

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: W. JOSEPH TRUCE
DATE: August 11, 2004
RE: SPINAL SURGERY SECOND OPINION PROCEDURE

The Administrative Director has now issued proposed regulations (proposed for permanent adoption July 2004) No. 8 CCR §9788.01 to §9788.91 with respect to the spinal surgery second opinion procedure as mandated by Labor Code §4062 as amended on January 1, 2004.

Basically, Labor Code §4062 allows defendants to obtain a second opinion as to spinal surgery by following procedures set out by Labor Code §4062 as amended.

The new amendment to Labor Code §4062 provides as follows:

“The employer may object to a report of the treating physician recommending that spinal surgery be performed within ten (10) days of the receipt of the report. If the employee is represented by an attorney, the parties shall seek agreement with the other party on a California License Board Certified or Board eligible Orthopedic Surgeon or Neurosurgeon to prepare a second opinion report resolving the disputed surgical recommendations. If no agreement is reached within ten (10) days, or if the employee is not represented by an attorney, an Orthopedic Surgeon or a Neurosurgeon shall be randomly selected by the Administrative Director to prepare a second opinion report resolving the disputed surgical recommendations. Examination shall be scheduled on an expedited basis. The second opinion report shall be served on the parties within forty-five (45) days of receipt of the treating physician’s report. If the second opinion report recommends surgery, the employer shall authorize the surgery. If the second opinion report does not recommend surgery, the employer shall file a Declaration of Readiness to Proceed. The employer shall not be liable for medical treatment costs for the disputed surgical procedure whether through a lien filed with the Appeals Board or as a self-procured medical expense, or if the periods of temporary disability resulting from

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the surgery, if the disputed surgical procedure is performed prior to the completion of the second opinion process required by this subdivision
...”

Although Labor Code §4062 as amended (as noted above) became effective on January 1, 2004 the Administrative Director did not promulgate rules and regulations or set forth procedures to implement this section until July of 2001.

Anyone wishing to read the proposed rules (CCR §§ 9788.01 to 9788.91) can go to the DWC website.

This memo does not start to summarize either the rules referred to above or undertake an in-depth discussion of the proposed rules. However, this memo will attempt to address the various time limits and requirements to obtain a second opinion as to spinal surgery as follows:

1. Labor Code §4062 provides that we only have ten (10) days to object to the treating physician's recommendations for surgery and although Labor Code §4062 is not specific as to whether or not the recommendation for surgery is to be communicated either in writing or by telephone, I assume that Labor Code §4062 is referring to a written request.
2. I am quite certain that Labor Code §4062 contemplates that the ten (10) days start to run from the time that the written request recommending spinal surgery is served on the claims administrator. Although we may receive the request weeks subsequent to when the request was actually served on the claims administrator, the time apparently starts running as soon as the written request is communicated to our client. **Therefore, we must be ever vigilant in requesting that our clients react immediately to a written request for surgery so as to preserve their rights under Labor Code §4062.**
3. Once we follow through and object to a request for spinal surgery within the required ten (10) days from receipt we face another time limit. **As soon as the written objection is filed we have ten (10) days (assuming that the applicant is represented by an attorney) to agree on a Board-Certified or Board eligible Orthopedic Surgeon or Neurosurgeon to prepare a second opinion report resolving the disputed surgical recommendation.**
4. If the parties do not reach agreement, then we can request that the Administrative Director appoint a physician from the panel to resolve the question of surgery. **I am enclosing DWC form 223 (effective June 2004) entitled “Objection to Treating Physician’s**

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Recommendation for Spinal Surgery.” Please note that this form must be used in requesting that the administrative director assign a panel physician as to the question of whether or not spinal surgery is reasonable.

5. In reviewing this form it is noted that the form must be completed and signed under penalty of perjury and that the Administrative Director’s questionnaire calls for us to advise as to the date that the treating physician’s recommendations for spinal surgery was first received and the name of the entity (employer, insurance carrier, or administrator) that receives the request for surgery.
6. The Administrative Director DWC form objection to the treating physician’s recommendation for spinal surgery provides that the person signing the Declaration under penalty of perjury must be “a Principal or employee of the employer, insurance carrier, or administrator . . .” Query: Does this mean that an attorney representing the employer or insurance carrier may not sign this form?
7. There is a space in the form entitled: “Reasons for this objection, specific to this employee . . .” This may call for our reasoning in denying the surgery as recommended by the treating physician. However, unless we have a QME Report recommending against surgery or a letter from a medical director advising that the spinal surgery recommended is not within the medical protocols of the American College of Occupational and Environmental Medicine, we may not have a basis for requesting a second opinion.
8. The time frame for the Administrative Director panel doctor to serve his second opinion report would not appear to be practical or reasonable as Labor Code §4062 as amended mandates that said second opinion report will be served for the five (5) days “of receipt of the treating physician’s report” recommending said surgery. **In many cases this would not seem to be possible given the fact that the parties have ten (10) days to try and agree on a second opinion doctor and also assuming the fact that the second opinion physician must first examine the applicant before rendering an opinion.**
9. In many cases it might be a practical solution to select a competent and credible Board Certified Orthopedist to quickly render a second opinion as to spinal surgery. Kim Matian of our Los Angeles office advises that Dr. William Dillin of the Kerlan-Jobe Medical Group may well be an answer in these types of situations. Dr. Dillin has an excellent reputation regarding questions of spinal surgery and apparently has streamlined his office so as to accommodate parties who wish to utilize his expertise pursuant to Labor Code §4062. Kim advises that persons who call Dr. Dillin’s office are advised by the Centrex system to press

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a certain number for a second opinion spinal surgery consultation. Dr. Dillin's office advises that on the question of second opinion surgery Dr. Dillin will not report on **any other issue** and Dr. Dillin's basic requirement is that when the applicant comes in for a consultation that the applicant bring the relevant MRI films. In the alternative, these films can be sent to Dr. Dillin's office prior to the second opinion consultation.

10. For second opinions, Dr. Dillin can apparently, if the applicant is within twenty-four hours of notification. Dr. Dillin's office indicates that the report would issue within two weeks after the appointment.
11. In summary there are certainly a lot of unanswered questions about the new Labor Code §4062 procedure and I assume that we will learn on a case by case basis.

WJT

Enclosure: **DWC Form 223: Objection to Treating Physician's Recommendation for Spinal Surgery**

Subj: Re: Dr. Dillon
Date: 7/13/2004 12:09:45 PM Pacific Standard Time
From: kmatian@kttla.com
To: JTruce@aol.com
Sent from the Internet (Details)

Hi Joe,

I called their offices on Thursday. I was transferred to Dr. Dillon's secretary who is familiar with the new law but she has stringent requirements for making an appointment. First, all MRI films should be forwarded prior to the appointment. Second, the Doctor will only discuss spinal surgery, not TTD or AME issues. (The Regulations specifically state that the Doctor can comment on alternative methods of treatment, so I put this in my cover letter.) Appointments were available in 24 hours. We scheduled an appointment a week later because we needed to copy the MRI films. I was told that I would get the report within two weeks after the appointment. The secretary schedules the interpreter.

All together, the process went smoothly except for copying the MRI films which was very difficult. The company wanted a check in hand prior to copying the films and would only allow the patient or the AA to pick up the films. At this point, I still don't know if the adjuster was able to get the check out in time and the appointment is Thursday.

I will contact you as soon as I get the report.

-Kim

At 09:10 PM 7/12/2004 -0400, you wrote:

Hi Kim, Can you give me an e mail summarizing your experience in calling Dr. Dillon's office as to second opinion surgery as I want to incorporate this into a memo.---joe

Adopt:

**Title 8, California Code of Regulations
Chapter 4.5, Division of Workers' Compensation
Subchapter 1
Administrative Director – Administrative Rules**

Article 5.1

Spinal Surgery Second Opinion Procedure

Section 9788.01. Definitions.

As used in this Article:

- (a) "Agreed second opinion physician" is a physician agreed upon by an employer and represented employee pursuant to Labor Code Section 4062 subdivision (b).
- (b) "Completion of the second opinion process" occurs on the forty-fifth day after the receipt of the treating physician's report by the employer, unless the time has been extended by mutual written consent of the parties as provided in these regulations, or unless the time has been extended as provided in these regulations because the employee failed to attend an examination with the second opinion physician or agreed second opinion physician.
- (c) "CPT[®]" means the procedure codes set forth in the American Medical Association's Physicians' Current Procedural Terminology (CPT) 1997, copyright 1996, American Medical Association.
- (d) "Income" of a person includes the income of that person's business partner, physician member of the office of a group practice as defined in Labor Code section 139.3, spouse, cohabitant, and immediate family. Income of a second opinion physician does not include income from employment which had terminated prior to the time the physician was selected as a second opinion physician where there is no reasonable prospect of future employment.
- (e) "Material familial affiliation" means a relationship in which one of the persons or entities listed in subdivision (c) of Labor Code section 4062 is the parent, child, grandparent, grandchild, sibling, uncle, aunt, nephew, niece, spouse, or cohabitant of the second opinion physician. For entities of the employer, insurer, physician, medical group, independent practice association, administrator, utilization review entity, facility, or institution mentioned in subdivision (c) of Labor Code section 4062, which are not

persons, the familial affiliation shall be determined by considering the relationship of all of the officers, directors, owners and management employees, and individual claims administrators and supervisors to the second opinion physician.

(f) "Material financial affiliation" includes all of the following financial relationships between the second opinion physician and another person or entity listed in subdivision (c) of Labor Code section 4062, or parent or subsidiary or otherwise related business entity of a person or entity:

(1) One has a direct or indirect investment worth two thousand dollars or more in the other;

(2) One is a director, officer, partner, trustee, employee, or holds any position of management in the other;

(3) One has a direct or indirect interest worth two thousand dollars or more in fair market value in an interest in real estate owned or controlled by the other;

(4) One has received income of any kind, including gifts, from the other, aggregating three hundred dollars or more within the twelve months prior to the time of selection as a second opinion physician, except that the following income shall not be counted for this purpose:

A. income for services as a second opinion physician;

B. income for services as a treating physician;

C. income for services as an agreed medical examiner;

D. income for services as a panel Qualified Medical Evaluator selected for unrepresented employees;

E. income from services as a Qualified Medical Evaluator for represented employees.

F. income for services as a Qualified Medical Evaluator for an employer from the first five cases in any twelve month period for the same employer, carrier, or administrator.

(5) One has an employment or promise of employment relationship with the other.

(g) "Material professional affiliation" is any relationship in which the second opinion physician shares office space with, or works in the same office of, any of the other persons or entities listed in subdivision (c) of Labor Code section 4062.

(h) "Parent, subsidiary, and otherwise related business entity" have the same meanings as in Section 18703.1, Title 2, Division 6 of the California Code of Regulations.

(i) "Receipt of the treating physician's report" is the day it was first received by the employer, insurance carrier, or administrator.

(j) "Retired spinal surgeon" is a physician currently licensed in the State of California who once had, but no longer has, hospital privileges to perform spinal surgery described in Section 9788.2 (c)(2). "Retired spinal surgeon" does not include a physician whose

hospital privileges to perform spinal surgery were either surrendered by the physician or were terminated or not renewed by the hospital, after disciplinary charges were filed or after a disciplinary investigation was commenced.

(k) "Second opinion physician" is the physician who is randomly selected pursuant to subdivision (b) of Labor Code section 4062 to render the second opinion on a treating physician's recommendation of spinal surgery.

(l) "Spinal surgery" includes:

(1) any of the procedures listed in the Official Medical Fee Schedule denominated by the following CPT[®] procedure code numbers:

22100, 22101, 22102, 22103, 22110, 22112, 22114, 22116, 22210, 22212, 22214, 22216, 22220, 22222, 22224, 22226, 22548, 22554, 22556, 22558, 22585, 22590, 22595, 22600, 22610, 22612, 22614, 22630, 22632, 22800, 22802, 22804, 22808, 22810, 22812, 22830, 22840, 22841, 22842, 22843, 22844, 22845, 22846, 22847, 22848, 22849, 22850, 22851, 22852, 22855; 62287, 62292, 63001 through 63615; and,

(2) any other procedure, which is not listed in subdivision (l)(1), which is a non-diagnostic invasive procedure to the spine or associated anatomical structures to perform an operative or curative procedure which is not primarily an analgesic procedure; and,

(3) any procedure which involves the introduction of energy, a foreign substance, or a device that destroys tissue in the spine and/or associated structures, including nerves and disks, or involves the implantation of devices into the spine and associated structures, including nerves and disks, and which is not primarily an analgesic procedure;

(4) Notwithstanding subdivisions (1) through (3), "spinal surgery" does not include penetration of the body by needles in the performance of acupuncture by a practitioner whose license permits the performance of acupuncture, nor does "spinal surgery" include surgery which is required because of a bona fide medical emergency.

Authority: Sections 133, 5307.1 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.1. Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery.

(a) An employer who objects to the treating physician's recommendation for spinal surgery shall serve the objection, by mail or other rapid means of delivery, on the Administrative Director, the employee, the employee's attorney, if any, and on the treating

physician within 10 days of receipt of the treating physician's report containing the recommendation. The objection shall be written on the form prescribed by the Administrative Director in Section 9788. The employer shall include with the objection a copy of the treating physician's recommendation to which the employer objects. The objection shall include the employer's reasons, specific to the injured worker, for the objection to the recommended procedure. The employer's objection shall include a declaration made under penalty of perjury in the following form, of the date the report was first received by the employer, employer's insurance carrier, or administrator, date and time the objection

was sent, and the manner in which the objection was sent:

I declare under penalty of perjury of the laws of the State of California on (date), that the enclosed physician's report was first received by the employer, insurance carrier or administrator on (date), and that on (date), I served the enclosed objection on (names of persons served) and on the Administrative Director by (means of service)_____.

The declaration and form must be executed by a principal or employee of the employer, insurance carrier, or administrator. The employer shall serve the original and one photocopy, or two originals, of the objection on the Administrative Director.

(b) If after an employer has served the objection on the Administrative Director, either the employer and employee agree to an agreed second opinion physician or the employer withdraws its objection to the treating physician's recommendation for spinal surgery, the employer shall notify the Administrative Director within one working day of the agreement or withdrawal of objection.

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.11. Form for Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery.

[DWC Form 233]



OBJECTION TO TREATING PHYSICIAN'S RECOMMENDATION FOR SPINAL SURGERY

EMPLOYEE				
Last Name	First Name	Other names/initials	Social Security Number	Date of Injury
W.C.A.B. Case No.				
RESIDENCE ADDRESS: Street		City	State	Zip Code
EMPLOYER				
Name				
MAILING ADDRESS: Street		City	State	Zip Code
Insurance Carrier:				
Claims Administrator:				
Company providing utilization review:				
Employer health care provider:				
EMPLOYEE'S ATTORNEY				
Name				
MAILING ADDRESS: Street		City	State	Zip Code
Telephone:		Fax Number:		
TREATING PHYSICIAN				
Last Name:	First Name:	Other names/initials:		
MAILING ADDRESS: Street		City	State	Zip Code
Telephone:		Fax Number:	E-mail:	
Physician's Medical Group:				
Independent Practice Association:				
Exact procedure which is being objected to:				
Name of facility or institution at which the proposed procedure is to be performed:				
Name of facility or institution at which an alternative procedure (if any) recommended by the employer, employer health care provider, carrier, or administrator is proposed to be performed:				

Date that the treating physician's recommendation for this procedure was first received by any of employer, insurance carrier, administrator:

Name of entity which received it on that date:

Type of entity (employer, insurance carrier, or administrator):

NAME OF PERSON SIGNING THIS OBJECTION:

Name: _____ Company: _____

MAILING ADDRESS: Street _____ City _____ State _____ Zip Code _____

Telephone: _____ Fax Number: _____ E-mail: _____

Reason(s) for this objection, specific to this employee:

I declare under penalty of perjury of the laws of the State of California on (date) _____, that the enclosed physician's report was first received by the employer, insurance carrier or administrator on (date) _____, and that on (date) _____, I served the enclosed objection on:

(name of person served)	(means of service: e.g. mail/certified mail/fax/FedEx)	(time, if by fax)
ADMINISTRATIVE DIRECTOR		

(Signature)

The declaration and this form must be signed by a Principal or Employee of the employer, insurance carrier, or administrator.

This form, together with the report of the treating physician containing the recommendation for treatment which is objected to, is to be mailed to the Administrative Director, Medical Unit, P.O. Box 8888, San Francisco, CA 94128-8888, and copies served by mail or other rapid means of delivery (such as fax or overnight delivery) on the employee, employee's attorney, and treating physician. This Objection is to be sent within ten (10) days of the first receipt by any of the employer, insurance carrier, or administrator, of the treating physician's report containing the recommendation.

Authority: Sections 133 and 5307.3, Labor Code.
Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.2. Qualifications of Spinal Surgery Second Opinion Physicians.

(a) An agreed second opinion physician may be any California licensed board-certified or board-eligible orthopaedic surgeon or neurosurgeon.

(b) The Administrative Director shall maintain a list of qualified surgeons who have applied, and whom the Administrative Director has found to be eligible to give second opinions under Labor Code § 4062 (b) after random selection by the Administrative Director.

(c) To apply to be on the Administrative Director's list, a physician shall demonstrate to the satisfaction of the Administrative Director that the physician:

(1) Is currently board certified either as a neurosurgeon by the American Board of Neurological Surgery or the American Osteopathic Board of Surgery, or as an orthopaedic surgeon by either the American Board of Orthopaedic Surgery or the American Osteopathic Board of Orthopedic Surgery;

(2) Has current hospital privileges in good standing at an accredited hospital in California to perform spinal surgery without proctoring;

(3) Has an unrestricted license as a physician and surgeon in California;

(4) Has no record of previous discipline by any governmental physician licensing agency, and is not then under accusation by any governmental physician licensing agency;

(5) Has not been terminated or had discipline imposed by the Industrial Medical Council or Administrative Director in relation to the physician's role as a Qualified Medical Evaluator; is not then under accusation by the Industrial Medical Council or Administrative Director; has not been denied renewal of Qualified Medical Evaluator status, except for non-completion of continuing education or for non-payment of fees; has neither resigned nor failed to renew Qualified Medical Evaluator status while under accusation or probation by the Industrial Medical Council or Administrative Director or after notification that reappointment as a Qualified Medical Evaluator may or would be denied for reasons other than non-completion of continuing education or non-payment of fees; and has not filed any applications or forms with the Industrial Medical Council or Administrative Director which contained any untrue material statements; and

(6) Has not been convicted of any crime involving dishonesty or any crime of moral turpitude.

(d) The Administrative Director may also accept to be on the list a retired spinal surgeon who does not meet the qualifications of subdivision (c)(2), but who does meet the qualifications of subdivisions (c)(1), (c)(3), (c)(5), (c)(6), and either (c)(4) or (e), if the

retired spinal surgeon met the qualifications of subdivision (c)(2) within three years of application . The qualification of such physician shall not extend longer than three years from the last time the physician met the requirements of subdivision (c)(2).

(e) The Administrative Director may also accept to be on the list a physician who does not meet the qualifications of subdivision (c)(4), but who does meet the qualifications of subdivisions (c)(1), (c)(2), (c)(5), (c)(6), and either (c)(3) or (d), if at least five years have elapsed since discipline was imposed, the physician is not currently the subject of a discipline accusation, and the Administrative Director finds that the physician has been rehabilitated.

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.3. Application Procedures.

Physicians seeking to serve as a second opinion physician shall:

(a) Make application to the Administrative Director on the form prescribed by the Administrative Director in Section 9788.31;

(b) Furnish certified copies of their board certification and hospital privileges, and shall submit other documentation of their qualifications as the Administrative Director may require.

(c) Both after making application, and after being notified by the Administrative Director that the application has been accepted, the physician shall keep the Administrative Director informed of any change of address, telephone, or fax number.

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.31. Application Form.

[DWC Form 232]

Authority: Sections 133 and 5307.3, Labor Code.
Reference: Sections 4062 (b) and 4600, Labor Code

Section 9788.32. Administrative Director's Action on Application.

(a) After reviewing a completed application, if the Administrative Director finds that the applicant meets the qualifications, he/she shall notify the applicant by mail, and add the applicant's name to the list of second opinion physicians.

(b) If a physician applicant does not qualify only because the physician has a record of previous discipline by a governmental physician licensing agency and if at least five years have elapsed since discipline was imposed, the Administrative Director shall notify the physician that the physician may within ninety days submit written evidence of the physician's rehabilitation from the offenses or inadequacies for which discipline was imposed. If no evidence is submitted within that time period, the Administrative Director shall reject the application. If the physician submits evidence, the Administrative Director shall consider any written evidence submitted by the physician along with any other evidence the Administrative Director may obtain through investigation. The Administrative Director shall make a finding as to whether the physician has been rehabilitated from the offenses or inadequacies for which discipline was imposed. If the Administrative Director does not find that the physician has been rehabilitated, the Administrative Director shall reject the application.

(c) If the Administrative Director finally determines that an applicant does not meet the qualifications, he/she shall notify the applicant by mail that the application is rejected.

(d) An applicant whose application has been rejected may, within 30 days of the mailing of the notice of rejection, request a hearing by filing a written request for hearing with the Administrative Director. If a written request for hearing is not received by the Administrative Director within 30 days of the mailing of the notice of rejection, the applicant shall be deemed to have waived any appeal or request for hearing.

(e) Upon receipt of a written request for hearing, the Administrative Director shall serve a statement of issues, as provided in Government Code section 11504.

(f) Hearings shall be held under the procedures of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code (commencing with section 11500) and the regulations of the Office of Administrative Hearings (California Code of Regulations, Title 1, Division 2).

(g) Failure to file timely a mailed notice of defense or failure to appear at a noticed hearing or conference shall constitute a waiver of a right to a hearing.

(h) An applicant whose application has been rejected may reapply after:
1. one year has elapsed from the date his application was rejected; or

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2. the time when the deficiencies which were the reasons for rejection have been corrected;
whichever occurs first.

Authority: Sections 133 and 5307.3, Labor Code; Sections 11400.20, 11415.10, Government Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.4. Removal of Physicians from the Spinal Surgery Second Opinion Physician List.

The Administrative Director may remove from the list any physician whenever the Administrative Director learns:

- (a) That the physician no longer meets the qualifications to be on the list; or
- (b) That the California Medical Board, or any other state medical board from whom the physician is licensed, has filed any accusation against the physician; or
- (c) That the physician, having been notified by the Administrative Director of the physician's selection to render a second opinion in any case, has not served the second opinion report in that case within the time limits prescribed in these regulations; or
- (d) That the physician's application to be on the list contained statements which were not true; or
- (e) That the physician has at any time failed to disclose to the Administrative Director that the physician had a material professional, familial, or financial affiliation with any of the persons or entities listed in subdivision (c) of Labor Code section 4062 in any case in which the physician had been selected as a second opinion physician.
- (f) Upon removal of a physician from the list, the Administrative Director shall advise the physician by mail of the removal, the Administrative Director's reasons for removal, and the right to request a hearing on the removal.
- (g) A physician who has been mailed a notice of removal from the list may, within 30 days of the mailing of the notice of removal, request a hearing by filing a written request for hearing with the Administrative Director. If a written request for hearing is not received by the Administrative Director within 30 days of the mailing of the notice of removal, the physician shall be deemed to have waived any appeal or request for hearing.
- (h) Upon receipt of a written request for hearing, the Administrative Director shall serve an accusation, as provided in Government Code section 11503.
- (i) Hearings shall be held under the procedures of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code (commencing with section 11500) and the regulations of

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the Office of Administrative Hearings (California Code of Regulations, Title 1, Division 2).

(j) Failure to file timely a mailed notice of defense or failure to appear at a noticed hearing or conference shall constitute a waiver of a right to a hearing.

(k) A physician who has been removed from the list may petition for reinstatement after one year has elapsed since the effective date of the decision on the physician's removal. The provisions of Government Code section 11522 shall apply to such petition.

Authority: Sections 133 and 5307.3, Labor Code, Sections 11400.20, 11415.10, 11522, Government Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.5. Random Selection of Second Opinion Physician.

(a) Within five (5) working days of the Administrative Director's receipt of an objection to a recommendation for spinal surgery, the Administrative Director shall randomly select a physician from those listed physicians located within a thirty (30) mile radius of the employee's address, provided that six physicians are located within that radius; and if six are not located within that radius, using ever increasing radii, until at least six (6) physicians are located from which a random selection may be made. The Administrative Director shall not include among the six physicians any physician that the Administrative Director has determined, from the information submitted to the Administrative Director by the physician and by the employer objecting to the treating physician's recommendation, has a material affiliation prohibited by subdivision (c) of Labor Code section 4062. The selected second opinion physician shall notify the Administrative Director if he/she has a material professional, familial, or financial affiliation with any of the persons or entities listed in subdivision (c) of Labor Code section 4062, within five working days of the physician's receipt of notification of selection. Upon such notification, the Administrative Director shall immediately select a replacement second opinion physician.

(b) Until the Administrative Director shall have a computerized system for random selection of physicians, the Administrative Director shall manually make random selections as in subdivision (a), except that instead of using an initial thirty mile radius, the Administrative Director shall select from those physicians located within the same zipcode as the employee's address, or if there are not at least six physicians located within that zipcode, then additional adjacent zipcodes shall be used until there are at least six physicians found within the geographic area of selection.

(c) Upon selection by the Administrative Director, the second opinion physician shall, unless the physician notifies the Administrative Director of a material professional, familial, or financial affiliation, notify the parties within five working days of the

physician's receipt of notification of selection of the date and time of any appointment for examination of the employee.

(d) Within ten days of the selection of a second opinion physician, either the employer or the employee may object to the selection on the basis that the second opinion physician has a material professional, familial, or financial affiliation with any of the persons or entities listed in subdivision (c) of Labor Code section 4062, by filing a written objection with the Administrative Director and serving the other parties. The Administrative Director may either sustain the objection, in which case a new selection shall be made, or deny the objection.

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.6 Examination by Second Opinion Physician or Agreed Second Opinion Physician.

(a) The second opinion physician or agreed second opinion physician may physically examine the patient-employee, if the second opinion physician or agreed second opinion physician determines in his or her sole discretion that an examination of the patient-employee is required, but nevertheless must physically examine the patient-employee before finally rendering a second opinion in all cases in which the second opinion physician or agreed second opinion physician disagrees with the recommendation of the treating physician. If there is to be a physical examination of the patient-employee, the second opinion physician or agreed second opinion physician shall schedule the examination, and shall, at least ten days in advance of the scheduled examination, send written notice of the date, time, and place of the examination to the employee, the employee's attorney, if any, and the party who objected to the recommended surgery.

(b) The employer shall, and the employee may, furnish all relevant medical records to the second opinion physician or agreed second opinion physician, including x-ray, MRI, CT, and other diagnostic films, and any medical reports which describe the employee's current spinal condition or contain a recommendation for treatment of the employee's spinal diagnoses. If a special form of transportation is required because of the employee's medical condition, it is the obligation of the employer to arrange for it. The employer shall furnish transportation expense in advance of the examination. Except for the examination itself, the second opinion physician shall have no ex parte contact with any party. Except for matters dealing with the scheduling of appointments, all communications between the second opinion physician or agreed second opinion physician and any party shall be in writing, with copies served on the other parties.

(c) If the employee fails to attend an examination with a second opinion physician or agreed second opinion physician, and the physician is unable to reschedule the employee's appointment before the 35th day after receipt of the treating physician's report, the time to complete the second opinion process shall be extended for an additional 45 days. If a

second opinion physician is unable to schedule another examination within the 45 additional days, the Administrative Director, upon request, will select another second opinion physician.

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.7. Contents Of Second Opinion And Agreed Second Opinion Physician Reports.

(a) If the second opinion physician or agreed second opinion physician disagrees with the recommendation of the treating physician, the second opinion physician's or agreed second opinion physician's report may include a recommendation for a different treatment or therapy.

(b) Reports of second opinion physicians and agreed second opinion physicians shall include, where applicable:

- (1) The date of the examination;
- (2) The patient's complaints;
- (3) A listing of all information received from the parties reviewed in preparation of the report or relied upon for the formulation of the physician's opinion;
- (4) The patient's medical history relevant to the treatment determination;
- (5) Findings on record review or examination;
- (6) The relevant diagnosis;
- (7) The physician's opinion whether or not the proposed spinal surgery is appropriate or indicated, and any alternate treatment recommendations;
- (8) The reasons for the opinion, including a reference to any treatment guidelines referred to or relied upon in assessing the proposed medical care;
- (9) The signature of the physician.

(c) Second opinion physicians and agreed second opinion physicians shall serve with each report the following executed declaration made under penalty of perjury:

"In connection with the preparation and submission of the attached report of second opinion on recommended spinal surgery, I declare, on the date next written, under penalty of perjury of the laws of the State of California, that I have no material familial affiliation, material financial affiliation, or material professional affiliation prohibited by Labor Code Section 4062, subdivision (c).

_____ date

_____ signature"

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.8. Time Limits For Providing Reports.

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Second opinion physicians and agreed second opinion physicians shall serve the report on the employer, the employee, and the employee's attorney, if any, as soon as possible, but in any event within forty-five days of receipt of the treating physician's report (as defined herein), unless the parties have agreed in writing to extend the time to a later date.

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code

Section 9788.9. Charges for Services of Second Opinion Physician and Agreed Second Opinion Physician

Payment for the services of the second opinion physician shall be made by the employer. The fee shall be:

(a) if the physician examines the injured worker, the same as the fee allowed under Section 9795 for a Basic Comprehensive Medical-Legal Evaluation, without modifiers which might otherwise be allowed under Section 9795(d); or,

(b) if the physician does not examine the injured worker, one half of the fee allowed under Section 9795 for a Basic Comprehensive Medical-Legal Evaluation, without modifiers which might otherwise be allowed under Section 9795(d).

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.

Section 9788.91. Filing of a Declaration of Readiness to Proceed.

If the report of the second opinion physician or agreed second opinion physician does not concur with the treating physician's recommendation for surgery, the employer shall file a declaration of readiness to proceed, unless the parties agree with the determination of the second opinion physician or agreed second opinion physician.

Authority: Sections 133 and 5307.3, Labor Code.

Reference: Sections 4062 (b) and 4600, Labor Code.