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Section 10225.1 (f) and (g)	**THE PROPOSED REGULATION ILLEGALLY AUTHORIZES A LABOR CODE SECTION 5814.6 ADMINISTRATIVE PENALTY BASED IN WHOLE OR IN PART UPON AN AWARD UNDER FORMER LABOR CODE SECTION 5814, REPEALED BY THE SAME LEGISLATION.** Proposed subdivision (f) states, "(f)~~(d)~~ No administrative penalty assessed pursuant to this section shall be based solely on penalty awards issued by workers' compensation administrative law judges before June 1, 2004 for violations of Labor Code section 5814. ~~conduct occurring before June 1, 2004.~~" Purportedly "[I]n reliance on *Abney v. Workers' Compensation Appeals Board* (Writ Denied, 2005) 70 Cal. Comp. Cases 460, subdivision (g) has been revised to state:" "(g)~~(e)~~ For the purposes of this section, penalty awards issued by workers' compensation administrative law judges before June 1, 2004 for violations of Labor Code section 5814 ~~based on conduct occurring on or after June 1, 2004~~ regardless of the date of injury, may be considered as evidence of a general business practice." These proposals are fatally defective under	David Mitchell Sr. Vice President Republic Indemnity September 22, 2006 Written Comment	We agree to delete (f) and (g).	Subdivisions (f) and (g) will be deleted.

	established California law, as they impose a new administrative penalty under LC 5814.6 for conduct under now repealed LC 5814, and which conduct is no longer proscribed under newly enacted LC 5814. Looking at the most recent legislative changes in order to determine legislative intent, it is apparent that in addition to repealing former LC 5814 and enacting a radically new and different LC 5814, the legislature has also drastically restricted most of the other workers' compensation penalty provisions. For example, it removed vocational rehabilitation from the reach of the 5814 penalty statute (by amending § 3207 to delete vocational rehabilitation from the definition of compensation); it eliminated any penalty for delays during Utilization Review (§ 4610.1); it eliminated any penalty for late payment of treatment billings where the treatment itself was timely authorized (§ 5814(e)); and it eliminated the increase rate of payment for delayed vocational rehabilitation (§ 4642, repealed in 2003 in AB 227). Thus, <u>much of what gave rise to an award of penalty under now repealed LC 5814 would not longer be penalized even under that statute</u>. Furthermore, in enacting SB 899, the Legislature specified that former section 5814 would become "inoperative" and therefore unenforceable as of 6/1/04, at which time the new section 5814 would become operative. <u>It defies all logic that the regulatory agency would consider imposing an administrative penalty under newly enacted LC 5814.6 for an</u>			

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	award under a prior statute legislatively mandated as inoperable (by the same statute that enacted LC 5814.6) and now completely repealed. In addition to the historic legislative restrictions of the reach of now repealed LC5814 as summarized above, and in addition to the direct legislative expression of intent that former LC 5814 be totally inoperative as also outlined above, relevant judicial precedent also prohibits a punitive administrative action based on an earlier finding of violation of statute which was subsequently changed to make the conduct no longer an offense under the law. For example, in an administrative proceeding not unlike the WCAB, a licensed physician's conviction of possession of marijuana (at a time when marijuana was statutorily classified as a narcotic drug under the Business and Professions Code) resulted in the initiation of proceedings for the revocation of his license. The doctor challenged the revocation and during the pendency of his appeal, the Legislature modified the governing statutory scheme by removing marijuana from the narcotic drug classification. The Court of Appeal, relying upon the statutory revision, reversed the administrative revocation order, declaring: "Since [the] mitigating amendment was enacted prior to the Board's decision becoming final (review…was pending at the time the amendment became effective),			

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	petitioner is entitled to the benefit thereof…." Under this above quoted analogous judicial precedent, it would be improper to assess a LC 5814.6 administrative fine based on an award made under now repealed LC 5814 (i.e., a mitigating amendment) for conduct which would not be a violation of the current LC 5814. The impropriety upon which that old LC 5814 penalty was premised is no longer an impropriety under the new statute. As such, California law prohibits the imposition of the regulatory action based on an award of a penalty under a now repealed statute. The Legislature is presumed to know both the statutes and case law already in existence and to enact new statutes in light thereof [See, e.g., *Arthur Anderson v. Superior Court* (1998) 67 Cal. App.4th 1481, 1500, 79 Cal. Rptr.2d 87], and the action taken by the regulator in regard to the foregoing proposed regulations is directly contrary to California law and thus cannot be approved by OAL.			
Section 10225.1 (i)(3) and (i)(4)	**LABOR CODE SECTION 5814 IMPOSES A PENALTY ONLY WHERE THERE IS AN UNREASONABLE DELAY IN PROVIDING COMPENSATION, NOT FOR LATE AUTHORIZATIONS OR OBJECTIONS OR BENEFIT NOTICES. PROPOSED REGULATION SUBDIVISION (I)(4) ILLEGALLY PENALIZES THE FAILURE TO PROVIDE A BENEFIT**	David Mitchell Sr. Vice President Republic Indemnity September 22, 2006 Written Comment	We agree to revise these subdivisions. A violation of Labor Code section 5814 can only occur "when payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the	The subdivisions will state: (3) For each penalty award by a workers' compensation administrative law judge for a violation of Labor

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	NOTICE/AUTHORIZATION, AND THUS IS BEYOND THE SCOPE OF THE REGULATOR'S AUTHORIZING LEGISLATION. Subdivision (i)(4) and (i)(3), as currently proposed, now read as follows: (4) For each penalty award by a workers' compensation administrative law judge for a violation of Labor Code section 5814 for an unreasonable delay or refusal ~~a failure~~ to ~~timely~~ **provide or deny authorization** for medical treatment ~~or a failure to timely reimburse an employee for self procured medical treatment costs~~: (3) For each penalty award by a workers' compensation administrative law judge for a violation of Labor Code section 5814 for an unreasonable delay or refusal ~~a failure~~ to make a ~~timely~~ payment or **proper objection** to temporary disability benefits or salary continuation payments in lieu of temporary disability; vocational rehabilitation maintenance allowance, life pension, or death benefits: (bold type added for emphasis) As previously noted in his June 2006 commentary, the touchstone of conduct proscribed by Labor Code Section 5814 is "payment of compensation" and it is conduct		issuance of an award." Labor Code section 5814. These two subdivisions set forth the amount of the penalty under 5814.6 when, and only when, a workers compensation administrative law judge has already made a finding that there was a violation of Labor Code section 5814. Please note that the introductory phrase is "For each penalty award by a workers' compensation administrative law judge for a violation of Labor Code section 5814…" The remainder of the sentence is merely tracking the type of award that the judge issued, as the penalties amounts differ depending on the severity of delay or refusal of compensation. Labor Code section 3207 defines compensation as "every benefit or payment conferred by this division upon an injured worker…" "Compensation" includes the medical treatment. The penalty for unreasonable delay or denial of "payment of compensation" under Lab C § 5814 unquestionably applies to delinquent payment of medical treatment benefits under Lab C § 4600. Avalon Bay Foods v Workers' Comp. Appeals Bd. (1998) 18 Cal 4th 1165, 77 Cal Rptr 2d 552, 959 P2d 1228, 1998 Cal LEXIS 5149. When a claims administrator	Code section 5814 for an unreasonable delay or refusal ~~a failure~~ to make a ~~timely~~ payment ~~**or proper objection to**~~ **of** temporary disability benefits or salary continuation payments in lieu of temporary disability; vocational rehabilitation maintenance allowance, life pension, or death benefits: (4) For each penalty award by a workers' compensation administrative law judge for a violation of Labor Code section 5814 for an unreasonable delay or refusal ~~a failure~~ to ~~timely~~ provide ~~**or deny**~~ authorization for medical treatment ~~or a failure to timely reimburse an employee for self procured medical treatment costs~~:

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	in violation of 5814 that gives rise to potential administrative penalties under 5814.6. Whereas the statute speaks only to "payment of compensation", the proposed regulations at various points go far beyond the failure to pay compensation, and instead improperly venture into the realm of late authorizations and/or written notifications as quoted above. For example, a claims administrator may not send out timely admission or denial of authorization for medical treatment, or may not issue a proper objection to temporary disability benefits, but may nonetheless timely provide the actual payment for the treatment or timely provide the actual temporary disability benefit. Failure to issue timely benefit notices is the subject of a different audit penalty scheme. The above quoted proposed administrative penalty under LC 5814.6 based upon failure to provide or deny authorization (which is essentially a benefit notice timeliness issue), rather than the delay in paying for the medical treatment, goes beyond the legislative grant of authority under LC 5814.6, and therefore cannot be approved by OAL.		unreasonably refuses to authorize medical treatment, it is denying compensation. Title 8 CCR 9792.6 defines "authorization" as the assurance that appropriate reimbursement will be made for an approved specific course of proposed medical treatment. When a claims administrator unreasonably delays or refuses authorization for a medical treatment, it is delaying or refusing "compensation" as defined by the Labor Code. Pre-authorization of medical treatment is often required by claims administrators via the utilization review process. (Labor Code section 4610) Unless the procedure is authorized, the claims administrator will not pay for the treatment. If the authorization for medical treatment was unreasonably delayed or denied, the injured worker is then required to seek different medical treatment, pay for the medical treatment himself, or go without medical treatment. Labor Code section 4610.1 provides: "…In no case shall this section preclude an employee from entitlement to an increase in compensation under section 5814 when an employer has unreasonably delayed or denied medical treatment due to an unreasonable delay in completion of	

			the utilization review process set forth in section 4610."	
Section 10225.1 et al	**THE PROPOSED REGULATION'S PENALTIES VIOLATE ESTABLISHED FEDERAL AND STATE CONSTITUTIONAL DUE PROCESS LIMITATIONS IN THAT THE PENALTY BEARS NO RATIONAL RELATIONSHIP TO ANY HARM CAUSED BY THE CONDUCT PENALIZED.** The workers' compensation system of penalties is a progressive system. It starts with late payment and minor penalty, then goes to a self-corrected error giving rise to a further minor penalty, progresses to a finding of unreasonable delay producing a range of penalty from 0-25% depending on the severity of the conduct, and finally to an administrative penalty for knowingly engaging in an improper general business practice. In this context of progressive penalties, newly enacted LC 5814.6 (operative 6/1/2004) states, (a) Any employer or insurer that *knowingly* violates Section 5814 with a frequency that indicates a *general business practice* is liable for administrative penalties of not to exceed four hundred thousand dollars ($400,000). Penalty payments shall be imposed by the administrative director …. (b) The administrative director may impose a penalty under either this	David Mitchell Sr. Vice President Republic Indemnity September 22, 2006 Written Comment	We disagree.	None.

[1] Proposed regulation 10225.1(i)(1 thru 9) outlines nine separate administrative penalties under LC 5814.6.

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	section or subdivision (e) of Section 129.5. (c) This section shall become operative on June 1, 2004. (italics added for emphasis) It is axiomatic that the regulator's authority is limited by the legislative authorization under which it acts. Section 5814.6 authorizes an administrative penalty only under one circumstance … a finding of a knowing violation with such frequency as to constitute a general business practice. Nonetheless, the proposed regulation goes much farther than that legislative authorization in two ways, and violates the Constitutional safeguards in a third: **1. It proposes an *additional LC 5814.6* punishment for each previous LC 5814 award, rather than limiting it to those indicating a "general business practice"**; This is apparent in reviewing the regulatory scheme [see proposed 10225.1(i)] which includes *both* a penalty for a general business practice (as authorized by LC 5814.6) *and* a separate LC 5814.6 penalty for each LC 5814 penalty previously awarded by a WCALJ (not authorized by LC 5814.6). Inasmuch as the only penalty authorized by LC 5814.6 is for a general business practice, it is submitted that the proposed regulation improperly goes beyond the scope permitted by the statute.		We disagree. Labor Code section 5814.6 authorizes "administrative penalties of not to exceed $400,000." It does not state that there is only one assessment that may be made. The regulations first require a finding of a knowing violation with such frequency as to constitute a general business practice. If such finding is made, there will be a minimal penalty of $100,000. However, the total penalty that will be imposed will be determined based on how many 5814 penalty awards were issued and the severity of the awards. We also disagree that this penalty may only be imposed for the same type of underlying violations. The	None.

			penalties apply for violations of LC 5814. The penalty schedule provides for an equitable imposition of the final 5814.6 assessment.	
	2. Contrary to LC 5814.6(c), the regulation proposes to allow *both* an administrative penalty under 5814.6 *and* a civil penalty under 129.5 *except* where both are charged in the same Notice of Assessment; LC 5814.6 expressly prohibits penalizing the same conduct under both LC 5814.6 and LC 129.5 [see LC 5814.6(b)]. The legislative intent that the individual LC 5814 violations not be punished under both 129.5(e) and LC 5814.6 could not be clearer. Despite this limitation, the proposed rules would prohibit this "piling on" of administrative fines and penalties only where the Notice of Assessment is charged for both LC5814.6 and LC129.5 in the same pleading. The proposed regulation 10225.1(h) expressly states, (h)~~(f)~~ The Administrative Director may issue a Notice of Assessment under this article in conjunction with an order to show cause pursuant to 8 Code of Regs. § 10113, charging both an administrative penalty under this section and a civil penalty under		We disagree. It is correct that statute prohibits the individual LC 5814 violations from being punished under both 129.5(e) and LC 5814.6. The regulation clarifies that the Notice of Assessment may charge both remedies, but clarifies that only one penalty shall be imposed. There is no conflict with the statute.	None.

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	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. There is no similar prohibition where the administrative penalty under LC 5814.6 and the civil penalty under LC 129.5 are separately pursued by the Administrative Director. As such, the regulation is directly contrary to the express terms of the statute and therefore invalid. **3. It proposes a punitive award greater than that allowed under Constitutional principles of Due Process as enunciated by the US Supreme Court in BMW of North America v. Gore, and State Farm Mutual Auto Ins. Co v. Campbell, and by the California Supreme Court in Simon v. San Paolo US Holding Co. and Johnson v Ford Motor Co. in terms of the "grossly excessive" standard, the ratio of punitive award to actual harm, and the failure to take into account the factors mandated by these judicial decisions**. The above-referenced Supreme Court decisions outline how the Due Process Clause of the Fourteenth Amendment to the Federal Constitution makes the Eighth Amendment's prohibition against excessive fines applicable		We agree to delete subdivisions 10225.1(f) and (g), which provided that awards issued prior to June 1, 2004 may be considered as evidence of general business practice. We disagree that this penalty may only be imposed for the same type of underlying violation. The penalties apply for all violations of Labor Code section 5814. The penalty schedule provides for an equitable imposition of the final Labor Code section 5814.6 assessment. We also disagree that the penalties are too high. The statute authorizes imposition of not more than $400,000. The penalty structure of Labor Code section 5814 was reduced under SB 899, and Labor Code section 5814.6 was created to address and assess the claims administrators who knowingly violate Labor Code section 5814 with a frequency that indicates a general business practice. In general, penalties are found to be	We will delete subdivisions (f) and (g).

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	to the States, thus imposing substantive limits on a State's discretion in this area. They articulate several benchmarks which can result in a penalty award being unconstitutional, and as applicable herein the proposed regulations are in violation of that Constitutional standard. First and foremost under BMW, principles of "constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose…." But the proposed regulations use events prior to the authorizing statute as a basis for imposition of the newly enacted administrative penalty, thus providing no notice at the time of the conduct that it could produce such a punishment. This alone violates the fundamental principles "constitutional jurisprudence" and invalidates the regulation. One of the criteria used to determine the validity of a punitive award under both BMW and Johnson is that the prior conduct may only be considered where it is similar to the conduct at issue in the case. With this standard in mind, it is apparent that the proposed regulation exceeds Constitutional limitations. Under the proposed penal scheme, once it is determined that any an award of LC 5814 penalty for a specific misconduct represents a "general business practice", the regulations throw open the door to an administrative penalty under LC 5814.6		constitutional where various factors are considered including; 1) degree of culpability, 2) prior misconduct, 3) the concern of creating a financial bonanza that would ill serve public policy, and 4) the sophistication and financial strength of the assessed. "Legislature may constitutionally impose reasonable penalties to secure obedience to statutes enacted under the police power so long as those enactments are procedurally fair and reasonably related to a proper legislative goal." Kinney v. Vaccari (1980) 27 Cal.3d 348, 352. These regulations take these factors into consideration.	

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	for any and all LC 5814 penalties which may have been awarded … regardless of whether the reason for the other LC 5814 penalties is the same or similar to the action which constituted a "general business practice."[1] Thus, the regulation exceeds the Constitutional limitations as required by the Supreme Court in Johnson. These cases also analyze the ratio of actual damages to punitive damages, and in no instance have they upheld a punitive award more than 10 times the actual damages. However, the proposed regulations herein would allow for a punitive award which could easily be 300 times the actual damages (for example, 10225.2(i)(2) states that an unreasonable delay in payment of an award of $100 pharmacy bill can produce a $30,000 administrative penalty; or if an employee has a prior award for medical treatment, an unreasonable delay challenging a $100 x-ray similarly can produce a $30,000 administrative penalty. Being a day late with prospective or concurrent review of a request for authorization to perform a $100 x-ray can produce a $5,000 administrative penalty under 10225.2(i)(4)(b) (which is 50 times the actual damages). Similar excessive fines exist throughout the entire proposed administrative penalties. As such, the proposed penalty scheme cannot pass Constitutional muster.			
Section 10225(q)	The case law looks to whether the punitive award criteria fits into the greater statutory scheme. LC 5814.6 only punishes conduct "knowingly" engaged in. The statute does not	David Mitchell Sr. Vice President Republic Indemnity September 22, 2006	We disagree. There is ample case and statutory authority to support the definition: "[A] corporation, as such, cannot	None.

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	define this term. The regulator's proposed regulation 10225(q) defines it as follows: "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. The question arises whether this definition finds any support anywhere under California law … and it does not. When one looks to the other areas of California law where knowledge is required for imposition of punitive statutes, one only need look at the incongruity between well established principles of civil law, and compare the knowledge requirements therein with the scintilla of implied knowledge required by proposed Regulation 10225(q) to impose similar liability. Civil law references "authorized or ratified" and requires conduct of an "officer, director or managing agent"	Written Comment	know, … and … its knowledge … must ultimately be the knowledge … of the people – the officers, managers, and employees – who link the corporate abstraction to the real world. *FMC Corp. v. Plaisted & Cos.* (1988) 61 Cal.App.4th 1132, 1213. *FMC* held that knowledge of rank-and-file employees may be imputed to a corporation. Corporate knowledge is not restricted to matters known by corporate managers. More specifically, *FMC* held that knowledge of rank-and-file employees could be imputed to an insured corporation to find that the corporation "expected" its activities to cause pollution damage. Its liability insurance policies did not cover " expected" pollution damage. The court applied normal rules of agency that impute an agent's knowledge to the principal: "Civil Code §2332: [B]oth principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." In line with normal rules of agency, *FMC* noted the rule is limited to "[k]nowledge … [the] employee receives or has in mind when acting in the course of his or	

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	and that the person be in a position to make decisions that create corporate policy, as a prerequisite to imposition punitive damages. Such a standard would be consistent with the progressive penalty system under the workers compensation statutes. But instead, under the proposed regulation an inadvertent mistake by two clerks is enough to trigger imposition of the $400,000 administrative penalty. Without a showing of managerial awareness, the imposition of an administrative penalty of $400,000 for "knowingly" violating Labor Code Section 5814, upon a mere showing of knowledge by any employee at any level, violates the statutory scheme of progressive penalties for progressively egregious conduct, is overreaching beyond the express or implied legislative grant of authority, inconsistent with other statutes, and thus cannot be approved by OAL.		her employment …, [and that] concerns a matter within the scope of the employee's duties." (*Id.*, p. 1212-1213.) Also in line with normal rules of agency, *FMC* held that a corporation has the knowledge of its employee "whether [the] employee communicated [that] knowledge to the [corporation] or not". *Id.* at 1212. In the case of *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395, 402, the appellate court held that an owner of a bar is responsible for the acts of the bartender who "knowingly permitted" the illegal sale of narcotics, despite the fact that the owner testified that she spent little time at the bar, that she did not personally know of the illegal activities and that she had no reason to suspect the illegal activities. The bartender's "knowledge and permission are imputed to appellant as his employer (the owner, operator and licensee) within the scope of the principle that a 'licensed employer may be disciplined to the extent or revocation of his license for the acts of his employees. (Cites omitted.)." Finally, in *The People v. Taylor* (1992) 7 Cal.App.4th 677, 692, the court analyzed the meaning of "knowingly" as it is used in Health and Safety Code §25189.5, which	

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			provides that it is unlawful for a person to "knowingly" dispose of hazardous waste. The defendant argued that he did not know that his action of abandonment constituted an unlawful "disposal" and therefore, the act was not done "knowingly." The court held that knowingly does not require any knowledge of the unlawfulness of the act, but simply the knowledge that the facts exist which bring the act or omission within the provisions of the code. "California case law has long held that the requirement of 'knowingly' is satisfied where the person involved has knowledge of the facts, though not the law." (*Id*. at p. 692) In the *Taylor* case, the court determined that the defendant was aware of the actual facts surrounding his vacating of the manufacturing premises and his permanently leaving behind hazardous waste materials.	