



California Workers' Compensation Institute  
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VIA HAND DELIVERY AND E-MAIL

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

**Re: Labor Code Section 5814.6 – Administrative Audits and Penalties**  
15-day Comment Period

Dear Mesdames Nevans and Gray:

These comments on the Labor Code Section 5814.6 Administrative Penalties regulations are presented on behalf of the members of the California Workers' Compensation Institute. Recommended modifications are indicated by underline and ~~strikethrough~~.

**Recommendation -- 10225.1(b) and (c) -- Separate and Independent Audits**

The DWC should conduct all auditing in accordance with the regulations, procedures, and structures established for the Division's audit authority under Labor Code section 129 and 129.5.

**Discussion**

In accordance with the Institute's previous testimony relating to the proposal that separate, uncoordinated audits and penalties be imposed for section 5814.6, we reiterate our concern that the Division is embarking on an inordinately complicated and unnecessary program of independent audits that is directly contrary to the Legislature's policy decision from 2002 (AB 749).

With the provisions proposed for section 10225.1(b) and (c), the Division has made it clear that they will review monthly reports from the WCAB to monitor 5814 penalty activity. Based on 2 such penalty awards, "the Audit Unit may proceed with an investigation." These proposed new audits could easily be included in the current audit mechanism under section 129 as target audits, if the WCAB statistics establish

good cause to investigate. The potential for monthly audits based on only 2 penalty awards is a distortion of the statutory standard and a waste of both the claims administrators' productivity and the Division's resources.

The AD must provide the regulated community with a more orderly and coordinated program of audits or the Division will again fail to focus its resources on the most serious offenders and fail to create an effective enforcement mechanism, which lead the Legislature to revise the entire audit process in 2002.

### **Recommendation -- 10225.1(f) and (g) -- Effective Date**

**Revise:** (f)(e) No administrative penalty assessed pursuant to this section shall be based solely on conduct occurring before June 1, 2004.

**Delete:** (g) For the purposes of this section, penalty awards issued by workers' compensation administrative law judges before June 1, 2004 for violations of Labor Code section 5814 regardless of the date of injury, may be considered as evidence of a general business practice.

### **Discussion**

#### **Authority**

Government Code section 11342.2 states:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

The effective date of section 5814.6 is expressly stated in subsection (c) – June 1, 2004. There is no provision for the calculation of the new penalty to be determined by conduct occurring prior to the effective date of the statute.

#### Abney v WCAB (2004) 69 CCC 1552; 70 CCC 460 (Writ Denied)

Abney interpreted section 5814 as revised by SB 899. The Board, en banc, noted that new section 5814(i) specifically included a direction to apply the new provisions of that penalty "without regard to whether the injury occurs before, on, or after the operative date of this section." Abney does not construe the newly enacted penalty provision contained in section 5814.6, and that section contains no similar provision.

Section 49 of SB 899, the clause requiring immediate application of the new law, also does not control the effective date of section 5814.6 because section 5814.6 has an explicit operative date, June 1, 2004.

Section 5814.6 applies to specific conduct -- knowingly violating section 5814 with a frequency that indicates a general business practice. The application of the 5814.6 penalty is inextricably linked to the conduct to be sanctioned. The AD does not have the statutory authority to use conduct prior to the effective date of the statute as evidence of a general business practice sanctionable by the new penalty.

Additionally, the Legislature significantly revised the structure of section 5814, which is the foundation of any administrative penalty imposed under section 5814.6. The AD has no statutory authority to use conduct relating to the former section 5814 penalty, which no longer exists, to impose additional administrative penalties under the new section 5814.6.

The rationale from the Board's opinion in Abney does not support what is essentially a retroactive application of the statute by this proposed regulation.

**Recommendation -- 10225.1(i)(1) – Business Practice Penalty**

(1) \$ 100,000 for ~~each~~ a finding by the Administrative Director, or his or her designee, that an employer or insurer, or entity acting on its behalf, knowingly violated Labor Code section 5814 with a frequency that indicates a general business practice, and for each applicable penalty award, the following;

**Discussion**

Labor Code section 5814.6(a) states:

(a) Any employer or insurer that knowingly violates Section 5814 with a frequency that indicates a general business practice is liable for administrative penalties not to exceed four hundred thousand dollars (\$400,000). Penalty payments shall be imposed by the administrative director and deposited into the Return-to-Work Fund established pursuant to Section 139.48. (Emphasis added.)

The use of 'each' in the proposed regulation connotes that there may be multiple findings by the AD that the employer or insurer knowingly violated section 5814 with a frequency indicating a general business practice. The statute does not support that interpretation and to the extent that this language is ambiguous, a clarification is required. It should be explicit that section 10225.1(i)(1) is a single penalty based on a finding by the AD that the violations of section 5814 are sufficient to indicate a general business practice.

**Recommendation -- 10225.1(i)(3) and (4)**

(3) For each penalty award by a workers' compensation administrative law judge for a violation of Labor Code section 5814 for an unreasonable delay or refusal a failure to make a timely payment ~~or proper objection to~~ of temporary disability benefits or salary continuation payments in lieu of temporary disability; vocational rehabilitation maintenance allowance, life pension, or death benefits:

(4) For each penalty award by a workers' compensation administrative law judge for a violation of Labor Code section 5814 for an unreasonable delay or refusal to provide ~~or deny authorization for~~ medical treatment:

**Discussion**

**Authority**

See: Government Code section 11342.2 noted above.

In Boehm & Associates (1999) 64 CCC 1350 the Court held that a regulation allowing the insurer to avoid interest payments until claim adjudicated was invalid.

“... we note that the Legislature possesses the plenary constitutional authority to create and enforce a workers' compensation system (Cal. Const., art. XIV, § 4); therefore, any decision of the appeals board or regulation promulgated by the Director of the Division of Workers' Compensation in contradiction to the Workers' Compensation Act is invalid. (See Coca-Cola Co. v. State Bd. of Equalization (1945) 25 Cal.2d 918, 922 [administrative regulations may not contravene terms of statutes under which they are adopted].)”

The determination of the legality of a regulation adopted by the AD includes whether it is within the scope of authority conferred by the statute and whether it is reasonably necessary to effectuate purpose of statute. San Diego Nursery Co., Inc. v. Agricultural Labor Relations Bd. (1979) 160 CR 822, 100 Cal.App.3d 128.

The references to treatment authorization and the failure to timely object are inconsistent with the provisions of Labor Code section 5814. Section 5814.6 is based solely on awards of penalties under section 5814 and that section imposes penalties only “when payment of compensation has been unreasonably delayed or refused.” Section 5814 does not address the denial of authorization for medical care or the failure to timely object and the inclusion of this language is not authorized by section 5814.6.

The failure to send the proper notice and to timely object is addressed by the AD's audit regulations under Labor Code sections 129 and 129.5, but cannot serve as a basis for the imposition of administrative penalties under section 5814.6. If benefits are paid on time and medical care is provided in a timely fashion, whether notices are or are not provided, then no penalties are appropriate. Benefit notice failures or untimely objections cannot be considered under section 5814.6.

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: Ms. Destie Overpeck  
CWCI Medical Care Committee  
CWCI Claims Committee  
CWCI Legal Committee  
CWCI Associate Members