TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 180: MONITORING AND ENFORCEMENT

28 TAC §§180.8 and 180.26

1. INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts with changes the amendment of 28 Texas Administrative Code (TAC) §180.8, *Notices of Violation; Notices of Hearing; Default Judgments* and adopts with changes the amendment of §180.26, *Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies.* DWC first published proposed amendments to §180.8 and §180.26 as published in the May 18, 2018, issue of the *Texas Register* (43 TexReg 3226). A public hearing was held on August 2, 2018. In response to written comments received and comments during the August 2, 2018, public hearing, DWC withdrew its first proposal.

On November 2, 2018, DWC proposed new amendments as published in the *Texas Register* (43 TexReg 7328). A public hearing was held on November 16, 2018. In response to comments, no changes have been made to the amendment of §180.8, as proposed. The only changes were to make grammar and citation corrections as they related to the Texas Administrative Code. Changes have been made to the amendment of §180.26. Proposed §180.26(i)(2)(C) was deleted, removing the requirement that system participants must acknowledge in all consent orders that the ordered sanction is appropriate. While this deletion does not preclude DWC and a system participant from agreeing to include such an acknowledgement in a consent order, DWC, based on

public comments, determined that requiring such an acknowledgement in all consent orders could unnecessarily restrict parties seeking informal disposition of an enforcement matter in some cases. For the same reason, DWC also deleted the word "appropriately" from §180.26(i)(2)(B). Additional non-substantive amendments were made to §180.26 in response to the public comments submitted.

2. REASONED JUSTIFICATION. Section 180.8 and §180.26 relate to DWC's enforcement process. The adopted amendments are necessary to implement Senate Bill (SB) 1895, 85th Legislature, Regular Session. SB 1895 amended Labor Code §415.021(c), *Assessment of Administrative Penalties,* to require that the commissioner consider additional factors when assessing an administrative penalty and added subsection (c-1), which directs the commissioner to adopt rules requiring DWC to communicate certain information when assessing administrative penalties, including the relevant statute or rule violated, the conduct that gave rise to the violation, and the factors considered in the determination of a penalty. Amended §180.8(b)(4) requires that a Notice of Violation (NOV) include a statement of the basis for the proposed sanction. This statement will include a description of the underlying facts considered by DWC for each of the factors considered in DWC's determination of the proposed sanction, the description of which factors under Labor Code §415.021(c) or Rule §180.26 had a mitigating or aggravating effect on the proposed sanctions, and a description of the proposed sanction for each violation or violation type in the case of repeated administrative violations. Rule §180.8 currently requires that the NOV include the statute or rule violated, the conduct that gave rise to the violation, and a description of a proposed sanction. This additional language will

implement SB 1895 and ensure that DWC communicates all necessary information to affected persons when assessing administrative penalties or other sanctions.

Amended §180.8(c) requires that Notices of Hearing include a description of the underlying facts considered, a description of which factors under Labor Code §415.021(c) and §180.26 had a mitigating or aggravating effect, and a description of the proposed sanction DWC intends to impose.

Amended §180.26(h) and (i) implement the provisions in Labor Code §415.021(c-1) which require that DWC "communicate to the person information about the penalty, including: (1) the relevant statute or rule violated; (2) the conduct that gave rise to the violation; and (3) the factors considered in determining the penalty." DWC currently communicates this information to persons subject to an administrative violation, and §180.26(e) already requires DWC to consider the factors listed in Labor Code §415.021(c) when determining which sanction to impose and the severity of such a sanction. The additional language in these amendments will implement SB 1895 by memorializing DWC's current practices and ensuring that DWC communicates all necessary information when assessing administrative penalties or other sanctions.

The amendment to §180.26(i) requires that consent orders include a statement of the factors DWC considered aggravating or mitigating when determining the proposed sanction. Furthermore, the amendment to §180.26(i) requires that consent orders include a statement acknowledging that DWC and the system participant communicated regarding the information described by amended §180.26(h) and that DWC considered the factors under Labor Code §415.021(c) and §180.26(e). Additional non-substantive

editorial changes are made to §180.26 to align its language with DWC's style guide and to correct grammatical errors.

3. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

General

Comment: Two commenters support the amendments as proposed. These commenters agree that the amendments advance the legislative intent underlying SB1895. Additionally, one commenter noted that the new rule language facilitates due process notice requirements for administrative enforcement actions.

Response: DWC appreciates the supportive comments. No change was made in response to these comments.

Section 180.8

Comment: Commenter recommends deleting the term "appropriateness of" from §180.8(b)(4)(A) because it is ambiguous. Appropriateness, the commenter states, may reflect an individual's opinion or belief at a particular point in time and can change with the times, or as leaders within the agency change. Additionally, the commenter states that Labor Code §415.021(c) does not require the commissioner to consider appropriateness but only certain delineated factors. The commenter states that the words "appropriateness of" may add to disputed issues at a hearing or unnecessarily complicate informal resolution through consent orders.

Response: DWC appreciates the comment. Under the Workers' Compensation Act, DWC determines an appropriate sanction through consideration of underlying facts, the laws at issue, and the relevant factors under Labor Code §415.021(c). This process

is commonplace as there are many provisions within the Act that require DWC to determine appropriateness, including, but not limited to,§§414.003(b) ("commissioner shall use the information compiled under this section to impose appropriate penalties and other sanctions under Chapters 415 and 416"), 402.00128(b)(7) (DWC may "enter appropriate orders"), 413.0512(c)(1) ("the medical quality review panel shall recommend to medical advisor appropriate action regarding doctors, other health care providers, insurance carriers, utilization review agents, and independent review organizations"), and 408.023(c) ("The commissioner may also consider the practice restrictions of an applicant when determining appropriate sanctions under Section 408.0231"). Moreover, the NOV is a statement of the facts that DWC must prove and a description of why DWC believes a proposed sanction is appropriate. If the case is heard at the State Office of Administrative Hearings, DWC must establish the appropriateness of any sanction sought. No change was made in response to this comment.

Comment: Commenter supports the proposed language in §180.8(b)(4)(C) because it will give additional information as to how DWC may have arrived at an aggregate sanction amount and suggests similar language be added to §180.26.

Response: DWC appreciates the supportive comment but declines to add the suggested language to §180.26(h). This communication will occur as part of the negotiation of a consent order, but these elements do not need to be set forth in the consent order itself. Thus, it is important that DWC and system participants continue to have flexibility to negotiate the terms of individual consent orders. No change was made in response to this comment.

Section 180.26

Comment: In reference to §180.26(h), a commenter inquired why the required communications for the informal procedure are materially different than the required communications for a formal notice under proposed §180.8(b)(4). Commenter contends that the required communications should be similar, if not identical. Commenter also recommends that §180.26(h)(3) be amended to include communications similar to those proposed in §180.8(b)(4).

Response: DWC appreciates the comment but declines to make the change because an NOV and a consent order serve different purposes and are used at different phases of the enforcement process. The elements of an NOV, which is a formal document and referred to in §180.8, are not the same as a consent order, which is described in §180.26. An NOV is the first step in formal enforcement proceedings whereas negotiation prior to consent order is part of informal disposition. An NOV is prepared and served upon a respondent after attempts to resolve the matter informally have failed. This makes the relevant matters to be communicated by DWC through an NOV and proposed consent order materially different. No change was made in response to this comment.

Comment: Commenter recommends deleting "appropriateness" and "appropriately" from §180.26(h)(3). Commenter states that Labor Code §415.021(c) does not require the use of the term "appropriately considered" or set any type of

standard for determination of appropriateness. SB 1895 only requires that the factors enumerated in Labor Code §415.021(c) be considered.

Response: DWC appreciates the comment. The communications between DWC and stakeholders that may produce a consent order logically are structured to produce, for the purpose of compromise, an understanding of the proposed sanctions, including how DWC considered the factors under Labor Code §415.021 and why DWC believes the proposed sanction is appropriate. Therefore, the term "appropriateness" has not been deleted from the first sentence of §180.26(h)(3).

However, DWC has modified the text of §180.26(h)(3) by changing "whether" to "how" and removing "appropriately" in order to align it with §180.8(b)(4)(A). This change corrects a redundancy and adds clarity without substantively changing the rule.

Comment: Commenter disagrees with the proposed language in §180.26(i) that states "Consent Orders must include" and opposes mandatory language in consent orders. Commenter states that nothing in the Labor Code, Tex. Gov. Code Chapter 2001, or SB 1895 authorizes DWC to enact rules regulating the terms or language in a consent order. Commenter states that Tex. Gov. Code §2001.056 does not dictate what terms must be in an informal disposition and further states that the proposed rule could be in conflict with this statute. Commenter recommends replacing the term "must" with the term "may" to remove the mandatory prescription.

Response: DWC appreciates the comment. "Must" aligns the rule, as amended, with the legislature's statement of requirements – an obligatory term – set forth in Labor Code §415.021(c-1). DWC is not seeking to regulate or adopt rules under Government

Code §2001.056. DWC is simply prescribing the requirements for commissioner orders under Labor Code §402.061 and §402.00128. No changes were made in response to this comment.

Comment: Commenter recommends deleting §180.26(i)(2)(B) and (C) because these subparagraphs require system participants to acknowledge that DWC "appropriately" considered the factors and that the ordered sanction is "appropriate." Commenter states that system participants should be able to agree to informal disposition without admitting that either a violation or sanction was appropriately considered by DWC. Commenter further states that the deletion would give more flexibility for both DWC and system participants to negotiate an informal disposition.

Response: DWC appreciates the comment. DWC declines to delete subparagraph (B) in its entirety because §415.021(c-1)(3) requires that as part of a consent order DWC communicate the factors it considered in the determination of a proposed penalty. However, DWC has deleted subparagraph (C) and the term "appropriately" from subparagraph (B) to allow for more flexibility between the parties during negotiations.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: Concentra and Office of Injured Employee Counsel

For, with changes: Insurance Council of Texas

4. STATUTORY AUTHORITY. Amended §180.8 and §180.26 are adopted under the authority of Labor Code §§402.00111, 402.00116, 402.00128, 402.061, 415.021, and 415.032. The adopted amendments support the implementation of the Workers' Compensation Act, Labor Code Title 5, Subtitle A.

Labor Code §402.00111 states that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Texas Workers' Compensation Act.

Labor Code § 402.00116 states that the commissioner of workers' compensation is DWC's chief executive and administrative officer and shall administer and enforce the Texas Workers' Compensation Act, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the division or the commissioner of workers' compensation.

Labor Code §402.00128 states that the commissioner of workers' compensation shall conduct the daily operations of DWC and otherwise implement policy and, among other functions, may delegate, assess, and enforce penalties; and enter appropriate orders.

Labor Code §402.061 states that the commissioner shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §415.021 states that the commissioner shall adopt rules that require DWC, in the assessment of an administrative penalty against a person, to communicate

to the person information about the penalty, including the relevant statute or rule violated, the conduct that gave rise to the violation, and the factors considered in determining the penalty.

Labor Code §415.032 states that if an investigation by DWC indicates that an administrative violation has occurred, DWC shall notify the person alleged to have committed the violation in writing of various items including the charge. This statute also states steps the person alleged is required to take before the 20th day the noticed was received.

5. TEXT.

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

§180.8. Notices of Violation; Notices of Hearing; Default Judgments

(a) A notice of violation (NOV) is a notice issued to a system participant when the division finds that the system participant has committed an administrative violation and the division seeks to impose a sanction under the Act or division rules. An NOV is not required to be issued before or after the issuance of an ex parte emergency cease and desist order.

(b) An NOV shall be in writing and include:

(1) the provision(s) of the Act, rule, order, or decision of the commissioner that the system participant violated;

(2) a summary of the facts that establish that the violation(s) occurred;

(3) a description of the proposed sanction that the division intends to impose;

(4) a statement of the basis for the proposed sanction including:

(A) a description of the underlying facts considered by the division for each of the factors listed in Labor Code §415.021(c) (relating to Assessment of Administrative Penalties) and §180.26 of this title (relating to Criteria for Proposing, Recommending and Determining Sanctions; Other Remedies) in determining the appropriateness of the division's proposed sanction;

(B) a description of which factors under Labor Code §415.021(c) and §180.26 of this title had a mitigating or aggravating effect on the division's proposed sanctions; and

(C) a description of the division's proposed sanction for each violation or violation type in the case of repeated administrative violations. This requirement does not prohibit the division from considering the aggregate impact of all administrative violations described in the NOV when proposing a sanction if justice requires such consideration;

(5) the right to consent to the charge and the proposed sanction(s);

(6) the right to request a hearing; and

(7) other information about the rights, obligations, and procedures for requesting a hearing.

(c) The charged party shall file a written answer to the NOV not later than the twentieth day after the day the notice is received. The answer shall either consent to the proposed sanction, and remit the amount of the penalty, if any, or request a hearing by being filed with the division's chief clerk of proceedings. If the charged party fails to respond to the NOV within 20 days of receipt of the notice, the division shall schedule a

hearing at the State Office of Administrative Hearings (SOAH) and provide notice of hearing to the charged party that meets the requirements of §148.5 of this title (relating to Notice of Hearing) and must include the information in subsection (b)(3) and (4) of this section.

(d) A charged party that receives a notice of hearing under subsection (c) of this section shall, within 20 days of the date on which the notice of hearing is provided to the party, file a written answer or other responsive pleading. Such response shall be filed in accordance with 1 TAC §155.101 of this title (relating to Filing Documents) and §155.103 of this title (relating to Service of Documents on Parties).

(e) For purposes of this section, events described in paragraphs (1) or (2) of this subsection constitute a default on the part of a charged party who receives a notice of hearing under subsection (c) of this section:

(1) failure of the charged party to file a written response as provided by subsection (d) of this section; or

(2) failure of the charged party to appear in person or by legal representative on the day and at the time set for hearing in a contested case at SOAH, regardless of whether a written response has been filed.

(f) In the event that a charged party defaults as described by subsection (e) of this section, the division may seek informal disposition by default by the commissioner as permitted by Government Code §2001.056.

(g) For purposes of this subchapter, "disposition by default" shall mean the issuance of an order against the charged party in which the allegations against the party in the notice of hearing are deemed admitted as true, upon the offer of proof to the

commissioner that proper notice was provided to the defaulting party. For purposes of this section, proper notice means notice sufficient to meet the provisions of the Government Code §2001.051 and §2001.052 and §148.5 of this title (relating to Notice of Hearing).

(h) After informal disposition of a contested case by default, a charged party may file a written motion to set aside the default order and reopen the record. A motion by the charged party to set aside the default order and reopen the record shall be granted by the commissioner if the charged party establishes that the failure to file a written response or to attend the hearing was neither intentional nor the result of conscious indifference, and that such failure was due to a mistake or accident. A motion to set aside the default order and reopen the record shall be filed by the charged party with the division's chief clerk of proceedings prior to the time that the order of the commissioner becomes final pursuant to the applicable provisions of Government Code, Chapter 2001, Subchapter F.

(i) A motion to set aside the default order and reopen the record is not a motion for rehearing and is not to be considered a substitute for a motion for rehearing. A motion for rehearing is required in order to exhaust administrative remedies. The filing of a motion to set aside the default order and reopen the record has no effect on either the statutory time periods for the filing of a motion for rehearing or on the time period for ruling on a motion for rehearing, as provided in applicable provisions of the Government Code, Chapter 2001, Subchapter F.

SUBCHAPTER B. MEDICAL BENEFIT REGULATION

§180.26. Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies.

(a) The division may impose sanctions on any system participant if that system participant commits an administrative violation.

(b) The division may impose the following sanctions against a doctor or insurance carrier for any reason listed in Labor Code §408.0231(c) or any other criteria the commissioner considers relevant:

(1) reduction of allowable reimbursement to a doctor (such as an automatic percentage reduction on all or some types of health care);

(2) mandatory preauthorization or utilization review of all or certain health care treatments and services (such as mandatory treatment plans);

(3) required supervision or peer review monitoring, reporting, and audit (by the insurance carrier, the division, or an independent auditor or reviewer);

(4) deletion or suspension from the designated doctor list;

(5) restrictions on appointments or reviews;

(6) conditions or restrictions on an insurance carrier regarding actions by insurance carriers under the Act and rules, that are not inconsistent with a memorandum of understanding adopted between the commissioner and the commissioner of insurance regarding the regulation of insurance carriers and utilization review agents as necessary to ensure that appropriate health care decisions are reached under applicable regulations by the department and the division, the Act, and Chapter 4201, Insurance Code; and

(7) mandatory participation in training classes or other courses as established or certified by the division.

(c) In addition to a penalty or the other sanctions that may be imposed in accordance with other applicable provisions of the Act, the division may also impose the following sanctions pursuant to Labor Code §415.023(b) against an insurance carrier or its representative, a health care provider, or a representative of an injured employee or legal beneficiary if any of those parties commit an administrative violation as a matter of practice, meaning a repeated violation of the Act or a rule, order, or decision of the commissioner:

(1) a reduction or denial of fees;

(2) public or private reprimand by the commissioner;

(3) suspension from practice before the division;

(4) restriction, suspension, or revocation of the right to receive reimbursement under the Act; and

(5) referral and petition to the appropriate licensing authority for appropriate disciplinary action, including the restriction, suspension, or revocation of the person's license.

(d) In addition to, or in lieu of, the sanctions in subsections (b) and (c) of this section, the division may impose any other sanction or remedy allowed under the Act or division rules, including but not limited to assessing an administrative penalty of up to $25,000 per violation against a person who commits an administrative violation.

(e) When determining which sanction to impose against a system participant and the severity of that sanction, the division shall consider the factors listed in Labor Code §415.021(c) and other matters that justice may require, including but not limited to:

(1) Performance Based Oversight (PBO) assessment;

(2) the promptness and earnestness of actions to prevent future violations;

(3) self-report of the violation;

(4) the size of the company or practice;

(5) the effect of a sanction on the availability of health care; and

(6) evidence of heightened awareness of the legal duty to comply with the Act and division rules.

(f) In an investigation where both an administrative violation and a criminal prosecution are possible, the division may, at its discretion, postpone action on the administrative violation until the related criminal prosecution is completed.

(g) As an alternative to imposing a sanction such as an administrative penalty on a charged system participant, the division may, at its discretion, provide formal notice of the violation through a Warning Letter. A Warning Letter shall:

(1) include a summary of the duty that the division believes that the charged system participant failed to fulfill or timely fulfill;

(2) identify the facts that establish that a violation occurred; and

(3) inform the charged system participant that subsequent noncompliance of the same sort may be deemed to be a repeated administrative violation or matter of practice any of which will be subject to sanction.

(h) The division may enter into a consent order with the system participant if the division and the system participant have communicated regarding:

(1) the relevant statute or rule violated;

(2) the facts establishing that the administrative violation occurred; and

(3) the appropriateness of the proposed sanction, including how the division considered the factors under Labor Code §415.021(c) and subsection (e) in determining the proposed sanction.

(i) A consent order may be entered into before or after issuance of an NOV under §180.8 of this title (relating to Notices of Violation; Notices of Hearing; Default Judgments). Consent orders must include:

(1) a description of which factors under Labor Code §415.021(c) and subsection (e) of this section the division considered aggravating or mitigating when determining the proposed sanction; and

(2) a statement that the system participant acknowledges:

(A) the division and the system participant communicated regarding the information listed in subsection (h)(1)-(3) of this section; and

(B) the division considered the factors under Labor Code §415.021(c) and subsection (e) of this section.

6. CERTIFICATION.

The agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of DWC's legal authority.

Issued at Austin, Texas, on the 20th day of December, 2018.

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Cassie Brown
Commissioner of Workers' Compensation

COMMISSIONER'S ORDER NO. _____

ATTEST:

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Nicholas Canaday III
General Counsel
Texas Department of Insurance,
Division of Workers' Compensation