst acceptable result of plus or minus 5%, and a confidence level of 80% for these numbers. Epi Info is public domain software that can be downloaded for free from the CDC's website at: <http://www.cdc.gov/epiinfo/>.

Subdivision (e) was added to set forth how complaints may be submitted and the location of the complaint form on the Division's website. The section also explains that complaints will be reviewed and investigated if necessary.

Subdivision (f) was revised to provide 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. This is necessary in light of the *Sandhagen* decision (*State Compensation Insurance Fund, Petitioner v. Workers' Compensation Appeals Board, (Sandhagen)* (2006) 144 Cal. App. 4th 1050, 71 Cal. Comp. Cases 1541), which provides that Labor Code section 4600 did not state that all medical treatment requests had to be subject to utilization review. *Sandhagen* holds that recourse is also provided under section 4062 "[i]f either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610" (§ 4062, subd. (a).) Objections must be timely filed and are followed by a medical review. The medical review conducted under section 4062 differs from that conducted under section 4610. Under section 4062, the employee undergoes a comprehensive medical evaluation with a QME. This section was also revised to exempt employers who fall under Labor Code section 4600(d)(3) and (4),

Subdivision (g) contains minor corrections: "employer's claims" is replaced with "claims administrator's" for clarification. The words "routine, target or full" are replaced with "profile audit review" because the investigation will be done once every five years concurrent with the profile audit review. The references to Title 8 are moved or deleted depending on context.

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

Former subdivision (f), new subdivision (i), replaces "to" with "for" for better syntax.

Former subdivision (g) was deleted as reference to the audit regulations was unnecessary and confusing.

Former subdivision (h) is deleted, as the employer's name is requested under subdivision (j).

Subdivision (j) is revised to describe the procedure when a utilization review organization or claims administrator is provided with notice of the investigation. The words "a Special Target or Routine Target" are added to clarify that notice will always be provided for a Routine Target. When notice is provided, the investigation subject will be provided with sixty days notice prior to the investigation. The Notice will also list the requested information and records. The information previously listed has been revised based on comments that some of the previously listed information is not maintained.

Subdivision (j)(1) now requires a description of the system used to identify each request for authorization (if applicable). It also states the following new language:

"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."

Subdivision (j)(3) clarifies that the legend should also be given for the, 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.

Subdivision (j)(4) clarifies the investigation subject must only provide the total number of California workers' compensation requests for authorization and dispositions in response during the three month calendar period specified by the Administrative Director. The language regarding withdrawn requests has been deleted.

Subdivision (j)(5) has been deleted.

Former subdivision (j)(5), new subdivision (j)(6) has been revised so that the language tracks the cited regulations. It now states: "A description of the methods by which the medical director for utilization review ensures compliance that the process by which the claims administrator or utilization review organization reviews and approves, modifies, delays, or denies requests by physicians complies with Labor Code section 4610 and sections 9762.6 through 9762.10 as required by sections 9792.6(1) and 9792.7(b) of Title 8 of the California Code of Regulations."

Former subdivision (j)(7) has been deleted. Most of the previously requested data has been moved to (j)(1).

New subdivision (j)(6) has been revised to clarify that the data elements requested will depend on the type of entity being investigated. The words “or person subject to Labor Code section 4610” is deleted because that phrase is part of the definition of a utilization review organization. The name and address of the third party administrator and the insurer is added. “Request for medical treatment” is changed to “request for authorization” to be consistent with the utilization review regulations (section 9792.6(o)). The following was deleted: “vii) the date the request was sent by the claims adjuster to the utilization review organization (if applicable); ... ix) the name of the requesting physician;”

Subdivision (k) was revised to clarify the information must be produced. “The utilization review organization or claims administrator shall provide the requested information listed in subdivision (j) within 14 calendar days of receipt of the request for information.” It also now provides that the Administrative Director shall provide the investigation subject with a list of randomly selected requests for authorization from a three month calendar period.

Subdivision (l) is revised to state: “Within fourteen (14) calendar days of receipt from the Administrative Director, or his or her designee, of the list of requests for authorization, 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.” Reference to original documents was removed because the documents may be electronic and the Division does not need original documents even if they exist.

Subdivision (m) refers only to claims administrators. The reference to original documents was removed. The term “request for authorization” was inserted to be consistent with section 9792.6(o).

In subdivision (n), the requirement to produce original records was deleted. The words “or other person performing utilization review for an employer” is deleted because that phrase is part of the definition of a utilization review organization. The reference to section 9792.11(j) is corrected to (k). The word “credible” is added before complaint.

In subdivision (o), “business day” is modified by “normal” and reference is made to the definition as used in the utilization review regulation section 9792.9(a)(1).

In subdivision (p) and (p)(1), the words “or other person performing utilization review for an employer” is deleted because that phrase is part of the definition of a utilization review organization.

In subdivision (q), it is clarified that upon initiating a 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. The words “or other person

performing utilization review for an employer” is deleted because that phrase is part of the definition of a utilization review organization.

In subdivision (r), the words “employer or the employer’s claims administrator” are deleted. The words “or other person performing utilization review for an employer” is deleted because that phrase is part of the definition of a utilization review organization. The amount of time the utilization review organization must retain records has been changed from five years to three years, as the utilization review organizations will be investigated at least once every three years. A new sentence is added: “Claims administrator shall retain their claim files as set forth in section 10102 of Title 8 of the California Code of Regulations.” This regulation already requires claims administrators to retain claim files for specific periods of time for audit purposes.

In subdivision (s), the word “Target” replaces “Non-Routine,” as the term’s name has been changed. The words “or other person performing utilization review for an employer” is deleted because that phrase is part of the definition of a utilization review organization.

New subdivision (t) is added to explain the procedure that follows the investigation:

“Written notification of the preliminary investigation report will be provided to the claims administrator or utilization review organization. The preliminary investigation report shall contain the basis for each assessment, a statement of the alleged violations and the amount of each proposed penalty. A conference to discuss the preliminary investigation report shall be scheduled 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) and Notice of Hearing, as set forth in section 9792.15. The final investigation report shall not contain any individually identifiable information except that it shall identify the employer, claims administrator, and utilization review organization, if applicable.”

The purpose of the preliminary investigation report and conference is to allow the parties to resolve disputes prior to the issuance of the final report. The final report will not contain personally identifiable information because the final report will be provided to the employer and posted on the Division’s website.

New subdivision (u) provides that the investigation subject may stipulate to the allegations and final report in the Order to Show cause. This allows the Order to become final without requiring the parties to attend a hearing.

Subdivision (v) clarifies when the Order becomes final and sets forth the requirement that the audit subject notify every employer whose utilization review process was assessed with a penalty. This ensures that the employers are aware of how their employee’s requests for authorization are handled. The section now states:

“(v) Within thirty-one 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 to every employer whose utilization review process was assessed with a penalty pursuant to section 9792.12:

(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 final

investigation report 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) The notice shall be served by certified mail.”

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

In subdivision (a), the words “Single Instance” are deleted, as neither the penalties listed in (a) or (b) are listed in a grouped manner.

All other penalties listed in subdivisions (a) and (b) were re-written to follow a similar sentence structure, starting with the words, “For failure...” and ending with the penalty amount. The words “A maximum of” was removed for clarity. The amounts listed will be assessed unless one of the mitigating factors listed in section 9792.13 (a) apply.

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

“For failure to establish a Labor Code section 4610 utilization review plan process, : \$50,000;” This is the most egregious violation – the complete failure to establish a plan as required by Labor Code section 4610.

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

“For failure to include all of the requirements of section 9792.7(a) in the utilization review plan: \$5,000;” This penalty is less severe, as the plan has been established, but is missing one or more of the required components.

New subdivision (a)(3) states:

“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;” This violation is less severe than failing to have established a plan.

New subdivision (a)(4) states:

“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;” This violation is less severe than the violation listed in (a)(3).

The violation listed in subdivision (a)(5) is the same violation as it was in the last revision; the sentence has been restructured for clarity. Failure to have a medical director is one of the most severe violations possible.

Former subdivision (a)(2) has been deleted, as it is included in subdivision (a)(5).

Subdivision (a)(6) is the same violation as it was in the last revision; the sentence has been restructured for clarity. Also, a definition for “scope of practice” has been added for clarity: “as set forth by the reviewer’s licensing board.” The penalty amount is \$25,000, as it is not as severe as the failure to have a medical director.

Subdivision (a)(7) is the same violation as it was in the last revision; the sentence has been restructured for clarity. The severity of this violation is similar to (a)(6), and therefore the penalty amount is the same.

Subdivision (a)(8) is the same violation as it was in the last revision; the sentence has been restructured for clarity. This re-written version does not require the non-physician review to possess the written amended request prior to approving the request. The severity of this violation is similar to (a)(6) and (a)(7), and therefore the penalty amount is the same.

Former subdivision (a)(6) has been deleted as the violation went beyond the requirements listed in the utilization review regulations.

Subdivision (a)(9) is the same violation as it was in the last revision; the sentence has been restructured for clarity. An expedited review is defined by section 9792.6(g) and means utilization review conducted when the injured worker's condition is such that the injured worker faces an imminent and serious threat to his or her health. Therefore, the failure to timely respond to such a request is a serious violation. The penalty amount for this violation is \$15,000.

Subdivision (a)(10) is the same violation as it was in the last revision; the sentence has been restructured for clarity. This requirement is found in section 9792.8(a)(2). Compared to the other violations in this (a) subdivision, the violation is less severe, and the penalty amount has been reduced back to \$5,000.

Subdivision (a)(11) is the same violation as it was in the last revision; the sentence has been restructured for clarity. The term "good faith" has been removed, as it was not defined in the utilization review regulations. The penalty amount is \$10,000, as the failure to discuss reasonable options for a care plan prior to denying authorization is a serious violation.

Subdivisions (a)(12) through (a)(14) address the failure to respond to the request for authorization by the injured employee's treating physician. The penalties are structured based on the type of review: \$2,000 for a non-expedited prospective review; \$1,000 for a non-expedited prospective review; and \$500 for a retrospective review.

Subdivision (a)(15) has been moved from subdivision (b). It is a \$100 penalty for failing to disclose or otherwise make available, upon request, the Utilization Review criteria to the public. The violation was moved to this section, as it is not the type of violation that would be discoverable during a review of the requests for authorization.

Former subdivision (a)(11) is deleted. The violations are now covered by (a)(3) and (a)(4).

Former subdivision (a)(12) is deleted as there is no requirement in the utilization review regulations to provide a physician with an authorization number.

In section (b) Additional Penalties and Remediation, a new subdivision (1) has been added. This section provides that the investigation subject's performance rating will be determined and if the subject's performance rating is 85% or better, the penalties amounts listed in subdivision (b) will not be assessed. This section was added to mirror the profile audit review procedure where no

penalties are assessed if a claims administrator passes the performance standard. (Labor Code section 129(b)(1).) The sections states:

(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 selected requests. 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. The Administrative Director, or his or her designee, may assess penalties as set forth below following a Special Target Investigation. If the performance rating is less than eighty-five percent, the violations shall be assessed as set forth below:

This revision as well as the revision to subdivision (b)(3) was added in response to the *Sandhagen* decision (*State Compensation Insurance Fund, Petitioner v. Workers' Compensation Appeals Board, (Sandhagen)* (2006) 144 Cal. App. 4th 1050, 71 Cal. Comp. Cases 1541). *Sandhagen* provides that Labor Code section 4600 did not state that all medical treatment requests had to be subject to utilization review. *Sandhagen* holds that recourse is also provided under section 4062 "[i]f either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610" (§ 4062, subd. (a).) Objections must be timely filed and are followed by a medical review. The medical review conducted under section 4062 differs from that conducted under section 4610. Under section 4062, the employee undergoes a comprehensive medical evaluation with a QME. Thus, if the penalties listed in these regulations are prohibitively high, claims administrators have commented that they will forego the utilization review process and instead utilize the process under Labor Code section 4062, which will cause injured workers delay in receiving requested medical treatment.

Subdivision (b)(2) has been revised. The word "basic" has been deleted as unnecessary. The references to other subdivision have been corrected. Clarification is added that the ability to

waive penalties by entering into an abatement agreement may only be made following a Routine Investigation. The words “or other person performing utilization review for an employer” is deleted because that phrase is part of the definition of a utilization review organization. In subdivision (b)(2)(B) the words “regardless of advance notice” is replaced with “within the time frame specified in the agreement.” The words “Non-Routine “ are replaced with “a Return Target.” The reference to section 9791.12 is corrected to 9792.12. In subdivision (b)(2)(C) the words “full basic” are deleted as unnecessary. Subdivision (b)(2)(D) is deleted.

Subdivision (b)(3) has been revised. This section will apply when there is a Return Target Investigation and the investigation subject fails to meet the performance standard of 85%. The penalty amounts shall be as follows:

(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,

The violations listed in subdivision (b)(4) all have a penalty of \$100. The words “basic,” “a maximum of,” and “at that location” have all been deleted as unnecessary. Former subdivision (b)(4)(A) has been deleted as it is included in (b)(4)(E).

Subdivision (b)(4)(A) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “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.”

Subdivision (b)(4)(B) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “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.”

Subdivision (b)(4)(C) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “For failure to make a decision to approve or modify or deny the request for authorization within five (5) working days or receipt of the requested information for prospective or concurrent review and to communicate the decision as required by section 9792.9(g)(3).”

Subdivision (b)(4)(D) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “For failure to make and communicate a retrospective decision to approve, modify, or deny the request within thirty (30) working days or receipt of the information, as required by section 9792.9(g)(4).”

Subdivision (b)(4)(E) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “For failure to include in the written decision that modifies, delays or denies authorization, all of the items required by section 9792.9(j).”

Subdivision (b)(4)(F) is the same violation as it was in the last revision; the sentence has been restructured for clarity. “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 sections 9792.8(a)(3) of Title 8 of the California Code of Regulations.”

The violations listed in subdivision (b)(5) all have a penalty of \$50. The words “basic,” “a maximum of,” and “at that location” have all been deleted as unnecessary.

Subdivision (b)(5)(A) and (B) are the same violations as in the last revision; the sentences have been restructured in a very minor way for clarity.

Subdivision (b)(5)(C) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “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;”

Subdivision (b)(5)(D) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “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;”

Subdivision (b)(5)(E) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “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);”

Subdivision (b)(5)(F) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “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;”

Subdivision (b)(5)(G) is the same violation as it was in the last revision; the sentence has been restructured for clarity. It now states: “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);”

Subdivision (b)(6) was revised to indicate that the Administrative Director shall post the final investigative report or Final Determination on the Division’s website.

Former subdivision (b)(6), which defined “reasonable costs” has been deleted, as the requirement for the investigation subject to pay reasonable costs has been deleted.

In subdivision (c), the reference to section 9792.12 (a) has been corrected to (b).

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

Subdivision (a) is revised to replace the word “case” with “investigation.” The words “adjust a basic or graduated” are replaced with “mitigate.”

Subdivision (a)(2) is clarified by stating: “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.”

Subdivision (a)(3) is simplified to: “The history of previous penalties.”

Subdivision (a)(4) is deleted, as it is the same as the new (a)(4).

Subdivision (a)(5), (6), and (8) are deleted as inappropriate reasons to mitigate.

In subdivision (a)(7), the word “rate” is replaced with the word “frequency.”

In subdivision (a)(5), the words “employer” and “or other person performing utilization review services” are deleted as duplicative.

Former subdivision (b) is deleted.

In new subdivision (b), the following sentence is added: “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).”

In subdivision (d), the words “utilization review organization” is added. The word “or other person assessed a proposed penalty pursuant to section 9792.12 of Title 8 of the California Code of Regulations” are deleted as duplicative.

Modifications to Section 9792.14 Liability for Penalty Assessments

In subdivisions (a), (b), and (c), the phrase beginning “or other entity ...” is deleted as duplicative.

**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 (b) was revised to replace the word “contain” with the word “include.”

Subdivision (b)(2) is clarified by adding the words “final investigation report, which shall include the ...”

Subdivision (b)(3) is revised by adding the sentence “The date of the hearing shall be at least ninety days from the date of service of the Order to Show Cause.” This ensures that the parties will have adequate time and notice prior to the hearing.

Former subdivision (d) was deleted, as the requirement to notify the employer of the final investigation report is addressed in section 9792.11.

New subdivision (d) corrects the reference to the claims administrator and utilization review organization only.

Subdivision (e) replaces the word “appealed” with “contested” for clarity.

Subdivision (g) corrects the reference to the claims administrator and utilization review organization only. The last sentence was removed as unnecessary and in conflict with the requirement that the employer only needs to be notified once the Order is final.

In subdivision (k), the word “reasonable” is replaced with “sixty (60) calendar days” for clarity and to assure the parties of adequate notice before the prehearing conference.

In subdivision (r), the reference to section 9792.13(m) was corrected to 9792.15(m). The following language was added: “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.” This language was added because if there is good cause that prevents the witness from testifying, this will allow the declaration to be introduced with the same effect as other hearsay evidence.

In subdivision (s), the words “Administrative Director or the” are added in case the Administrative Director issued the Recommended Determination and Order. The word “Final” has been deleted from modifying “Determination and Order” for clarity (as the Order is not final until the time to appeal has elapsed).

Subdivision (t) is added. It states: “The Determination and Order Assessing Penalty shall be served on all parties personally or by registered or certified mail by the Administrative Director.” This is added to ensure the parties receive the Determination and Order and to clarify that it is the Administrative Director’s responsibility to serve the Determination and Order.

Subdivision (u) was revised for clarity. The word “Final” has been deleted from modifying “Determination and Order” for clarity (as the Order is not final until the time to appeal has

elapsed). The phrase “for the purposes of review within twenty (20) days of” was deleted, as it was contradictory with the phrase that followed and did not make sense when read with the timeframe in which to appeal. The word “the” is inserted in the phrase “Petition Appealing the Determination and Order.”

In subdivision (v), the word “Final” has been deleted from modifying “Determination and Order” for clarity (as the Order is not final until the time to appeal has elapsed). The phrase “or amend the Final Determination and Order for good cause” was deleted as it was vague.

In subdivision (w), the word “Final” was deleted and the word “the” is inserted in the phrase “Petition Appealing the Determination and Order.”

In subdivision (x), the word “Final” has been deleted from modifying “Determination and Order” and the word “the” is inserted in the phrase “Petition Appealing the Determination and Order.”