

TITLE 8. INDUSTRIAL RELATIONS
DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS
CHAPTER 4.5. DIVISION OF WORKERS' COMPENSATION
SUBCHAPTER 1.8.1. ADMINISTRATIVE DIRECTOR -OTHER ADMINISTRATIVE
PENALTIES
ARTICLE 1 - ADMINISTRATIVE PENALTIES PURSUANT TO LABOR CODE
SECTION 5814.6

§ 10225 Definitions

As used in this article:

(a) "Adjusting location" means the office where claims are administered. Separate underwriting companies, employers that are both self-administered and self-insured, and/or third-party administrators operating at one location shall be combined as one adjusting location only if claims are administered under the same management at that location. Where claims are administered from an office that includes a satellite office at another location, claims administered at the satellite office(s) will be considered as part of the single adjusting location for investigation and auditing purposes under this article when it is demonstrated that the claims are under the same immediate management.

(b) "Administrative Director" means the Administrative Director of the Division of Workers Compensation, including his or her designee.

(c) "Claim" means a request for compensation, or record of an occurrence in which compensation reasonably would be expected to be payable for an injury arising out of and in the course of employment.

(d) "Claim file" means a record in paper or electronic form, or any combination, containing all of the information specified in section 10101.1 of Title 8 of the California Code of Regulations and all documents or entries related to the provision, payment, delay, or denial of benefits or compensation under Divisions 1, 4 or 4.5 of the Labor Code.

(e) "Claims administrator" means a self-administered workers' compensation insurer; a self-administered self-insured employer; a self-administered legally uninsured employer; a self-administered joint powers authority; or a third-party claims administrator for an insurer, a self-insured employer, a legally uninsured employer or a joint powers authority.

(f) "Compensation" means every benefit or payment, including vocational rehabilitation, supplemental job displacement benefits, medical treatment, medical and medical-legal expenses, conferred by Divisions 1 and 4 of the Labor Code on an injured employee or the employee's dependents.

(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.

(h) "Concurrent medical treatment authorization" means authorization requested or provided during an inpatient stay.

(i) "Determination and Order" means Determination and Order in re Labor Code § 5814.6 Administrative Penalties.

(j) "Employee" means every person in the service of another, as defined under Article 2 of Chapter 2 of Part 1 of Division 4 of the Labor Code (Sections 3350 et seq.), or in the case of the employee's death, his or her dependent, as each is defined in Division 4 of the Labor Code, or the employee's or dependent's agent or attorney.

(k) "Employer" shall have the same meaning as the word 'employer' as defined in Division 4 of the Labor Code (sections 3300 et seq.).

(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.

(m) "Indemnity" means payments made directly to an eligible person as a result of a work injury and as required under Division 4 of the Labor Code, including but not limited to temporary disability indemnity, salary continuation in lieu of temporary disability indemnity, permanent disability indemnity, vocational rehabilitation temporary disability indemnity, vocational rehabilitation maintenance allowance, life pension and death benefits.

(n) "Insurer" means any company, group, or entity in, or which has been in, the business of transacting workers' compensation insurance for one or more employers subject to the workers' compensation laws of this state. The term insurer includes the State Compensation Insurance Fund.

(o) "Investigation" means the process used by the Administrative Director, or his or her designee, pursuant to Section 10225.1 and/or Government Code sections 11180 through 11191, to determine whether a violation of Labor Code section 5814.6 has occurred, including but not limited to reviewing, evaluating, copying and preserving electronic and paper records, files, accounts and other things, and interviewing potential witnesses.

(p) "Joint powers authority" means any county, city, city and county, municipal corporation, public district, public agency, or political subdivision of the state, but not the state itself, included in a pooling arrangement under a joint exercise of powers agreement for the purpose of securing a certificate of consent to self-insure workers' compensation claims under Labor Code Section 3700(c).

(q) "Knowingly" means acting with knowledge of the facts of the conduct at issue. For the purposes of this article, a corporation has knowledge of the facts an employee receives while acting within the scope of his or her authority. A corporation has knowledge of information contained in its records and of the actions of its employees performed in the scope and course of employment. An employer or insurer has knowledge of information contained in the records of its third-party administrator and of the actions of the employees of the third-party administrator performed in the scope and course of employment.

(r) "Notice of Assessment" means Notice of Labor Code § 5814.6 Administrative Penalty Assessment.

(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.

(t) "Petition Appealing Determination and Order" means Petition Appealing Determination and Order of the Administrative Director in re Labor Code § 5814.6 Administrative Penalties.

(u) "Proof of service" means an affidavit or declaration made under penalty of perjury and filed with one or more documents required to be filed, setting out a description of the document(s) being served, the names and addresses of all persons served, whether service was made personally or by mail, the date of service, and the place of service or the address to which mailing was made.

(v) "Prospective medical treatment authorization" means authorization requested or provided prior to the delivery of the medical services.

(w) "Recommended Determination and Order" means Recommended Determination and Order in re Labor Code § 5814.6 Administrative Penalties.

(x) "Retrospective medical treatment authorization" means authorization requested or provided after medical services have been provided and for which services approval has not already been given.

(y) "Salary continuation" means payment made to an injured employee as provided under Division 4 of the Labor Code.

(z) "Serve" means to file or deliver a document or to cause it to be delivered to the Administrative Director or his or her designee, or to such other person as is required under this article.

(aa) "Stipulated Order" means a Notice of Assessment that was timely paid.

(bb) "Supplemental job displacement benefits" means benefits as described under Labor Code section 4658.5 and sections 10133.50 – 10133.59 of Title 8 of the California Code of Regulations.

(cc) "Third-party administrator" means an agent under contract to administer the workers' compensation claims of an insurer, a self-insured employer, a legally uninsured employer, a self-insured joint powers authority or on behalf of the California Insurance Guarantee Association. The

term third-party administrator includes the State Compensation Insurance Fund for locations that administer claims for legally uninsured and self-insured employers, and also includes managing general agents.

(dd) "Utilization review files" means those files, documents or records, whether paper or electronic, containing information that documents an employer or insurer utilization review process required under Division 4 of the Labor Code.

(ee) "Workers' Compensation Appeals Board" means the Appeals Board, commissioners, deputy commissioners, presiding workers' compensation judges and workers' compensation administrative law judges.

Authority: Sections 133, 5307.3 and 5814.6, Labor Code

Reference: Sections 129.5, 139.48, 5814 and 5814.6, Labor Code

§ 10225.1 Schedule of Administrative Penalties Pursuant to Labor Code §5814.6.

(a) Administrative penalties shall only be imposed under this section based on violations of Labor Code section 5814, after more than one penalty award 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.

(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.

(d) 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 (c) and sections 10106, 10106.1, 10107 and 10107.1 of Title 8 of the California Code of Regulations the Administrative Director, or his or her designee, may conduct an investigation, which may include but is not 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 conducted pursuant to Labor Code section 129 and 129.5.

(e) The Administrative Director, or his or her designee, may also utilize the provisions of Government Code sections 11180 through 11191 to carry out the responsibilities mandated by Labor Code section 5814.6.

(f) The Administrative Director may issue a Notice of Assessment under this article in conjunction with an order to show cause pursuant to section 10113 of Title 8 of the California Code of Regulations, charging both an administrative penalty under this section and a civil penalty under subdivision (e) of Labor Code section 129.5 in the same pleading, however only one penalty may be imposed by the Administrative Director following the hearing on such charges.

(g) 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 for 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;

(2) \$30,000 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 comply with an existing compensation order;

(3) 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 make a payment of temporary disability benefits or salary continuation payments in lieu of temporary disability; vocational rehabilitation maintenance allowance, life pension, or death benefits:

(A) \$5,000 for 14 days or less of indemnity benefits;

(B) \$10,000 for 15 days through 42 days of indemnity benefits;

(C) \$15,000 for more than 42 days of indemnity benefits.

(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.

(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 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.

(7) \$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 to make payment to an injured worker as reimbursement for payment for services provided for a supplemental job displacement benefit voucher, or where the unreasonable delay or refusal to pay the training provider causes an interruption in the employee's retraining.

(8) 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 make a payment of permanent disability indemnity benefits:

(A) \$1,000 for 15 weeks or less of indemnity benefits;

(B) \$5,000 for more than 15 but not more than 50 weeks of indemnity benefits;

(C) \$7,500 for more than 50 but not more than 95 weeks of indemnity benefits;

(D) \$15,000 for more than 95 weeks of indemnity benefits.

(9) \$2,500 for any other penalty award by the Workers' Compensation Appeals Board pursuant to Labor Code section 5814 not otherwise specified in this section.

(h) In cases that the Administrative Director deems appropriate, the Administrative Director, or his or her designee, may mitigate a penalty imposed under this section after considering each of these factors:

(1) The consequences and gravity of the violation(s).

(2) The good faith of the claims administrator.

(3) The history of previous penalty awards under Labor Code section 5814.

(4) The number and type of the violations.

(5) The time period in which the violations occurred.

(6) The size of the claims adjusting location.

(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.

(j) In no event shall the administrative penalties assessed against a single employer or insurer in a single Stipulated Order or final Determination and Order after doubling or tripling exceed \$400,000.

Authority: Sections 133, 5307.3 and 5814.6, Labor Code

Reference: Sections 129.5, 139.48, 5814 and 5814.6, Labor Code; and Sections 11180 through 11191, Government Code.

§10225.2 Notice of Administrative Penalty Assessment, Appeal Hearing Procedures and Review.

- (a) Pursuant to Labor Code section 5814.6, the Administrative Director shall issue a Notice of Assessment when the Administrative Director, or his or her designee (the investigating unit of the Division of Workers Compensation), has evidence to support a finding that an employer or insurer has knowingly violated section 5814 with a frequency that indicates a general business practice.
- (b) Successor liability may be imposed on a corporation or other business entity that has merged with, consolidated with, or otherwise continued the business of an employer or insurer that is subject to penalties under Labor Code section 5814.6. The surviving entity shall assume and be liable for all the liabilities, obligations and penalties of the prior employer or insurer. Successor liability will be imposed if there has been a substantial continuity of business operations and/or the new business uses the same or substantially the same work force.
- (c) The Notice of Assessment shall be in writing and shall contain all of the following:
 - (1) The basis for the penalty assessment, including a statement of the alleged violations and the amount of each proposed penalty;
 - (2) A description of the methods for paying or appealing the penalty assessment.
- (d) The Notice of Assessment shall be served personally or by registered or certified mail.
- (e) Within thirty (30) calendar days after the date of service of the Notice of Assessment, the employer or insurer may pay the penalties as assessed or file an appeal with the Administrative Director.
- (f) If the employer or insurer pays the penalties within thirty (30) calendar days, the Notice of Assessment shall be deemed a Stipulated Order.
- (g) If the employer or insurer files an appeal of the Notice of Assessment with the Administrative Director, the appeal shall:
 - (1) Admit or deny, in whole or in part any of the allegations set forth in the Notice;
 - (2) Appeal the existence of any or all of the alleged violations;
 - (3) Appeal the amount of any or all the penalties assessed;
 - (4) Set forth any affirmative and other defenses;
 - (5) Set forth the legal and factual bases for each defense and each ground for appeal. Any item listed in the Notice of Assessment but not appealed shall be paid within thirty (30) calendar days after the date of service of the Notice of Assessment.

(h) Failure to timely file an appeal shall constitute a waiver of the appellant's right to an evidentiary hearing. Unless set forth in the appeal, all defenses to the Notice of Assessment shall be deemed waived. The appellant may also file a written request for leave to assert additional defenses which the Administrative Director may grant upon a showing of good cause.

(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.

(1) The appellant shall file the original and one copy of the appeal on the Administrative Director and concurrently serve one copy of the appeal on the investigating unit of the Division of Workers Compensation designated by the Administrative Director. The original and all copies of any filings required by this section shall have a proof of service attached.

(j) At any time before the hearing, the Administrative Director may file or permit the filing of an amended Notice of Assessment. All parties shall be notified thereof. If the amended Notice of Assessment presents new allegations or new penalties, the Administrative Director shall afford the Appellant a reasonable opportunity to prepare its defense, and the Appellant shall be entitled to file an amended appeal.

(k) At the Administrative Director's discretion, the Administrative Director may proceed with an informal pre-hearing conference with the appellant in an effort to resolve the contested matters. If any or all of the proposed penalties in Notice of Assessment or the amended Notice of Assessment remain contested, those contested matters shall proceed to an evidentiary hearing.

(l) Whenever the Administrative Director's Notice of Assessment has been contested, the Administrative Director may designate a hearing officer to preside over the hearing. The authority of the Administrative Director or any designated hearing officer includes, but is not limited to: conducting a prehearing settlement conference; setting the date for an evidentiary hearing and any continuances; issuing subpoenas for the attendance of any person residing anywhere within the state as a witness or party at any pre-hearing conference and hearing; issuing subpoenas duces tecum for the production of documents and things at the hearing; presiding at hearings; administering oaths or affirmations and certifying official acts; ruling on objections and motions; issuing prehearing orders; and preparing a Recommended Determination and Order based on the hearing.

(m) The Administrative Director, or the designated hearing officer, shall set the time and place for any prehearing conference on the contested matters in a Notice of Hearing and shall give sixty (60) calendar days written notice to all parties.

(n) The prehearing conference may address one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

- (3) Clarification of issues.
 - (4) Rulings on identity and limitation of the number of witnesses.
 - (5) Objections to proffers of evidence.
 - (6) Order of presentation of evidence and cross-examination.
 - (7) Rulings regarding issuance of subpoenas and protective orders.
 - (8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.
 - (9) Any other matters as shall promote the orderly and prompt conduct of the hearing.
- (o) The Administrative Director, or the designated hearing officer, shall issue a prehearing conference order incorporating the matters determined at the prehearing conference. The Administrative Director, or the designated hearing officer, may direct one or more of the parties to prepare the prehearing conference order.
- (p) Not less than 30 calendar days prior to the date of the pre-hearing conference, or if no pre-hearing conference is set, not less than 30 calendar days prior to the date of the evidentiary hearing, the Appellant shall file and serve the original and one copy of a written statement with the Administrative Director, or the designated hearing officer, specifying the legal and factual bases for its appeal and each defense, listing all witnesses the Appellant intends to call to testify at the hearing, and appending copies of all documents and other evidence the Appellant intends to introduce into evidence at the hearing. A copy of the written statement and its attachments shall also concurrently be served on the investigating unit of the Division of Workers' Compensation. If the Appellant's written statement and supporting evidence are not timely filed and served, the Administrative Director, or the designated hearing officer, shall dismiss the appeal and the violations and penalties as stated in the Notice of Assessment shall be final, due and payable. Within ten (10) calendar days of the date for filing the written statement and supporting evidence, the Appellant may file a written request for leave to file a written statement and supporting evidence. The Administrative Director, or the designated hearing officer, may grant the request, upon a showing of good cause. If leave is granted, the written statement and supporting evidence must be filed and served no later than ten (10) calendar days prior to the date of the hearing.
- (q) Oral testimony shall be taken only on oath or affirmation.
- (r) (1) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence.
- (2) In the absence of a contrary order by the Administrative Director, or the designated hearing officer, the investigating unit of the Division of Worker's Compensation shall present evidence first.

(3) The hearing need not be conducted according to the technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(4) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case to the Administrative Director, or to the designated hearing officer.

(s) The written affidavit or declaration of any witness may be offered and shall be received into evidence provided that (i) the witness was listed in the written statement pursuant to section 10225.2(p), (ii) the statement is made by affidavit or by declaration under penalty of perjury, (iii) copies of the statement have been delivered to all opposing parties at least 20 calendar days prior to the hearing, and (iv) no opposing party has, at least 10 calendar days before the hearing, delivered to the proponent of the evidence a written demand that the witness be produced in person to testify at the hearing. The Administrative Director, or the designated hearing officer, shall disregard any portion of the statement received pursuant to this regulation that would be inadmissible if the witness were testifying in person, but the inclusion of inadmissible matter does not render the entire statement inadmissible. 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.

(t) The Administrative Director, or the designated hearing officer, shall issue a written Recommended Determination and Order, granting or denying the appeal, in whole or part, and affirming or amending the penalty assessment(s). The Recommended Determination and Order shall include a statement of the basis for the decision and each penalty assessed. It shall be served on all parties within sixty (60) calendar days of the date the case was submitted for determination. This requirement is directory and not jurisdictional.

(u) The Administrative Director shall have up to sixty (60) calendar days to adopt or modify the Recommended Determination and Order issued by the Administrative Director or the designated hearing officer. In the event the Recommended Determination and Order is modified, the Administrative Director shall include a statement of the basis for the Determination and Order. If the Administrative Director does not act within sixty (60) calendar days, then the Recommended Determination and Order shall become the Determination and Order on the sixty-first calendar day.

(v) The Determination and Order shall be served on all parties personally or by registered or certified mail by the Administrative Director.

(w) The Determination and Order, if any, shall become final on the date it was served, unless the aggrieved party files a timely Petition Appealing Determination and Order within twenty (20) days.

A timely filed Petition Appealing the Determination and Order tolls the period for paying any disputed penalty. All findings and assessments in the Determination and Order that are not contested in the Petition Appealing Determination and Order shall become final as though no such petition was filed.

(x) At any time prior to the date the Determination and Order becomes final, the Administrative Director may correct the Determination and Order for clerical, mathematical or procedural error.

(y) Penalties assessed in a Determination and Order shall be paid within thirty (30) calendar days of the date the Determination and Order has been served, if no Petition Appealing the Determination and Order has been filed. The penalties shall be deposited into the Return-to-Work-Fund.

(z) All appeals from any part or the entire Determination and Order shall be made in the form of a Petition Appealing the Determination and Order, in conformance with the requirements of chapter 7, part 4 of Division 4 of the Labor Code. Any such Petition Appealing the Determination and Order shall be filed at the Workers' Compensation Appeals Board in San Francisco (and not with any district office of the Workers' Compensation Appeals Board), in the same manner specified for petitions for reconsideration.

Authority: Sections 133, 5307.3 and 5814.6, Labor Code

Reference: Sections 129.5, 139.48, 5300, 5814, 5814.6, and 5900 et seq., Labor Code