



California Workers' Compensation Institute

1111 Broadway Suite 2350, Oakland, California 94607 • Tel: (510) 251-9470 • Fax: (510) 251-9485

Website: www.cwci.org

June 24, 2005

VIA E-MAIL

Ms. Andrea Hoch
Department of Industrial Relations
Division of Workers' Compensation – 9th Floor
Post Office Box 420603
San Francisco, CA 94142

RE: 5814.6 Penalty Draft Regulations

Dear Ms. Hoch:

These comments on draft 5814.6 penalty regulations are presented on behalf of the California Workers' Compensation Institute members. Recommended modifications are indicated by underline and ~~strikethrough~~.

Recommendation

The Institute recommends that all auditing within the Division remain within the confines of the statutory scheme created in AB 749 (Labor Code Section 129 and 129.5).

For the reasons expressed in our commentary relating to the proposed auditing of utilization review programs, the Institute's members are opposed to tracking various aspects of claims administrator performance through separate and independent audits.

Definitions -- 10225

Subsection (a) through (h): These terms are common to a variety of regulations and should be given consistent definitions.

Subsection (i) - General Business Practice: This statutory term is still defined with reference to conduct occurring within a single claim file. The definition fails to incorporate the statutory standards set forth in sections 129.5 and 5814.6 – conduct “performed with a sufficient frequency so as to indicate a general business practice.” Under this definition, a series of failures in one claim or the violation of a single statute or regulation can be found to be a general

business practice or company policy punishable by the most significant fine. Offending conduct may include a single practice or separate act or omission.

Sections 129.5 and 5814.6 make it clear that these penalties are only to be imposed for serious, repetitive, intentional misconduct. Any regulation implementing these penalties must be consistent with and not in conflict with the scope of the statute. The regulations must reflect the concept of frequency and a pattern of misconduct established by the statute. The conduct must be performed with a sufficient frequency to establish a business practice. In our view, regardless of the number of violations occurring in a single file, a general business practice cannot be demonstrated in one file.

Subsection (n) – Knowingly: The proposed regulation fails to address both the letter and the spirit of the law in several ways. To “knowingly” violate a statute means the intentional commission or omission of wrongful acts. The claim administrator must commit a volitional, as opposed to an inadvertent, act. For sanctions to be imposed, the acting party must understand that the conduct is unlawful. The statute proscribes the commission (or omission) of wrongful acts that are done deliberately, intentionally, and willfully. The claims administrator must be aware that its conduct violates the statute. The proposed standard makes no distinction between willful, inadvertent, and negligent conduct. The award of 5814 penalties for unreasonable delay in benefit payments is often based on unintentional conduct.

Penalty Schedule -- 10225.1

Subsections (a) through (c) establish the Administrative Director’s intent to audit or investigate outside the DWC audit program. The proposed audit process for the determination of section 5814.6 penalties exemplifies the regulatory complexity entailed in creating a separate and distinct review processes. Essentially, the statute requires only the assessment of the frequency of section 5814 penalties awarded against the audit subject during the relevant period and a determination of mitigating or aggravating factors. The regulation does not clearly state the reviewer’s statutory duty regarding the verification of section 5814.6 penalties.

Recommended Language

(a) Pursuant to Labor Code section 5814.6, administrative penalties may be assessed against an employer or insurer that knowingly violates Labor Code section 5814 with a frequency that indicates a general business practice.

(~~ab~~) Administrative penalties shall only be imposed under this section on the basis of ~~an~~ ~~award of one or more awards~~ of penalties under Labor Code section 5814, issued by a Workers’ Compensation Administrative Law Judge, but shall not include ~~including an~~ order approving a compromise and release.

(~~bc~~) To determine whether a violation described in Labor Code section 5814.6 has occurred, and notwithstanding Labor Code section 129 (a) through (d) and section 129.5 subdivisions (a) through (e) and sections 10106, 10606.1, 10107 and 10107.1 of these regulations the Administrative Director, or his or her designee shall ~~may~~ ~~conduct an investigation, which may be limited to an audit of claims and/or utilization review files. The investigation may be independent of or may be conducted concurrently with an audit pursuant to Labor Code section 129 and 129.5.~~ ~~review all awards of section 5814 penalties during the relevant period. With regard to each such award, the Administrative Director, or his or her designee shall determine whether the claims administrator knowingly violated section 5814. For those penalty awards based on knowing violations,~~

the Administrative Director, or his or her designee shall determine whether there are sufficient frequency of relevant penalty awards to constitute a general business practice.

Conduct Before Statute Effective Date-- 10225.1 (d) and (e)

Administrative penalties may be based only on WCAB awards under the new Labor Code section 5814, and may not be based on awards under repealed sections.

Recommended Language

(d) No administrative penalty assessed pursuant to this section shall be based ~~solely~~ on conduct occurring before June 1, 2004.

(e) For purposes of this section, awards of compensation, awards of penalties pursuant to Labor Code section 5814 and claims handling practices prior to June 1, 2004, may not be considered as evidence of a pattern of related conduct.

Penalty Schedule -- 10225.1 (i)

Subsection (i) should be re-sequenced as (g).

Base Penalty: It is unclear how the reviewer might determine that there was a sufficient frequency of knowing violations of section 5814 to warrant a “base penalty.” The awards being reviewed already involve a statutory penalty payment, so the base penalty must be founded on a pattern and practice of misconduct. The criteria to determine whether a base penalty is appropriate are not clear.

Scheduled Penalties: Similarly, the criteria for determining whether the add-on schedule applies are not clearly presented. If the Division is suggesting aggravating and mitigating factors to be considered by the reviewers, then this methodology for calculating add-on penalties is somewhat one-dimensional. First, the factors only augment the penalty. Secondly, they are tied to benefit types or specific conduct. The mitigating or aggravating factors in (h) can be considered instead to either augment or mitigate the base penalty.

Multiplied penalties -- 10225.1 (i): The definition of a “second finding” is unclear. What timeframe, if any, is intended? The basis of all section 5814.6 penalties is a pattern and practice, and the statute assumes multiple violations of section 5814. Subsection (i) appears to be duplicative and unnecessary since the mitigating factors listed in (h) already include “the history of previous awards of penalties under Labor Code section 5814.” Without clarification, claims administrators will have no way to know what the Division expects in this regard.

Procedures – 10225.2

10225.2(d) and (e): The defendant is required to state its entire case – affirmative defenses and answer – within 30 days of the OSC Re Administrative Penalties. While these procedures seem to be based on regulation section 10113, et seq., which imposes a similar timeframe, these proceedings may involve a greater scope of conduct, more varied factual circumstances, and multiple charges. The AD or the hearing officer should have the discretion to establish a reasonable period of discovery to ensure due process.

The Division may have built a case for multiple administrative penalties over the course of a lengthy review. Due process requires that the audit subject be permitted to put forth a defense,

and 30 days is not reasonable when the failure to state a defense or answer constitutes a waiver of one's right to an evidentiary hearing.

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

Sincerely,

Michael McClain
CWCI General Counsel

BR/pm

Cc: Bob Walensa, DWC
CWCI Claims Committee
CWCI Medical Care Committee
CWCI Legal Committee
CWCI Associate Members