State of California
Office of Administrative Law

In re:
Division of Workers' Compensation

Regulatory Action:
Title 08, California Code of Regulations

Adopt sections: 9792.7.1, 9792.9.7, 9792.9.8
Amend sections: 9767.6, 9781, 9785, 9786, 9792.6.1, 9792.7, 9792.8, 9792.9.1, 9792.9.2, 9792.9.3, 9792.9.4, 9792.9.5, 9792.9.6, 9792.10.1, 9792.10.2, 9792.10.3, 9792.10.4, 9792.10.5, 9792.10.6, 9792.10.8, 9792.11, 9792.12, 9792.13, 9792.15, 9792.27.3, 9792.27.17
Repeal sections: 9792.6, 9792.9

DECISION OF DISAPPROVAL OF REGULATORY ACTION

Government Code Section 11349.3

OAL Matter Number: 2025-0606-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This regulatory action by the Division of Workers' Compensation (Division) seeks to update the Division's administrative rules related to utilization review standards. The updates address the reporting duties of the primary treating physician, procedures for independent medical review, investigation procedures for utilization review violations, and procedures to change the primary treating physician. In addition, the action seeks to add penalties for utilization review and independent medical review violations.

On June 6, 2025, the Division submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On July 21, 2025, OAL notified the Division that OAL disapproved the proposed regulatory action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the action because the proposed regulatory changes failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3), and for incorrect procedure.

DISCUSSION

The Division's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.) No exemption applies to this regulatory action.

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the APA standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency regarding the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. CLARITY STANDARD

In adopting the APA, the Legislature found the language of many regulations to be unclear and confusing to persons who must comply with the regulations.

(Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines "clarity" to mean "written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them."

The "clarity" standard is further defined in section 16 of title 1 of the California Code of Regulations (CCR), which provides:

> In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
> (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
> (2) […]
> (3) […]
> (4) […]
> (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
> (6) […]
> (b) Persons shall be presumed to be "directly affected" if they:
> (1) are legally required to comply with the regulation; or
> (2) are legally required to enforce the regulation; or
> (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
> (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

The following provisions in the Division's proposed regulations do not satisfy the clarity standard.

1.1. Proposed section 9792.6.1(u)(2) – "may be deemed completed"

Proposed section 9792.6.1(u)(2) states, in pertinent part:

> ~~(t)~~ (u) …A request for authorization ***may be deemed completed*** following receipt of information, test results, or a specialized consultation requested under section 9792.9.6.
> [Emphasis added.]

Proposed subsection (u)(2) is unclear because it can reasonably and logically be interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(5).) Use of the permissive term "may" in this provision makes it unclear whether, and under what circumstances, the Division will or will not treat a request for authorization as completed following receipt of all required information.

1.2. Proposed section 9792.6.1(u)(3) – meaning of "secure"

Proposed section 9792.6.1(u)(3) states, in pertinent part:

> (3) The request for authorization must be signed by the treating physician and may be mailed, faxed, or, if available, ~~e-mailed~~ sent electronically through the use of a ***secure***, encrypted email system or via electronic data interchange (EDI) to~~, if designated,~~ the address, fax number, ~~or~~ e-mail address, or clearinghouse designated by the claims administrator under section 9781(d)(5) for this purpose.
> [Emphasis added.]

Proposed subsection (u)(3) is unclear because it can reasonably and logically be interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(5).) The proposed language allows the request for authorization to be sent electronically, but it requires the use of a "secure" encrypted email system. "Secure" is not defined in statute or regulation. Without a definition for this term, it is unclear what constitutes a "secure" encrypted email system. As a commenter stated: "This proposed amendment is vague and may lead to different interpretations of a 'secure email' among the entities involved. Clarity is needed."

Further, given that the term "secure" is proposed for similar use in sections 9785(d), 9792.6.1(bb), 9792.9.4(b), and 9792.9.5(c), those sections are also unclear.

1.3. Proposed section 9792.12(a)(9) – penalty for failing to retain records

Proposed section 9792.12(a)(9) states:

> ~~(a) Mandatory Utilization Review Administrative Penalties.~~ Notwithstanding Labor Code section 129.5(c)(1) through (c)(3), the following penalty amounts ~~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~~:
> (a) For violations relating to utilization review plan requirements:
> (1) […]
> (9) For failure to retain records as required under section 9792.11(r): $20,000;

Proposed section 9792.11(r) states:

> (r~~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~~ the investigation subject shall produce the requested records in the manner described by subdivision 9792.11(m)~~(k)~~, within ~~one (1) working day when the records are located at the site of investigation, and within~~ five (5) business ~~working~~ days, or, when records are located at the site of an on-site investigation, one (1) business day ~~when the records are located at any other site~~. Any such request by the Administrative Director or his or her designee ~~also~~ may also 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.

Proposed subsection (a)(9) is unclear because it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).) Proposed subsection (a)(9) imposes a penalty for failure to retain records, but it cross-references a section that does not contain a requirement to retain records. Instead, the cross-referenced section discusses the requirement to produce records. The proposed regulations do not have a requirement to retain records. Without a regulation that specifically addresses the retention requirement, the regulated public would not know how to comply in order to avoid the penalty.

1.4. Proposed section 9792.10.1(a) and Form IMR (1/1/2026)- days for filing

Proposed section 9792.10.1(a) states:

> (a)(1) A request for independent medical review of a utilization review decision that denies or modifies a medical treatment request must be filed by an eligible party by mail, facsimile, or electronic transmission with the Administrative Director, or the Administrative Director's designee, **within 30 days** of service of the written utilization review determination issued by the claims administrator under section 9792.9.5(e).
> (2) If the utilization review decision only denies or modifies a medical treatment request for a drug listed on the MTUS Drug List, the request for independent medical review must be filed by the eligible party **within 10 days** of service of the written utilization review decision.
> [Emphasis added.]

The following language is proposed for adoption in Form IMR (1/1/2026):

> The deadline for filing an IMR Application is based on the type of medical treatment that is requested by the treating physician. If the disputed medical treatment only involves a drug that is listed on the Medical Treatment Utilization Schedule (MTUS) Formulary Drug List, the deadline for filing the IMR application is ***15 days*** from the mailing date of the determination letter. (See date above marked with an asterisk.) For all other disputes, ***the deadline is 35 days*** from the mailing date of the written

> determination letter. Both deadlines include additional days for mailing. However, under either deadline, add five (5) days if you live outside of California. Your deadline for filing this IMR Application is indicated in the checked box, below. [Emphasis added.]

The regulations are unclear because they can reasonably and logically be interpreted to have more than one meaning and they present information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(5).) While both the regulation and Form IMR (1/1/2026) address the deadline for filing a request for an independent medical review, each provides a different number of days within which the request must be made. As written, it is unclear to the regulated public the exact amount of time allotted for the request for an independent medical review to be filed with the Administrative Director. For a medical treatment that involves a drug listed on the MTUS Drug List, the deadline to request an independent medical review could be 10 days or 15 days. And for other disputes, the deadline could be 30 days or 35 days.

1.5. Proposed section 9792.9.7(b)(2) – surgery procedures

Proposed section 9792.9.7(b)(2) states:

> (2) Nonemergency surgery and surgical services provided in any setting, including inpatient hospital, outpatient hospital, surgical clinic, ambulatory surgical center, or physician's office. This includes all necessary and routine pre-operative, intra-operative, and post-operative services performed for the purpose of surgery including, but not limited to, related diagnostic tests or procedures, rehabilitation services, durable medical equipment or supplies, and routine post-surgical pain management treatment or services. For the purpose of this section, "surgery" means: 1) any procedure set forth in the Surgery section of the ***American Medical Association's Current Procedural Terminology (CPT®) pursuant to the physician and non-physician practitioner fee schedule at section 9789.12 et seq.,*** and 2) any Healthcare Common Procedure Coding System (HCPCS) procedure code defined as "surgery" in the Hospital Outpatient Departments and

> Ambulatory Surgical Centers Fee Schedule at section 9789.30 et seq.
> [Emphasis added.]

Proposed subsection (b)(2) is unclear because it can reasonably and logically be interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(5).) Proposed section 9792.9.7(a) allows a treating physician "to render medically necessary treatment or services to an injured worker without prospective utilization review for the first thirty (30) days after the date of injury." However, proposed section 9792.9.7(b)(2) describes some medical treatment services that still require prospective utilization review.
First, the phrase "pursuant to the physician and non-physician practitioner fee schedule at section 9789.12 et seq." is unclear because the proposed regulation does not state which specific sections are applicable. Second, the cross-referenced sections refer to various different versions of the CPT®. As written, it is unclear which version of the CPT® document applies, leaving the regulated public without clear guidance about how to comply with this requirement.

For the reasons discussed above, the proposed regulatory changes failed to comply with the clarity standard of the APA.

2. INCORRECT PROCEDURE

The APA requires agencies to follow specific procedures when conducting a regulatory action. In this action, the Division did not provide notice of all substantive revisions to the regulation text. Subdivision (a)(3) of Government Code section 11346.2 states:

> Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:
> (a) A copy of the express terms of the proposed regulation.
> (1) […]
> (2) […]

> (3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

During the 45-day comment period, the public was notified that the Division proposed to renumber subsections (e)(5)(J) and (e)(5)(K) of existing section 9792.1 as subsections (e)(13) and (e)(14) of proposed section 9792.9.5, respectively. In proposed subsection (e)(13), the phrase "including with respect to disputes over the necessity of or availability of the requested information" was added, but it was not underlined. In proposed subsection (e)(14), the phrase "or an agreed upon scheduled time to discuss the decision with the requesting physician" was deleted, but it was not shown in the proposed regulatory text in strikeout. Rather, it was simply omitted.

Because these modifications were not properly illustrated in the proposed regulation text, the public was not given the opportunity to comment on those changes as required by Government Code section 11346.2, subdivision (a)(3).

The Division must make these changes available to the public for comment, with changes accurately illustrated, prior to resubmitting the rulemaking to OAL.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Division may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to the Division on the date indicated below.

The Division must make any substantive regulatory text changes, which are sufficiently related to the originally noticed text, available for public comment for at least 15 days pursuant to subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Any objections or recommendations raised by the public during the 15-day public comment period must be summarized and responded to in the Final Statement of Reasons. The Division must resolve all issues raised in this Decision of Disapproval of Regulatory Action prior to the resubmittal of this regulatory action.

If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: July 28, 2025

_____/s/_____
Thanh Huynh
Senior Attorney

For: Kenneth J. Pogue
Director

Original: George Parisotto,
Administrative Director
Copy: River J Sung