The Texas Department of Insurance, Division of Workers' Compensation (DWC) adopts amendments to §180.8 (concerning Notices of Violation; Notices of Hearing; Default Judgment) and §180.26 (concerning Criteria for Imposing, Recommending and Determining Sanctions; Other Remedies). The proposed amendments were published on October 25, 2019, at 44 TexReg 6226. The amendments are adopted without changes.

REASONED JUSTIFICATION

These rules are adopted as required under Senate Bill (SB) 2551, 86th Legislature (2019). Senate Bill 2551 amended both the Workers' Compensation Act, Labor Code Title 5 (Act), and Government Code Chapter 607, Subchapter B (Subchapter B) (relating to Diseases and Illnesses Suffered by Firefighters, Peace Officers, and Emergency Medical Technicians (EMTs) (collectively "first responders")). A separate bill, SB 1582, added peace officers to the list of first responders covered by Subchapter B. As these adopted rules will apply uniformly to all first responders covered by Subchapter B, no additional rulemaking is required to implement SB 1582. These amendments are adopted concurrently with amendments to Chapter 124, which address both an insurance carrier's obligation to investigate and the notification process for presumption claims for first responders. The adopted amendments to Chapter 180 conform the rules regarding the factors DWC must consider when assessing an administrative violation with statutory changes made by SB 2551. The reasoned

justifications for the amendments to Chapters 124 and 180 are meant to be read together, and each is incorporated by reference into the other.

Subchapter B applies to certain occupational diseases or illnesses suffered by first responders who meet the qualifications set forth. Subchapter B applies to first responders who received a physical examination upon or during employment that did not reveal evidence of the illness or disease for which benefits or compensation is sought, who have been employed for five years or more as a first responder, and who seek benefits or compensation for a disease or illness covered by the subchapter that is discovered during employment as a first responder. Gov't Code §607.052(a). The diseases and illnesses covered by Subchapter B are tuberculosis or other respiratory illness, smallpox, reactions to vaccinations, cancer (firefighters and EMTs only), and acute myocardial infarction or stroke. §§607.053-607.056.

The presumptions under Subchapter B do not apply to a determination of a survivor's eligibility for benefits under Government Code Chapter 615, (relating to Financial Assistance to Survivors of Certain Law Enforcement Officers, Fire Fighters, and Others), in a cause of action brought in court except for judicial review of a grant or denial of employment-related benefits or compensation, to a determination regarding benefits or compensation under a life or disability insurance policy. Furthermore, a presumption does not apply if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and if either the first responder is

or has been a user of tobacco or if the their spouse has, during the marriage, smoked tobacco. §607.052(b). The presumptions under Subchapter B apply to a determination of whether a first responder's disability or death resulted from a disease or illness contracted in the course and scope of employment for purposes of benefits or compensation. §607.057.

Senate Bill 2551 amended Subchapter B to direct that four specified types of cancer and cancers originating in seven specified organs might trigger the presumption under Government Code §607.055. Senate Bill 2551 also amended the requirements for rebutting a presumption. A presumption can be rebutted through showing, by a preponderance of the evidence, that a risk factor, accident, hazard, or other cause not associated with an individual's service as a first responder was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred. §607.058(a). A rebuttal must include a statement that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a first responder was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred. §607.058(b).

Senate Bill 2551 also amended the Act to provide an insurance carrier with an additional option at the 15th day after receiving written notice of a first responder's disability or death for which a presumption may be applicable under Subchapter B.

Labor Code §409.021(a-3). Generally, at the 15th day, an insurance carrier must either begin the payment of benefits or notify the injured employee and DWC in writing of its refusal to pay. §409.021(a). An insurance carrier now has the option, at the 15th day, of providing a first responder and DWC with a notice, referred to in these rules as a "Notice of Continuing Investigation," that describes all steps taken by the insurance carrier to investigate the disability or death before notice was given and the information the insurance carrier reasonably believes is necessary to complete its investigation of the compensability of the injury. §409.021(a-3).

The bill also amended Labor Code §415.021, to require that the commissioner consider whether the employee cooperated with the insurance carrier's investigation of the claim and whether the employee timely authorized access to the relevant medical records when determining whether to assess an administrative penalty involving a claim in which the insurance carrier provided a Notice of Continuing Investigation. The commissioner shall also consider whether the insurance carrier conducted an investigation of the claim, applied the statutory presumptions under Subchapter B, and expedited medical benefits under Labor Code §504.055 (relating to Expedited Provision of Medical Benefits for Certain Injuries Sustained by First Responder in Course and Scope of Employment).

The changes in law made by SB 2551 apply to a claim for benefits filed on or after June 10, 2019, the effective date of SB 2551. Section 8 of SB 2551 provides that the

amendments to Government Code §607.055 and §607.058 apply only to a claim for benefits filed on or after June 10, 2019. Section 10 of SB 2551 provides that Labor Code §504.053(e)(1) applies only to administrative violations that occur on or after June 10, 2019. The adopted amendments will not apply to a claim for benefits filed before June 10, 2019.

DWC posted an informal draft of these amendments on its website for comment and hosted a stakeholder meeting on Wednesday, August 21, 2019. Subsequently, and in response to the comments received, DWC published proposed amendments in the *Texas Register* and held a public hearing on Wednesday, November 20, 2019.

Pursuant to the directives of SB 2551, DWC is conforming existing rules with new statutory language. The amendments to Rule 180.8(b) describe the requirements for a Notice of Violation (NOV). The adopted amendments to subsection (b)(4)(A)-(B) incorporate by reference a new factor under §415.021(c-2). Under the adopted amendments, if applicable, an NOV will demonstrate that DWC considered the factors in §415.021(c-2) before determining whether to assess an administrative penalty involving a claim in which the insurance carrier provided notice under §409.021(a-3).

In addition, the amendments to Rule 180.26 implement the criteria for imposing, recommending, and determining sanctions. The amendments include a subsection (f), which provides that DWC shall consider the factors in Labor Code §415.021(c-2) when

determining which sanction to impose in claims where the insurance carrier provided a Notice of Continuing Investigation.

Throughout Rules 180.8 and 180.26, additional non-substantive editorial changes are adopted to correct errors of grammar and punctuation, clarify wording, and to conform to the agency's style guidelines.

Finally, SB 2551 required that DWC adopt rules as required by or necessary to implement the bill. DWC adopts these amendments to implement SB 2551.

SUMMARY OF COMMENTS AND AGENCY RESPONSE

Texas Mutual Insurance Company and the Office of Injured Employee Counsel submitted comments offering general support of the implementation of SB 2551 and against the adoption of certain specific provisions.

Comment: Two commenters offered general support for the proposed rules.

Response: DWC appreciates the supportive comments.

Comment: One commenter raised a specific question regarding the amendments to §124.2(h)(1)(B) and (h)(2) and the "application of these subsections" to §180.8 and §180.26. The commenter states that the proposed amendments to §124.2 could be

interpreted as imposing a deadline on the injured employee to provide the insurance carrier with evidence or documentation to support their claim, which is unduly burdensome. Further, the commenter suggests that failure for an injured employee to comply with the insurance carrier's request may result in a denial of the claim, loss of benefits, and precludes any administrative violation against the insurance carrier.

Response: DWC appreciates the comment but disagrees that it has applied the requirements of §124.2(h)(1)(B) and (h)(2) to §180.8 and §180.26. The adopted amendments to §180.8 and §180.26 simply conform the language in these rules with changes made to Labor Code §415.021(c-2) by SB 2551, which requires the commissioner to consider additional factors when assessing administrative penalties in claims involving a presumption under Subchapter B. Failure by an injured employee to provide information requested by an insurance carrier does not preclude any administrative violation against the insurance carrier for noncompliance with the Act and DWC rules. DWC notes that amendments to §124.2(h)(1)(B) and (h)(2), address the contents of a Notice of Continuing Investigation and an insurance carrier's obligation to provide a claimant with a reasonable amount of time to respond. These amendments do not impose deadlines on injured employees. Rather, they provide an injured employee with plain language information about the steps the insurance carrier has taken to investigate their claim and a description of the information the insurance carrier believes it needs to complete the investigation, including any information needed from the injured employee. No changes were made as a result of this comment.

SUBCHAPTER A. GENERAL RULES FOR ENFORCEMENT

28 TAC §180.8

STATUTORY AUTHORITY FOR §180.8

The adopted rules are authorized by Texas Labor Code §§402.00111, 402.00116, 402.00128, 402.021, 402.061, 409.021, 409.022, 414.002, and 415.021; Government Code §607.052 and §607.058; and SB 2551 §9.

Section 402.00111(a) provides that the commissioner of workers' compensation "shall exercise all executive authority, including rulemaking authority under [the Act]."

Section 402.00116 provides that the commissioner is the chief executive and administrative officer of the agency with all the powers and duties vested under the Act.

Section 402.00128 describes the general powers and duties of the commissioner, including assessing and enforcing penalties and prescribing the form, manner, and procedure for the transmission of information to DWC.

Section 402.021 provides that a basic goal of the Texas workers' compensation system is that each employee shall be treated with dignity and respect when injured on the job and that it is the intent of the Legislature that the workers' compensation system must minimize the likelihood of disputes and resolve them promptly and fairly when identified

and effectively educate and clearly inform each system participant of their rights and responsibilities under the system and how to appropriately interact within the system.

Section 402.061 provides that "[t]he commissioner shall adopt rules as necessary for the implementation and enforcement of [the Act]."

Section 409.021(a) sets forth the general rule that "[n]ot later than the 15th day after the date on which an insurance carrier receives written notice of injury, the insurance carrier shall [either]: (1) begin payment of benefits as required by [the Act]; or (2) notify the division and the employee in writing of its refusal to pay and [their procedural rights]." Section 409.021(a-3) provides that "[a]n insurance carrier is not required to comply with Subsection (a) if the claim results from an injured employee's disability or death for which a presumption is claimed to be applicable under Subchapter B … and, not later than the 15th day after the date on which the insurance carrier received written notice of the injury, the insurance carrier has provided the employee and the division with a notice that describes all steps taken by the insurance carrier to investigate the injury. Section 409.021(a-3) also requires the commissioner to adopt rules as necessary to implement that subsection. Section 409.021(d) provides that "[a]n insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier."

Section 409.022(c) provides that "[a]n insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commissioner. Section 409.022(d) provides that, "if an insurance carrier's notice of refusal to pay benefits under Section 409.021 is sent in response to a claim for compensation resulting from [a first responder's] disability or death for which a presumption is claimed to be applicable under Subchapter B, … the notice must include a statement by the insurance carrier that: (1) explains why the carrier determined a presumption under that subchapter does not apply to the claim for compensation; and (2) describes the evidence that the carrier reviewed in making the determination described by Subdivision (1)."

Section 414.002 provides that DWC shall monitor the system for compliance with the Act and rules as well as other laws relating to workers' compensation.

Section 415.021(c-2) provides that "[i]n determining whether to assess an administrative penalty involving a claim in which the insurance carrier provided notice under Section 409.021(a-3), the commissioner shall consider whether: (1) the employee cooperated with the insurance carrier's investigation of the claim; and (2) the employee timely authorized access to the applicable medical records."

Government Code §607.052(a) provides that "[n]otwithstanding any other law, this subchapter applies only to a firefighter, peace officer, or [EMT] who: (1) on becoming

employed or during employment as a firefighter, peace officer, or [EMT], received a physical examination that failed to reveal evidence of the illness or disease for which benefits or compensation are sought using a presumption established by this subchapter; (2) is employed for five or more years as a firefighter, peace officer, or [EMT]; and (3) seeks benefits or compensation for a disease or illness covered by this subchapter that is discovered during employment as a firefighter, peace officer, or [EMT]."

Section 607.052(b) provides that "[a] presumption under this subchapter does not apply: (1) to a determination of a survivor's eligibility for benefits under Chapter 615; (2) in a cause of action brought in a state or federal court except for judicial review of a proceeding in which there has been a grant or denial of employment-related benefits or compensation; (3) to a determination regarding benefits or compensation under a life or disability insurance policy purchased by or on behalf of the firefighter, peace officer, or [EMT] that provides coverage in addition to any benefits or compensation required by law; or (4) if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and: (A) the firefighter, peace officer, or [EMT] is or has been a user of tobacco; or (B) their spouse has, during the marriage, been a user of tobacco that is consumed through smoking."

Section 607.058(a) provides that "[a] presumption under §§607.053, 607.054, 607.055, or 607.056 may be rebutted through a showing by a preponderance of the evidence that

a risk factor, accident, hazard, or other cause not associated with the individual's service as a firefighter, peace officer, or [EMT] was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred." Subsection (b) provides that "[a] rebuttal offered under [§607.058] must include a statement by the person offering the rebuttal that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a firefighter, peace officer, or [EMT] was a substantial factor in bringing about the individual's disease or illness without which the disease or illness would not have occurred."

Finally, §9 of SB 2551 requires that the commissioner adopt rules as required by or necessary no later than January 1, 2020.

The adopted amendments support the implementation of the Workers' Compensation Act, Texas Labor Code Title 5, Subtitle A.

§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) and (c-2), if applicable, (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 (c-2), if applicable, 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 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

28 TAC §180.26

STATUTORY AUTHORITY FOR §180.26

The adopted rules are authorized by Texas Labor Code §§402.00111, 402.00116, 402.00128, 402.021, 402.061, 409.021, 409.022, 414.002, and 415.021; Government Code §607.052 and §607.058; and SB 2551 §9.

Section 402.00111(a) provides that the commissioner of workers' compensation "shall exercise all executive authority, including rulemaking authority under [the Act]." Section 402.00116 provides that the commissioner is the chief executive and administrative officer of the agency with all the powers and duties vested under the Act.

Section 402.00128 describes the general powers and duties of the commissioner, including assessing and enforcing penalties and prescribing the form, manner, and procedure for the transmission of information to DWC.

Section 402.021 provides that a basic goal of the Texas workers' compensation system is that each employee shall be treated with dignity and respect when injured on the job and that it is the intent of the Legislature that the workers' compensation system must minimize the likelihood of disputes and resolve them promptly and fairly when identified and effectively educate and clearly inform each system participant of their rights and responsibilities under the system and how to appropriately interact within the system.

Section 402.061 provides that "[t]he commissioner shall adopt rules as necessary for the implementation and enforcement of [the Act]."

Section 409.021(a) sets forth the general rule that "[n]ot later than the 15th day after the date on which an insurance carrier receives written notice of injury, the insurance carrier shall [either]: (1) begin payment of benefits as required by [the Act]; or (2) notify the division and the employee in writing of its refusal to pay and [their procedural rights]." Section 409.021(a-3) provides that "[a]n insurance carrier is not required to comply with Subsection (a) if the claim results from an injured employee's disability or death for which a presumption is claimed to be applicable under Subchapter B … and, not later

than the 15th day after the date on which the insurance carrier received written notice of the injury, the insurance carrier has provided the employee and the division with a notice that describes all steps taken by the insurance carrier to investigate the injury. Section 409.021(a-3) also requires the commissioner to adopt rules as necessary to implement that subsection. Section 409.021(d) provides that "[a]n insurance carrier may reopen the issue of the compensability of an injury if there is a finding of evidence that could not reasonably have been discovered earlier."

Section 409.022(c) provides that "[a]n insurance carrier commits an administrative violation if the insurance carrier does not have reasonable grounds for a refusal to pay benefits, as determined by the commissioner. Section 409.022(d) provides that, "if an insurance carrier's notice of refusal to pay benefits under Section 409.021 is sent in response to a claim for compensation resulting from [a first responder's] disability or death for which a presumption is claimed to be applicable under Subchapter B, … the notice must include a statement by the insurance carrier that: (1) explains why the carrier determined a presumption under that subchapter does not apply to the claim for compensation; and (2) describes the evidence that the carrier reviewed in making the determination described by Subdivision (1)."

Section 414.002 provides that DWC shall monitor the system for compliance with the Act and rules as well as other laws relating to workers' compensation.

Section 415.021(c-2) provides that "[i]n determining whether to assess an administrative penalty involving a claim in which the insurance carrier provided notice under Section 409.021(a-3), the commissioner shall consider whether: (1) the employee cooperated with the insurance carrier's investigation of the claim; and (2) the employee timely authorized access to the applicable medical records."

Government Code §607.052(a) provides that "[n]otwithstanding any other law, this subchapter applies only to a firefighter, peace officer, or [EMT] who: (1) on becoming employed or during employment as a firefighter, peace officer, or [EMT], received a physical examination that failed to reveal evidence of the illness or disease for which benefits or compensation are sought using a presumption established by this subchapter; (2) is employed for five or more years as a firefighter, peace officer, or [EMT]; and (3) seeks benefits or compensation for a disease or illness covered by this subchapter that is discovered during employment as a firefighter, peace officer, or [EMT]."

Section 607.052(b) provides that "[a] presumption under this subchapter does not apply: (1) to a determination of a survivor's eligibility for benefits under Chapter 615; (2) in a cause of action brought in a state or federal court except for judicial review of a proceeding in which there has been a grant or denial of employment-related benefits or compensation; (3) to a determination regarding benefits or compensation under a life or disability insurance policy purchased by or on behalf of the firefighter, peace officer, or

[EMT] that provides coverage in addition to any benefits or compensation required by law; or (4) if the disease or illness for which benefits or compensation is sought is known to be caused by the use of tobacco and: (A) the firefighter, peace officer, or [EMT] is or has been a user of tobacco; or (B) their spouse has, during the marriage, been a user of tobacco that is consumed through smoking."

Section 607.058(a) provides that "[a] presumption under §§607.053, 607.054, 607.055, or 607.056 may be rebutted through a showing by a preponderance of the evidence that a risk factor, accident, hazard, or other cause not associated with the individual's service as a firefighter, peace officer, or [EMT] was a substantial factor in bringing about the individual's disease or illness, without which the disease or illness would not have occurred." Subsection (b) provides that "[a] rebuttal offered under [§607.058] must include a statement by the person offering the rebuttal that describes, in detail, the evidence that the person reviewed before making the determination that a cause not associated with the individual's service as a firefighter, peace officer, or [EMT] was a substantial factor in bringing about the individual's disease or illness without which the disease or illness would not have occurred."

Finally, §9 of SB 2551 requires that the commissioner adopt rules as required by or necessary no later than January 1, 2020.

The adopted amendments support implementation of the Workers' Compensation Act, Labor Code Title 5, Subtitle A.

§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.

(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) When determining which sanction to impose against a system participant and the severity of that sanction in claims where the insurance carrier provided notice under Section 409.021(a-3), (Notice of Continuing Investigation), the division shall consider the factors listed in Labor Code §415.021(c-2).

(g) 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.

(h) 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.

(i) 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 (c-2) and subsection (e) of this section in determining the proposed sanction.

(j) 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 (c-2) and subsection (e) of this section the division considered aggravating or mitigating when determining the proposed sanctions; 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 (c-2) and subsection (e) of this section.

CERTIFICATION

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

Issued at Austin, Texas, on December _____, 2019.

_____

Cassie Brown
Commissioner
Texas Department of Insurance, Division of Workers' Compensation