

FLAHIVE, OGDEN & LATSON

ADVISORY NO. 39

TOPIC: NOTICE OF ADMINISTRATIVE VIOLATION

The first Notice of Administrative Violation has been issued against one of our clients.

Attached is a blanked copy of the violation which we are required to acknowledge.

We will secure a copy of all codes for possible violations. This particular violation cites Art. 5.21(b) "FAILURE TO PAY OR CONTROVERT PAYMENT WITHIN 7 DAYS FROM RECEIPT OF WRITTEN NOTICE."

The penalty in the example case is \$1,000.

Remember what we have said at all the seminars and in the Texas Workers' Compensation Manual. The commission, in essence, finds you guilty, assesses a penalty certain and then gives you the right to be heard.

We are setting up an extensive logging, check and cross-check procedure. After we sign for the notice of penalty, the 20-day period to request a hearing begins. Failure to comply subjects you to a penalty of up to \$10,000, so extensive checks and rechecks with personal follow-up will be necessary if we are to meet the challenges.

We will chronologically do the following:

1. Sign the acknowledgement for penalty as required.
2. The same day, we will fax the Notice to the claim manager.
3. We ask that within 24 hours you fax your acknowledgement as provided in the return space on our notice of violation transmittal letter and check the following appropriately:
 - We already know we want to appeal this penalty, so please timely request a hearing. We are sending you relevant portions of our file.
 - We may appeal, but ask that you diary for final answer on the 14th day after date of order issuance if you have not heard from us before then.
 - Please advise the commission that we have elected to pay the penalty. We will forward a check to your office for delivery no later than 14 days after the date of initial order issuance and before the 20-day deadline.

Contact _____ in our office at

Telephone No. 1-800-_____, Ext. _____ for further information and handling.

Due to the serious potential represented by this portion of the statute and procedures, address all your correspondence, questions and comments to Ron Ogden.

What happens if you request a hearing before the Commission and lose? You then have the right to appeal to the District Courts in Travis County under the Administrative Procedures Texas Register Act ("APTRA"). Only Austin, Travis County, has venue.

It is too early to know if the commission will "bargain" a penalty. Initial indications are in the negative to this possibility. There may not be an effective defense to many of these deadline penalties, where your own date stamp provides the unequivocal basis for the penalty. We might want to argue that the amount of the penalty is excessive.

Our general recommendation is that you authorize us to appeal penalties until more ground rule information can be obtained. Our charges will be based on time involved. As you know, penalties are a non-claim expense if the sole problem is with the carrier's handling.

We would not want to see clients voluntarily pay large fines unless required to do so. It may be prudent to await a final plan of action until the constitutionality of the statute is upheld. On the other hand, no one would want to be a target for detailed investigation by the commission searing for violation. We need to discuss this on a case by case basis.

FLAHIVE, OGDEN & LATSON

Advisory No. 39

March 10, 1992