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

INTRODUCTION. The Texas Department of Insurance, Division of Workers' Compensation (DWC) proposes an amendment to 28 Texas Administrative Code (TAC) §180.8, *Notices of Violation; Notices of Hearing; Default Judgments* and §180.26, *Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies*. The proposed amendments are necessary to implement Senate Bill (SB) 1895, 85th Legislature, Regular Session, which was effective September 1, 2017. SB 1895 amended Labor Code §415.021(c), *Assessment of Administrative Penalties,* to require the commissioner to 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 to people when assessing administrative penalties against them, including the relevant statute or rule violated, the conduct that gave rise to the violation, and the factors considered in determining the penalty.

DWC first published proposed amendments to §180.8 and §180.26 of this title on May 18, 2018 (43 Tex Reg 3226). A public hearing was held on August 2, 2018. In response to the public comments received, DWC has withdrawn its first proposal and is proposing these amendments in its place.

Section 180.8 addresses **Notices of Violation; Notices of Hearing; Default Judgments.** DWC proposes amending §180.8(b)(4) and (c) to require a Notice of Violation (NOV) to 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 §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. The section currently requires that the NOV include the statute or rule violated and the conduct that gave rise to the violation. This proposed addition will implement SB 1895 and ensure that DWC communicates necessary information to affected persons when assessing administrative penalties or other sanctions.

Section 180.26 addresses **Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies**. DWC proposes amending §180.26(h) and (i) to implement the provisions in Labor Code §415.021(c-1) which requires 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 the division 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 this proposal will implement SB 1895 by memorializing the division's current practices and ensuring that DWC communicates necessary information when assessing

administrative penalties or other sanctions. The proposed 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 proposed amendment to §180.26(i) requires that consent orders include a statement acknowledging that DWC and the system participant communicated regarding the information added to §180.26(h), that DWC appropriately considered the factors under Labor Code §415.021(c) and §180.26(e), and that the sanction is appropriate. Additional non-substantive editorial changes are made to §180.26 to align its language with DWC's style guide and correct grammatical errors.

FISCAL NOTE. Marisa Lopez Wagley, Associate Commissioner of Enforcement, has determined that for each year of the first five years the amended sections are in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposed amendments.

PUBLIC BENEFIT AND COSTS. Ms. Wagley has also determined that, for each of the first five years amended §180.8 and §180.26 are in effect, the public benefits anticipated include aligning the rules with the current statute to minimize confusion and increasing transparency within the workers' compensation system. Transparency will be increased by the additional communication that will be provided when DWC assesses an administrative penalty or other sanction against a person.

ANTICIPATED COSTS TO COMPLY WITH THE PROPOSAL. Ms. Wagley anticipates that, for each of the first five years the amendments of §180.8 and §180.26 are in effect, there will be no costs to persons required to comply with the proposal. The proposed amendments do not change the circumstances under which an administrative penalty or other sanction is assessed and enforced. Instead, the amendments are just a memorialization of current practices of providing additional information to persons subject to administrative penalties.

Government Code §2001.0045 requires a state agency to offset any costs associated with a proposed rule by: (1) repealing a rule imposing a total cost that is equal to or greater than that of the proposed rule; or (2) amending a rule to decrease the total cost imposed by an amount that is equal to or greater than the cost of the proposed rule. As described above, DWC has determined that the proposed amendments will not impose a cost on system participants. Therefore, an offset is not necessary.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. Government Code §2006.002(c) provides that if a proposed rule may have an adverse economic effect on small businesses, micro-businesses, or rural communities, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the

purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. Government Code §2006.001(1) defines "micro business" similarly to "small business" but specifies that such a business may not have more than 20 employees. Government Code §2006.001(1-a) defines a "rural community" as a municipality with a population of less than 25,000.

In accordance with Government Code §2006.002(c), DWC has determined that the proposed amendments to §180.8 and §180.26 will not have an adverse economic effect on small businesses, micro-businesses, or rural communities. Therefore, a regulatory flexibility analysis is not required.

GOVERNMENT GROWTH IMPACT STATEMENT. Government Code §2001.0221 requires that a state agency prepare a government growth impact statement describing the effects that a proposed rule may have during the first five years that the rule would be in effect. The proposed amendments to §180.8 and §180.26 will not create or eliminate a government program and will not require the creation or elimination of existing employee positions. The proposed amendments will not require an increase or decrease in future legislative appropriations to DWC and will not result in an increase or decrease in fees paid to the division. The proposal does not create a new regulation or limit an existing regulation. The proposal does expand an existing regulation as required by statute.

TAKINGS IMPACT ASSESSMENT. DWC has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. Therefore, this proposal does not constitute a regulatory taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you would like to comment on this proposal, please submit your written comments by 5:00 p.m. CST on December 3, 2018. Written comments may be sent by email to rulecomments@tdi.texas.gov or by mail to Ashley Hyten, Texas Department of Insurance, Division of Workers' Compensation, Office of the General Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

DWC will hold a public hearing on Friday, November 16, 2018, at 10:00 a.m. in the Tippy Foster Room at the DWC Central Office, 7551 Metro Center Drive, Suite 100, in Austin, Texas. Written comments and public testimony presented at the hearing will be considered.

STATUTORY AUTHORITY. Amended §180.8 and §180.26 are proposed under the authority of Labor Code §401.024, *Transmission of Information*; Labor Code §402.00111, *Relationship Between Commissioner of Insurance and Commissioner of Workers' Compensation;* Labor Code §402.00116, *Chief Executive*; *Separation of Authority; Rulemaking*; Labor Code §402.00128, *General Powers and Duties of Commissioner;* Labor Code §402.061, *Adoption of Rules*; Labor Code §415.021*,*

Assessment of Administrative Penalties; and Labor Code §415.032, *Notice of Possible Administrative Violation; Response*. The proposed amendments support the implementation of the Workers' Compensation Act, Labor Code Title 5, Subtitle A.

Labor Code §401.024 states that the commissioner may prescribe the form and manner for transmitting any authorized or required electronic transmission.

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.

The proposed amendments affect the Texas Workers' Compensation Act, Texas Labor Code, Title 5, Subtitle A.

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. A NOV is not required to be issued before or after the issuance of an ex parte emergency cease and desist order.

(b) A 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)~~(4)~~ the right to consent to the charge and the proposed sanction(s);

(6)~~(5)~~ the right to request a hearing; and

(7)~~(6)~~ 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 (relating to Filing Documents) and §155.103 (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.

(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 [auditor/reviewer]);

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

(5) restrictions on appointments or reviews;

(6) conditions or restrictions on an[~~a~~] 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 [~~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 [~~, at its discretion,~~] 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 whether the division appropriately considered the factors under Labor Code §415.021(c) and subsection (e) of this section in determining the proposed sanction.

(i) A consent order may be entered into before or after issuance of a NOV [~~is issued~~] 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;

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

(C) the ordered sanction is appropriate.

CERTIFICATION.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued at Austin, Texas, on October 19, 2018.

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