



California Workers' Compensation Institute
1111 Broadway Suite 2350, Oakland, CA 94607 • Tel: (510) 251-9470 • Fax: (510) 251-9485
www.cwci.org

February 20, 2007

Carrie Nevans, Acting Administrative Director
Maureen Gray, Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation, Legal Unit
P.O. Box 420603
San Francisco, CA 94142

**RE: Labor Code Section 5814.6 - Administrative Audits and Penalties
Second 15-day Comment Period**

Dear Mesdames Nevans and Gray:

These comments on the Labor Code Section 5814.6 Administrative Penalty regulations are presented on behalf of the members of the California Workers' Compensation Institute.

The administrative director (AD) has fine-tuned the proposed regulations implementing Labor Code section 5814.6, adding specificity, clarifying some procedural issues for appeal, and sharpening the triggers for doubling or tripling the administrative penalties for repeat violators. These revisions are necessary and beneficial. It is essential that the regulator and the regulated community have a common understanding of the obligations imposed by the statute.

Unfortunately, the proposed regulations do not address several of the substantive policy issues raised by the Institute and others in earlier testimony.

The plain language of the statute indicates that the 5814.6 penalty exists in order to sanction claims administrators who have knowingly violated section 5814 with a frequency that indicates a general business practice of the unreasonable denial or delay in the payment of workers' compensation benefits. The administrative director's definitions of "general business practice" (a penalty award in more than one case) and "knowingly" (imputed corporate knowledge of the conduct) impermissibly disconnect the implementing regulations from the enabling statute and create a review system that was never contemplated by and is not authorized by the statute. Consequently, the proposed regulations continue to be an invalid exercise of administrative authority that violates the scope of the enabling statute.

By its constrained definition of a “general business practice,” the Division continues to disregard a key element of the statute – the frequency of section 5814 penalty awards. As we have previously expressed, the regulations fail to consider the number of files managed by a claims organization as a factor in determining whether “a pattern of violations” exists. While the regulations still do not expressly require the consideration of the number of files managed by the claims operation, we hope that it is implicit in the definition of “a pattern of violations.”

The standard definition of “pattern” is a representative sample. A representative sample of claims files managed over a 5-year period can only be established by a ratio or percentage sample. DWC reviewers should be instructed to look at the totality of the claim management process, including the total number of claims being managed within the period being reviewed, in determining whether section 5814 has been knowingly violated with a frequency that indicates a general business practice of the unreasonable denial or delay in the payment of workers’ compensation benefits.

The goal of this enforcement process is compliance with the statutory obligations to promptly and fully pay the workers’ compensation benefits to which the injured worker is entitled. In order to avoid a chilling effect on permissible claims management activity, these regulations must clearly state the criteria for adherence to the statute, must establish a reasonable deterrent effect, and must be fairly applied, or the regulations will fall beyond the authority of the statute.

Thank you for your consideration. Please contact me for further clarification or if I can be of any other assistance.

Sincerely,

Michael McClain
General Counsel and Vice President

MMc/pm

cc: Destie Overpeck, DWC Counsel
CWCI Medical Care Committee
CWCI Claims Committee
CWCI Legal Committee
CWCI Associate Members