

State of California
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

**NOTICE OF MODIFICATION TO TEXT OF
PROPOSED REGULATIONS**

Subject Matter of Regulations: Administrative Penalties Pursuant to Labor Code § 5814.6

TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 10225 – 10225.2

NOTICE IS HEREBY GIVEN that the Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in her by Labor Code sections 133 and 5814.6, proposes to modify the text of the following proposed amendments to Title 8, California Code of Regulations:

Section 10225	Definitions
Section 10225.1	Schedule of Administrative Penalties Pursuant to Labor Code § 5814.6
Section 10225.2	Notice of Administrative Penalty Assessment, Appeal Hearing Procedures and Review

PRESENTATION OF WRITTEN COMMENTS AND DEADLINE FOR SUBMISSION OF WRITTEN COMMENTS

Members of the public are invited to present written comments regarding these proposed modifications. **Only comments directly concerning the proposed modifications to the text of the regulations will be considered and responded to in the Final Statement of Reasons.**

Written comments should be addressed to:

Maureen Gray, Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

The Division's contact person must receive all written comments concerning the proposed modifications to the regulations no later than **5:00 p.m. on September 27, 2006**. Written comments may be submitted by facsimile transmission (FAX), addressed to the contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail), using the following e-mail address: dwcrules@hq.dir.ca.gov.

AVAILABILITY OF TEXT OF REGULATIONS AND RULEMAKING FILE

Copies of the original text and modified text with modifications clearly indicated, and the entire rulemaking file, are currently available for public review during normal business hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays, at the offices of the Division of Workers' Compensation. The Division is located at 1515 Clay Street, 17th Floor, Oakland, California.

Please contact the Division's regulations coordinator, Ms. Maureen Gray, at (510) 286-7100 to arrange to inspect the rulemaking file.

The specific modifications proposed include changes to the text of the proposed amendments Title 8, California Code of Regulations:

Section 10225	Definitions
Section 10225.1	Schedule of Administrative Penalties Pursuant to Labor Code § 5814.6
Section 10225.2	Notice of Administrative Penalty Assessment, Appeal Hearing Procedures and Review

DOCUMENTS SUPPORTING THE RULEMAKING FILE

- Comments from various interested parties concerning the regulations have been added to the rulemaking file.
- The case entitled *Abney v. Workers' Compensation Appeals Board* (Writ Denied, 2005) 70 Cal. Comp. Cases 460.

FORMAT OF PROPOSED MODIFICATIONS

Proposed Text Noticed for 45-Day Comment Period:

The new text is indicated by underlining, thus: underlined language.

Proposed Text Noticed for This 15-Day Comment Period on Modified Text:

Deletions from the regulatory text, as proposed in April 2006, are indicated by double strike-through, thus: ~~deleted language~~.

Additions to the regulatory text, as proposed in April 2006, are indicated by a double underline, thus: added language.

SUMMARY OF PROPOSED CHANGES

Modifications to Section 10225 Definitions

Subdivision (l), the definition of “general business practice,” was amended to include: “However, where a claim file with a violation of Labor Code section 5814 has been adjusted at multiple adjusting locations, that claim file may be considered when determining the general business practice of any of the adjusting locations where the violation occurred even if the file has been transferred to a different adjusting location.”

This sentence is added to address the situation when a claim file has been adjusted at more than one adjusting location.

Modifications to Section 10225.1 Schedule of Administrative Penalties Pursuant to Labor Code § 5814.6

Subdivision (a) is revised to correct the grammar, changing “awards have” to “award has.” In addition, the words “on or after June 1, 2004” have been added to clarify that the penalty awards, not the conduct, must have occurred on or after June 1, 2006. This language is based on the ruling of *Abney v. Workers' Compensation Appeals Board* (Writ Denied, 2005) 70 Cal. Comp. Cases 460.

Subdivision (b) and (c) have been added to explain how the Division will determine if penalty awards have been issued and to clarify that the Audit Unit will not proceed with an investigation unless more than one final penalty award has been issued on or after June 1, 2004 against a claims administrator at a single adjusting location. The subdivisions state the following:

“ (b) The Division of Workers' Compensation shall regularly submit copies of WCAB decisions, findings, and/or awards issued pursuant to Labor Code section 5814 to the Audit Unit.

(c) The Audit Unit shall obtain monthly Labor Code section 5814 activity reports and shall determine if the decisions, findings, and/or awards are final. If more than one final penalty award has been issued on or after June 1, 2004 against a claims administrator at a single adjusting location, the Audit Unit may proceed with an investigation.”

The remaining subdivisions have been re-lettered.

Subdivision (f) has been revised to state:

“(f)(d) No administrative penalty assessed pursuant to this section shall be based solely on penalty awards issued by workers' compensation administrative law judges before June 1, 2004 for violations of Labor Code section 5814. ~~conduct occurring before June 1, 2004.~~”

In reliance on *Abney v. Workers' Compensation Appeals Board* (Writ Denied, 2005) 70 Cal. Comp. Cases 460, subdivision (g) has been revised to state:

“ (g)(e) 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 ~~based on conduct occurring on or after June 1, 2004~~ regardless of the date of injury, may be considered as evidence of a general business practice.”

Subdivision (i)(1) is revised to use the defined term “knowingly;” and to refer to the parties as the “employer or insurer, or entity acting on its behalf.” In order to clarify that the \$100,000 is the initial penalty and that the penalties listed in (i)(2) – (9) will also be assessed if applicable, the words “and for each applicable penalty award, the following” have been added. The section now states:

~~(i)(e)~~ Pursuant to Labor Code section 5814.6, administrative penalties may be assessed against an employer and/or insurer as follows:

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

In subdivisions (i)(2)-(8) the phrase “unreasonable delay or refusal” replace the words “a failure...timely.” The replaced words are the same as the words used in the statute and therefore, the subdivision is easier to understand.

In subdivision (i)(3) the penalties amounts listed in (A) are increased from \$1000 to \$5000 and in (B) the penalties are increased from \$5000 to \$10,000. The increased is made because 14 days of indemnity could equal \$1600 and 42 days of indemnity could equal \$5600. The penalty amount is now greater than the amount that was unpaid.

The penalty for unreasonable delay or refusal to reimburse an employee for self-procured medical treatment was removed from subdivision (i)(4) and set forth in a separate new subdivision for clarity. The subdivisions now read as follows:

(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 ~~a failure to timely provide or deny authorization for medical treatment or a failure to timely reimburse an employee for self-procured medical treatment costs:~~

(A) \$ 1,000 for retrospective medical treatment authorization ~~and reimbursement;~~

(B) \$ 5,000 for prospective or concurrent medical treatment authorization ~~and reimbursement;~~

(C) \$15,000 for prospective or concurrent medical treatment authorization when the employee's condition is such that the employee faces an imminent and serious threat to his or her health.

(5) 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 reimburse an employee for self-procured medical treatment costs:

(A) \$ 1,000 for medical treatment costs up to \$100, excluding interest and penalty;

(B) \$ 2,000 for medical treatment costs of \$101 to \$300, excluding interest and penalty;

(C) \$ 3,000 for medical treatment costs of \$301 to \$500, excluding interest and penalty;

(D) \$ 5,000 for medical treatment costs of more than \$501, excluding interest and penalty;

In subdivision (i)(6), in response to comments, the reference to the notice of the supplemental job displacement benefit voucher was changed to refer instead to the supplemental job replacement benefit only. It now states:

(6)-(5) \$ 2,500 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 provide the Notice or to provide the supplemental job displacement benefit voucher, as required by section 10133.51(b) and section 10133.56(c), respectively, of Title 8 of the California Code of Regulations, in a timely manner to an eligible employee.

The penalty amount in (i)(7) was increased from \$1,000 to \$2,500 to be consistent with the similar penalty set forth in (i)(6).

The penalty amount in (i)(9) was increased from \$1,000 to \$2,500 to be consistent with the similar penalties set forth in (i)(6) and (i)(7).

In subdivision (j), a mitigating factor was added as (j)(5): "The time period in which the violations occurred." The penalty may be mitigated depending on how much time there is between the penalty awards.

In subdivision (k), the phrase "from the date of the first finding" was added to clarify when the five year time frame starts.

Modifications to Section 10225.2 Notice of Administrative Penalties Assessment, Appeal Hearing Procedures and Review

Subdivision (g) was revised to require the employer or insurer to verify the facts set forth in the appeal. It now states:

(g) The appeal shall be in writing signed by, or on behalf of, the employer or insurer, and shall state the appellant's mailing address. It need not be verified or follow any particular form. The appeal shall be verified, under penalty of perjury, by the employer or insurer. If the appellant is a corporation, the verification may be signed by an officer of the corporation. In the event the appellant is not the employer, the employer's address shall be provided and the employer shall be included on the proof of service.

In subdivision (n), a duplicate word, "officer," was deleted.

In subdivisions (q) and (r), the word "calendar" was added to clarify how many days the parties have to act. This was revised in response to comments.