STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

AMENDED FINAL STATEMENT OF REASONS AND UPDATED INFORMATIVE DIGEST

Subject Matter of Regulations: Workers' Compensation – Administrative Penalties Pursuant to Labor Code § 5814.6

TITLE 8, CALIFORNIA CODE OF REGULATIONS
Sections 10225, 10225.1 and 10225.2

The Acting Administrative Director of the Division of Workers' Compensation, pursuant to the authority granted by Labor Code Sections 133 and 5814.6, has adopted Article 5 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, commencing with Section 10225:

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

UPDATED INFORMATIVE DIGEST

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code §11346.9(d), the Acting Administrative Director incorporates the Initial Statement of Reasons prepared in this matter. The purposes and rationales for the regulations as set forth in the Initial Statement of Reasons continue to apply.

The regulation changes from the initially proposed regulations are summarized below.

THE FOLLOWING SUBDIVISIONS WERE AMENDED FOLLOWING THE PUBLIC HEARING AND CIRCULATED FOR A 15-DAY COMMENT PERIOD:

Modifications to Section 10225 Definitions

In subdivision (d), the citation to section 10101.1 was corrected to refer to Title 8 of the California Code of Regulations.

In subdivisions (g) and (s), the words "a workers' compensation administrative law judge" were replaced with the words "the Workers' Compensation Appeals Board." This term is defined as the Appeals Board, commissioners, deputy commissioners, presiding workers' compensation judges and workers' compensation administrative law judges. The revision was necessary because compensation orders and awards to pay penalties due to a violation of Labor Code section 5814 may be issued by any of the entities defined as the Workers' Compensation Appeals Board. Additionally, the previous definition in subdivision (ee) for "workers' compensation administrative law judge" was deleted and a new subdivision (ee) was added to define "the Workers' Compensation Appeals Board." The specific revisions to these subdivisions are listed below:

> "(g) "Compensation order" means any award, order or decision issued by the Workers' Compensation Appeals Board or the Division of Workers' Compensation vocational rehabilitation unit by which a party is entitled to payment of compensation.
>
> "(s) "Penalty award" means a final order or final award by the Workers' Compensation Appeals Board to pay penalties due to a violation of section 5814 of the Labor Code"
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> (Also in subdivision (s), the word "final" was added clarify that the penalty award or order must be a final award or order.)
>
> "(ee) "Workers' Compensation Appeals Board" means the Appeals Board, commissioners, deputy commissioners, presiding workers' compensation judges and workers' compensation administrative law judges."

Former subdivision (k) was changed to subdivision (i) and the term was changed from "Final Determination and Order" to "Determination and Order" for clarification purposes. The Determination and Order is issued by the Administrative Director. It is not final until the time to appeal has elapsed. This change of the name is reflected through out the regulations.

Subdivision (l), the definition of "general business practice," was amended to state:

> "(l) "General business practice" means a pattern of violations of Labor Code section 5814 at a single adjusting location that can be distinguished by a reasonable person from an isolated event. The pattern of violations must occur in the handling of more than one claim. The pattern of

> violations may consist of one type of act or omission, or separate, discrete acts or omissions in the handling of more than one claim. 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 conduct that caused the violation occurred even if the file has been transferred to a different adjusting location."

The sentence beginning with "However" was added to address the situation when a claim file has been adjusted at more than one adjusting location. The words "conduct that caused the" were added to clarify that when a claim file has been adjusted at more than one adjusting location, the relevant claims adjusting location is the one or ones where the conduct that caused the violations occurred. The following sentences were deleted because they failed to clarify the definition: "The pattern also may be based on evidence of violations of Labor Code section 5814 for failure to comply with an earlier compensation order in more than one claim. The conduct may include a single practice and/or separate, discrete acts or omissions in the handling of more than one claim." Instead, the following sentence was added to the definition: "The pattern of violations may consist of one type of act or omission, or separate, discrete acts or omissions in the handling of more than one claim."

This definition of "general business practice" was based on the definition of "general business practice" in 8 CCR §10100.2(p), which defines the term as it is used in Labor Code section 129.5(e). This definition (subdivision (l)) is stricter in that it requires the acts or omissions to occur in more than one claim and requires that the pattern must be found at a single adjusting location. This definition also clarifies 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 conduct that caused the violation occurred even if the file has been transferred to a different adjusting location.

With regard to the definition of "general business practice," case law supports the definition as written in subdivision (l):
1) The term "general business practice" itself has been approved in several cases in other states, without requiring mathematical certainty.

- As set forth in *Lees v. Middlesex Insurance Co* (1994) 229 Conn. 842, 849 n.8; 643 A.2d 1282:

  > The term "general business practice" is not defined in the statute, so we may look to the common understanding of the words as expressed in a dictionary. (citation). "General" is defined as "prevalent, usual [or] widespread"; Webster's Third New International Dictionary; and "practice" means "[p]erformance or application habitually engaged in ... [or] repeated or customary action."

- The *Dodrill v. Nationwide Mutual Insurance Co.* (1996) 201 W.Va. 1, 13; 491 S.E.2d 1 court stated:

> Accordingly, we hold that to maintain a private action based upon alleged violations of W.Va. code §33-11-4(9) in the settlement of a single insurance claim, the evidence should establish that the conduct in question constitutes more than a single violation of W.Va. code §33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be distinguished by fair minds from an isolated event.

2) Practices at a single adjusting location can constitute a "general business practice."

- *Grove v. Orkin Exterminating Co., Inc*. (1992) 18 Kan.App.2d 369, 374-375; 855 P.2d 968, a civil suit for compensatory and punitive damages for improper termite treatment, held that a state Board of Agriculture Pesticide Inspector's testimony about similar complaints his agency had received would be relevant in deciding whether the licensee's behavior in this case was a "general business practice."

  "....Foster [the state inspector] stated that Orkin had completely failed to treat the ground underneath the concrete slab on the east end of the house and had only partially treated the slab underneath the north wall of the house. Foster stated the treatment was wholly inadequate, comparing it to building a four-sided corral with only three sides, making it impossible to contain anything or keep anything out. He also stated that his office had received several similar complaints regarding Orkin's Wichita branch."

  This evidence certainly was relevant to show that Orkin's Wichita branch continually engaged in wanton conduct as a general business practice and, if the evidence is believed, would have bolstered the Groves' claim that Orkin knew the house was infested.

3) One type of act or omissions may constitute a "general business practice."

- In *Underwriters Life Insurance Co. v. Cobb* (Tex.App. 1988) 746 S.W.2d 810, 815, the insurance company's denial of other claims on the same basis and at the same time as its denial of the Cobbs' claim, was admissible to show that Underwriters' refusal to pay the Cobbs' claim was committed or performed with such frequency as to indicate a general business practice.
- Several California cases have construed the term "business practice" (lacking the qualifying adjective "general") on the same terms that have been used to define "general business practice".
- The court in *Barquis v. Merchants Collection Ass'n* (1972) 7 Cal.3d 94, 103; 101 Cal.Rptr. 745, examined Civil Code §3369 which defined "unfair competition" as "unlawful, unfair or fraudulent business practice." The court held that intentionally filing collections in improper venues, "when utilized as

a general practice by a collection agency whose primary business is litigation, ... constitutes an 'unlawful ... business practice' ..."

- In *State of California v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1169-1170; 252 Cal.Rptr. 221, the court interpreted the term "unlawful, unfair or fraudulent business practice" as used in the Unfair Practices Act, Cal. Bus. & Prof. Code §17200 (formerly Civil Code §3369), as follows:

  "As we have said, the statute is directed at "on-going wrongful business conduct...." (*People v. McKale* (1979) 25 Cal.3d 626, 632 [159 Cal.Rptr. 811, 602 P.2d 731].) Thus the "practice" requirement envisions something more than a single transaction …; it contemplates a "pattern ... of conduct" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 108 [101 Cal.Rptr. 745, 496 P.2d 817]), "on-going ... conduct" (id., at p. 111), "a pattern of behavior" (id., at p. 113), or "a course of conduct." (Ibid.)"

4) Separate discrete acts or omissions may constitute a "general business practice."

- In *People v. Casa Blanca Convalescent Homes, Inc* (1984) 159 Cal.App.3d 509, 526-527; 206 Cal.Rptr. 164, Casa Blanca, a nursing home company, was charged with multiple violations of Cal. Bus. & Prof. Code §17200, including allegations of an inadequate surety bond, inadequate staffing and nursing care, failing to maintain proper patient records, and permitting unsanitary conditions. Judgment was entered against Casa Blanca for 67 violations and $167,500 in civil penalties. Casa Blanca demanded the court define in its statement of decision what was meant by a "business practice." Citing Barquis v. Merchants Collection Assn., supra, 7 Cal.3d 94; the Casa Blanca court stated,

  "The Supreme Court held repeated violations of statute by acts which constituted a principal part of its business constituted an unlawful business practice and, as such, was actionable under Civil Code section 3369 (now Bus. & Prof. Code, §17200 et seq.)… The facts, admitted in the pleadings, were that Casa Blanca was in the business of operating and managing patient care hospitals and the sale of nursing home services. Nursing care was its primary business activity. This admission established, without question, the series of acts complained of was a business activity or practice. The key question presented to the trial court was not whether this was a 'business practice or activity' but rather whether this particular business activity was unlawfully conducted. The trial court, based upon more than sufficient evidence, found Casa Blanca was engaged in a variety of unlawful practices in its primary business -- rendering nursing care. "We conclude there is both a factual and legal basis for finding not only were there violations of the administrative regulations in question, but its activities constituted a pattern of behavior pursued by Casa Blanca as a 'business practice.'"

Subdivision (aa) has been added to define the term "Stipulated Order," which means a Notice of Assessment that was timely paid. The remaining definitions have been re-lettered.

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

Subdivision (a) was revised to state:

"(a) Administrative penalties shall only be imposed under this section based on violations of Labor Code section 5814, after more than one penalty awards has been issued by the Workers' Compensation Appeals Board on or after June 1, 2004 based on conduct occurring on or after April 19, 2004 for unreasonable delay or refusal to pay compensation within a five year time period. The five year period of time shall begin on the date of issuance of any penalty award not previously subject to an administrative penalty assessment pursuant to Labor Code section 5814.6."

These changes refine the minimum prerequisites for imposing an administrative penalty under this section: the underlying conduct that is the basis of penalty award must have occurred on or after April 19, 2004; the penalty award must have issued on or after June 1, 2004; and there must be more than one penalty award within a five year period.

Also, subdivision (a) was revised to correct the grammar, changing "awards have" to "award has."

Necessity re subdivision (a): Subdivision (a) provides that the penalty award must have issued on or after June 1, 2004. This is the operative date of the statute (SB 899). The conduct that gave rise to the penalty award must have occurred on or after April 19, 2004. April 19, 2004 is the date SB 899 was signed. The April 19, 2004 date is based on the WCAB holding of *Abney*. (*Abney v. Aera Energy* (WCAB Case No. GRO 024430, en banc decision) 69 Cal. Comp. Cases 1552; *Abney v. WCAB* (2005) 70 Cal. Comp. Cases 460.) Specifically, the WCAB wrote: "We hold that section 5814, as enacted by SB 899 and operative June 1, 2004, applies to unreasonable delays or refusals to pay compensation that occur prior to the operative date where the finding of unreasonable delay is made on or after June 1, 2004." Because Labor Code section 5814.6 applies to any employer or insurer that knowingly violates [the amended] Section 5814 with a frequency that indicates a general business practice, it is appropriate that these regulations follow the WCAB's rule regarding orders issued pursuant to Labor Code section 5814. (That is, all orders issued on or after June 1, 2004 are pursuant to the amended Labor Code section 5814.) However, in order to avoid any arguments regarding retroactive application of the statute, the regulations provide that the underlying conduct must have occurred on or after April 19, 2004, the effective date of the statute.

The word "regularly" in subdivision (b) was replaced with the words "at least monthly" for clarity.

Subdivision (b) and (c) were 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 at least monthly 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."

In subdivisions (d) and re-lettered (f) the citations to various regulations were corrected to refer to Title 8 of the California Code of Regulations.

Former subdivisions (f) and (g) were deleted to be consistent with the change that the penalty awards must have issued on or after June 1, 2004 for conduct occurring on or after April 19, 2004. The subsequent subdivisions were re-lettered.

Throughout the new subdivision (g), the words "a workers' compensation administrative law judge" were replaced with the words "the Workers' Compensation Appeals Board." This term is defined as the Appeals Board, commissioners, deputy commissioners, presiding workers' compensation judges and workers' compensation administrative law judges in section 10225 (ee). The revision is necessary because compensation orders and awards to pay penalties due to a violation of Labor Code section 5814 may be issued by any of the entities defined as the Workers' Compensation Appeals Board.

In subdivision (g)(1), the word "each" was changed to "a." Subdivision (g)(1) was also revised to use the defined term "knowingly;" and to refer to the parties as the "employer or insurer." In order to clarify that the $100,000 is the initial penalty and that the penalties listed in (g)(2) – (9) will also be assessed if applicable, the words "and additionally for each applicable penalty award, the following" have been added. Subdivision (g)(1) now mirrors the wording in section 10225.2(a) by the addition of the words "has evidence to support a finding."

Subdivision (g) now states:

> "Pursuant to Labor Code section 5814.6, the Administrative Director, or his or her designee, shall issue a Notice of Assessment for administrative penalties against an employer and/or insurer as follows:
>
> (1) $ 100,000 when the Administrative Director, or his or her designee, has evidence to support a finding that an employer or insurer knowingly violated Labor Code section 5814 with a frequency that indicates a general business practice, and additionally for each applicable penalty award, the following;"

In subdivisions (g)(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 (g)(3), the words “or proper objection to” were deleted. The penalties amounts listed in (A) were increased from $1000 to $5000 and in (B) the penalties were increased from $5000 to $10,000. The increased was 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.

In subdivision (g)(4), the words “or deny” were deleted. These changes were made in response to comments that penalties may only be imposed for failure to provide benefits.

The penalty for unreasonable delay or refusal to reimburse an employee for self-procured medical treatment was removed from subdivision (g)(4) and set forth in a separate new subdivision ((g)(5)) for clarity. Additionally, subdivision (g)(5) was revised. As previously drafted, there was a gap between the medicals costs of $100 and $101, $300 and $301, and $500 and $501. The revised language corrects the syntax problem. Subdivisions (g)(4) and (g)(5) now read as follows:

“(4) For each penalty award by the Workers’ Compensation Appeals Board for a violation of Labor Code section 5814 for an unreasonable delay or refusal to provide authorization for medical treatment:

(A) $1,000 for retrospective medical treatment authorization;

(B) $5,000 for prospective or concurrent medical treatment authorization;

(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 the Workers’ Compensation Appeals Board 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 of $100 or less, excluding interest and penalty;

(B) $2,000 for medical treatment costs of more than $100 to $300, excluding interest and penalty;

(C) $3,000 for medical treatment costs of more than $300 to $500, excluding interest and penalty;

(D) $5,000 for medical treatment costs of more than $500, excluding interest and penalty;”

In subdivision (g)(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) $ 2,500 for each penalty award by the Workers' Compensation Appeals Board for a violation of Labor Code section 5814 for an unreasonable delay or refusal a failure to provide the supplemental job displacement benefit, as required by section 10133.51(b) and section 10133.56(c), respectively, of Title 8 of the California Code of Regulations."

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

In subdivision (g)(8), the word "timely" was deleted (and replaced with the word "a") to be consistent with the wording of the other subdivisions and because the word was unnecessary.

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

Necessity for penalties set forth in subdivision (g):

> Subdivision (g) is necessary to establish a base administrative penalty of $100,000 where a general business practice in violation of Labor Code § 5814 has been determined. In addition to the base penalty, an employee or insurer will be assessed with additional penalties based on the type of Labor Code § 5814 violation that occurred. The penalties in higher amounts reflect the more severe violations – either because of the type of benefit that was unreasonably denied or delayed or the amount of compensation that was unreasonably denied or delayed. Thus, the detailed schedule of additional penalties ranging from $1,000 to $30,000 is based upon the nature, severity, frequency and duration of the relevant violations.
>
> Labor Code section 5814.6 allows a maximum penalty of $400,000. The penalty structure of Labor Code section 5814 was reduced under SB 899, and Labor Code section 5814.6 was created to address and assess the claims administrators who knowingly violate Labor Code section 5814 with a frequency that indicates a general business practice. In general, penalties are found to be constitutional where various factors are considered including; 1) degree of culpability, 2) prior misconduct, 3) the concern of creating a financial bonanza that would ill serve public policy, and 4) the sophistication and financial strength of the assessed. "Legislature may constitutionally impose reasonable penalties to secure obedience to statutes enacted under the police power so long as those enactments are procedurally fair and reasonably related to a proper legislative goal." *Kinney v. Vaccari* (1980) 27 Cal.3d 348, 352. Labor

Code section 129.5 (b) also sets forth factors that should be considered when assessing penalties under Labor Code section 129.5. Those factors include 1) the gravity of the violation; 2) the good faith of the claims administrator; 3) the history of previous violations; and 4) the frequency of the violations. Because the legislature considered those factors important with regard to claims handling violations, the Division of Workers' Compensation has also included those factors in subdivision (h) as mitigating factors for the penalties for unreasonable denials and delays of compensation.

Because Labor Code section 5814.6 allows a maximum penalty of $400,000, the schedule must allow for a range of penalty amounts up to $400,000. In order to be equitable, the itemized penalty amounts are based on severity of the violation. For example, the $30,000 penalty reflects the egregious conduct of a claims administrator who unreasonably delayed or refused to comply with a compensation order previously made by a workers' compensation judge. In this case, the claims administrator already had a hearing, was issued an order, and then unreasonably failed to comply with the WCAB order.

The penalty amounts set forth in (g)(3) are based on the amount of the unpaid or delayed indemnity payments. The penalties reflect an amount that is higher than the audit penalties set forth in 8 CCR 10111.2 (because these violations are for an *unreasonable denial or delay*) and an amount that is higher that what was originally due to the injured worker. The maximum TD rate is currently $840 per week. Therefore, 14 days of indemnity could equal $1680. It is necessary that the penalty for unreasonable delay or denial of 14 days of temporary disability be greater than the amount that was unpaid in order to act as a penalty and disincentive. Therefore, the penalty amount is $5000. Similarly, 42 days of indemnity could equal $5040, so the penalty amount is set at $10,000, and more than 42 days of indemnity constitutes a penalty amount of $15,000.

The penalty in (g)(4) concerns the delay or refusal of authorization of medical treatment. The penalties range from $1,000 for retrospective medical treatment (which is the least severe, as the medical treatment was already provided) to $5,000 for denial of prospective or concurrent medical treatment (because the unreasonable delay or denial prevents the injured worker from receiving timely medical treatment) and finally, to $15,000 for the most severe denial in this section (because the injured worker's condition is such that the employee faces an imminent and serious threat to his or her health).

The penalties in (g)(5), for unreasonable delay or refusal to reimburse an employee for self-procured medical treatment, are related to the

underlying amount that was paid by the injured worker for the self-procured medical treatment. The four levels of penalties are approximately ten times the amount of the out-of-pocket amount that the injured worker was required to pay.

The penalties in (g)(6) and (g)(7) are for $2500 each. The supplemental job displacement benefit value ranges from $4000 to $10,000. Although the penalty amount listed in the section are less than the possible amounts of the supplemental job displacement benefit unreasonably denied or delayed benefit, the consequence of failing to pay the supplemental job displacement benefit is less harmful to the injured worker than the unreasonable delay or denial of a temporary disability payment or authorization of a medical treatment.

The penalty in (g)(8) is for the unreasonable delay or refusal to make payments of permanent disability indemnity benefits. The penalties are structured to reflect the number of weeks of indemnity payments that were not made. Therefore, the more weeks that passed, the larger the penalty. Permanent disability payments for an injured worker with up to 99¾% disability will range from a low of $130 per week to a maximum of $270 per week. (An injured worker who is totally disabled will receive up to $840 per week.) The penalties reflect an amount that is higher than the audit penalties set forth in 8 CCR §10111.2 (because these violations are for an *unreasonable denial or delay*) and an amount that is higher that what was originally due to the injured worker. The penalty ranges from $1,000 for 15 weeks, $5,000 for 15 weeks to 50 weeks, $7500 for 50 weeks to 95 weeks, and $15,000 for more than 95 weeks of indemnity payments.

In subdivision (h), the word "adjust" was replaced with "mitigate" as the reasons listed will allow for a penalty to be lowered.

Also in subdivision (h), a mitigating factor was added as (h)(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.

Subdivision (i) was revised for clarity. The term "finding" was replaced with "Order" and the sentence structure was changed. The subdivision now states:

"(i) Each administrative penalty assessed under this section shall be doubled upon a second Order (which may be a Stipulated Order or a final Determination and Order) by the Administrative Director under Labor Code § 5814.6 against the same employer or insurer within a five (5) year period. Each administrative penalty under this section shall be tripled upon a third Order (which may be a Stipulated Order or a final Determination and Order) by the Administrative

Director under Labor Code § 5814.6 against the same employer or insurer within the same five (5) year period."

The last sentence of former subdivision (i) is now subdivision (j). The sentence was also clarified by adding the phrase "in a single Stipulated Order or final Determination and Order."

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

Subdivision (a) was revised to replace the phase "reason to believe" with "evidence to support a finding." The change is to create a more objective standard and for clarity.

Subdivision (f) was added. It states: **"**If the employer or insurer pays the penalties within thirty (30) calendar days, the Notice of Assessment shall be deemed a Stipulated Order." This subdivision was added because the employer or insurer may pay the penalties in the Notice of Assessment without dispute, which in effect is a stipulation. The timely paid Notice of Assessment will then be considered an order for the purposed determining the amount of any future orders as set forth in section 10225.1 (i) and (j).

Subdivision (g) was added to provide the introductory clause: "If the employer or insurer files an appeal of the Notice of Assessment with the Administrative Director, the appeal shall:" Following this clause is a list of issues to be addressed in the appeal.

The subdivisions following subdivision (g) were inadvertently not re-lettered in the fourth 15 day revision, but have been re-lettered in the final revision.

Former subdivision (g), new subdivision (i), was revised to require the employer or insurer to verify the facts set forth in the appeal. It now states:

"(i) The appeal shall be in writing signed by, or on behalf of, the employer or insurer, and shall state the appellant's mailing address. 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."

<u>Necessity for verification requirement:</u>

Former subdivision (g), new subdivision (i), requires the appeal to be verified. The purpose of requiring a verified appeal is to assure good faith averments by the party and to streamline the appeal process. At this point in the proceeding, the claims administrator has already been served with the Notice of Assessments which sets forth the basis for the penalty assessments, including a statement of the alleged violations. By admitting or denying the allegations under penalty of perjury, the issues in dispute will be clear allowing the administrative hearing process to go forward.

In former subdivision (k), new subdivision (m), the word "reasonable" is replaced with "sixty (60) calendar days" for clarity and to assure the parties of adequate notice before the prehearing conference.

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

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

In former subdivision (q), new subdivision (s), the following language was added: "Upon timely demand for production of a witness in lieu of admission of an affidavit or declaration, the proponent of that witness shall ensure the witness appears at the scheduled hearing and the proffered declaration or affidavit from that witness shall not be admitted. If the Administrative Director, or the designated hearing officer, determines that good cause exists that prevents the witness from appearing at the hearing, the declaration may be introduced in evidence, but it shall be given only the same effect as other hearsay evidence." This language was added to address the situation where the opposing party objects to the use of an affidavit or declaration in lieu of having the witness present at the trial. It requires the proponent to ensure that the witness will appear. Or, if there is good cause that prevents the witness from testifying, it allows the declaration to be introduced with the same effect as other hearsay evidence.

In former subdivision (s), new subdivision (u), the words "Administrative Director or the" are added in case the Administrative Director issued the Recommended Determination and Order. The word "Final" has been deleted from modifying "Determination and Order" for clarity (as the Order is not final until the time to appeal has elapsed). The words "on the sixty-first calendar day" are added for clarity.

Subdivision (v) (previously mis-lettered as (t)) is added. It states: "The Determination and Order shall be served on all parties personally or by registered or certified mail by the Administrative Director." This is added to ensure the parties receive the Determination and Order and to clarify that it is the Administrative Director's responsibility to serve the Determination and Order.

Re-lettered subdivision (w) was revised for clarity. The word "Final" has been deleted from modifying "Determination and Order" for clarity (as the Order is not final until the time to appeal has elapsed). The phrase "for the purposes of review within twenty (20) days of" was deleted, as it was contradictory with the phrase that followed and did not make sense when read with the timeframe in which to appeal.

In re-lettered subdivision (x), the word "Final" has been deleted from modifying "Determination and Order" for clarity (as the Order is not final until the time to appeal

has elapsed). The phrase "or amend the Final Determination and Order for good cause" was deleted as it was vague.

In re-lettered subdivision (y) the following sentence was added: "The penalties shall be deposited into the Return-to-Work-Fund." This is provided by the statute and is repeated here to advise the public where the funds are deposited.

In re-lettered subdivision (z), the word "Final" has been deleted from modifying "Determination and Order" and the word "the" is inserted in the phrase "Petition Appealing the Determination and Order."

UPDATE OF MATERIAL RELIED UPON

- The following cases have been added to the rulemaking file: *Abney v. Aera Energy* (WCAB Case No. GRO 024430, en banc decision) 69 Cal. Comp. Cases 1552; *Abney v. WCAB* (2005) 70 Cal. Comp. Cases 460; and *Dodrill v. Nationwide Mutual Insurance Company* (1996) 201 W. Va. 1; 491 S.E.2d 1.

LOCAL MANDATES DETERMINATION

- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. The proposed amendments do not apply to any local agency or school district.
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed amendments do not apply to any local agency or school district.

CONSIDERATION OF ALTERNATIVES

The Division considered all comments submitted during the public comment periods, and made modifications based on those comments to the regulations as initially proposed. The Acting Administrative Director has now determined that no alternatives proposed by the regulated public or otherwise considered by the Division of Workers' Compensation would be more effective in carrying out the purpose for which these regulations were proposed, nor would they be as effective as and less burdensome to affected private persons and businesses than the regulations that were adopted.

SUMMARY OF COMMENTS RECEIVED AND RESPONSES THERETO CONCERNING THE REGULATIONS ADOPTED

The comments of each organization or individual are addressed in the charts contained in the rulemaking binder.

The public comment periods were as follows:

Initial 45-day comment period: April 27, 2006 through June 29, 2006

First 15-day comment period: September 12, 2006 through September 27, 2006.

Second 15-day comment period: October 25, 2006 through November 10, 2006.

Third 15-day comment period: November 3, 2006 through November 18, 2006.

Fourth 15-day comment period: February 5, 2007 through February 20, 2007