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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SECTION 5814.6 ADMINISTRATIVE PENALTY BASED IN WHOLE OR IN PART UPON AN AWARD UNDER FORMER LABOR CODE SECTION 5814, REPEALED BY THE SAME LEGISLATION.**<br><br>Proposed subdivision (f) states,<br><br>"(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.~~"<br><br>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:"<br><br>"(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."<br><br>These proposals are fatally defective under | David Mitchell<br>Sr. Vice President<br>Republic Indemnity<br>September 22, 2006<br>Written Comment | We agree to delete (f) and (g). | Subdivisions (f) and (g) will be deleted. |

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| | established California law, as they impose a new administrative penalty under LC 5814.6 for conduct under now repealed LC 5814, and which conduct is no longer proscribed under newly enacted LC 5814.<br><br>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authorized (§ 5814(e)); and it eliminated the increase rate of payment for delayed vocational rehabilitation (§ 4642, repealed in 2003 in AB 227).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>.<br><br>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.<br><br>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:<br><br>"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…."<br><br>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.<br><br>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<br>Sr. Vice President<br>Republic Indemnity<br>September 22, 2006<br>Written Comment | We agree to revise these subdivisions. | The subdivisions will state:<br>(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.**<br><br>Subdivision (i)(4) and (i)(3), as currently proposed, now read as follows:<br><br>(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~~:<br><br>(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)<br><br>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 | | | 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:<br><br>(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. | | | |
| 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.**<br><br>The workers' compensation system of penalties is a progressive system. It starts with late payment and minor penalty, then | David Mitchell<br>Sr. Vice President<br>Republic Indemnity<br>September 22, 2006<br>Written Comment | We disagree. | None. |

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| | 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.<br><br>In this context of progressive penalties, newly enacted LC 5814.6 (operative 6/1/2004) states,<br><br>(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 ….<br>(b) The administrative director may impose a penalty under either this section or subdivision (e) of Section 129.5.<br>(c) This section shall become operative on June 1, 2004.<br>(italics added for emphasis)<br><br>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 | | | |

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

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| | 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:<br><br>**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"**;<br><br>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.<br>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 penalties apply for violations of LC 5814. The penalty schedule provides for an equitable imposition of the final 5814.6 assessment. | None. |
| | **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** | | 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 | None. |

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| | **charged in the same Notice of Assessment;**<br><br>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.<br><br>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,<br><br>(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 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.<br><br>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 | | Assessment may charge both remedies, but clarifies that only one penalty shall be imposed. There is no conflict with the statute.<br><br>We agree to delete subdivisions 10225.1(f) and (g), which provided | |

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| | contrary to the express terms of the statute and therefore invalid.<br><br>**3. It proposes a punitive award greater than that allowed under Constitutional principles of Due Process as enunciated by the US Supreme Court in <u>BMW of North America v. Gore</u>, and <u>State Farm Mutual Auto Ins. Co v. Campbell</u>, and by the California Supreme Court in <u>Simon v. San Paolo US Holding Co.</u> and <u>Johnson v Ford Motor Co</u>. 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**.<br><br>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 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.<br><br>First and foremost under <u>BMW</u>, principles of "constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment | | that awards issued prior to June 1, 2004 may be considered as evidence of general business practice.<br>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.<br><br>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 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 | We will delete subdivisions (f) and (g). |

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| | 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.<br><br>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 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.<br><br>These cases also analyze the ratio of actual damages to punitive damages, and in no instance have they upheld a punitive award | | reasonably related to a proper legislative goal." Kinney v. Vaccari (1980) 27 Cal.3d 348, 352.<br>These regulations take these factors into consideration. | |

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| | 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 define this term. The regulator's proposed regulation 10225(q) defines it as follows:<br><br>"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 | David Mitchell<br>Sr. Vice President<br>Republic Indemnity<br>September 22, 2006<br>Written Comment | We disagree. There is ample case and statutory authority to support the definition:<br>"[A] corporation, as such, cannot 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 | None. |

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| | 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.<br><br>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" 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 | | known by corporate managers.<br><br>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:<br><br>"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."<br><br>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 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.<br><br>In the case of *Endo v. State Board* | |

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| | 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. | | *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.)."<br><br>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 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 | |

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| | | | 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. | |
| Section 10225 (l) Definition of General Business Practice | The definition of general business practice has been amended to mean more than one 5814 penalty award at an adjusting location. While this is an improvement from previous versions of the regulations, the definition is still too general.<br><br>▪ The definition in the regulations is not consistent with that which is commonly-accepted in business. Webster's Third New International Dictionary defines "General" as "prevalent, usual or widespread." The term "Practice" is defined as "performance or application habitually engaged…. (or) repeated customary action."<br><br>▪ The definition does not consider the size of a particular adjusting location. Two 5814 penalty awards at a small adjusting location with perhaps 10 | Darrell Brown Workers' Compensation Practice – Vice President Sedgwick CMS September 24, 2006 Written Comment | We disagree. The definition sets forth a minimum standard. The mitigating factors will address the second concern. | None. |

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| | claims adjusters could indeed represent a general business practice. However, a claims adjusting location with perhaps 75 claims adjusters, two 5814 penalty awards would more than likely not signify a general business practice at that location. | | | |
| Section 10225 (s) Definition of Penalty Award | A 5814 Award issued by a workers' compensation judge can be appealed and possibly reversed. Therefore, the term "Penalty Award" should be changed to "Final Penalty Award" and apply after all appeals have been exhausted. | Darrell Brown Workers' Compensation Practice – Vice President Sedgwick CMS September 24, 2006 Written Comment | We agree. | The definition for penalty award will be revised to state: (s) "Penalty award" means an **final** order or **final** award by a workers' compensation administrative law judge to pay penalties due to a violation of section 5814 of the Labor Code |
| Section 10225.1 et al | The penalties for the violations of this section are exorbitant.<br>▪ 10225.1(i) (2) requires an assessment of $30,000 for each penalty award by the workers' compensation administrative law judge that is not complied with. This section needs to be clarified as some orders are appealed, during which process defendants do not necessarily concede their position or comply with the order.<br>▪ The assessments under 10225.1 should be more reflective of the nature and extent of the underlying issue. A 5814 penalty award could | Darrell Brown Workers' Compensation Practice – Vice President Sedgwick CMS September 24, 2006 Written Comment | We agree.<br>We disagree that a revision is required. Labor Code section 5814 | The definition for penalty award will be revised to state: (s) "Penalty award" means an **final** order or **final** award by a workers' compensation administrative law judge to pay penalties due to a violation of section 5814 of the Labor Code<br>None |

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| | be assessed for a relatively minor issue. Additionally, 5814 penalty awards can be assessed for areas of the law that are not quite settled by the Courts. The California workers' compensation industry continues to receive interpretations of the different statutes by the Workers' Compensation Appeals Board and the District Courts of Appeals. In some instances, the decisions are not consistent. One obvious example of this is the two apportionment decisions from two different District Courts – Welcher and Dykes. | | requires an *unreasonable* delay or refusal. Only final orders will be considered. Also, the mitigation factors address the claims administrator's good faith and the gravity of the violations.. | |
| Section 10225.1(b) and (c) | **Recommendation -- Separate and Independent Audits**<br>The DWC should conduct all auditing in accordance with the regulations, procedures, and structures established for the Division's audit authority under Labor Code section 129 and 129.5.<br><br>**Discussion**<br>In accordance with his previous testimony relating to the proposal that separate, uncoordinated audits and penalties be imposed for section 5814.6, he reiterates his concern that the Division is embarking on an inordinately complicated and unnecessary program of independent audits that is directly contrary to the Legislature's policy decision from 2002 (AB 749).<br><br>With the provisions proposed for section 10225.1(b) and (c), the Division has made it clear that they will review monthly reports | Michael McClain<br>General Counsel and Vice President – CWCI<br>September 27, 2006<br>Written Comment | We disagree. Under the proposed regulations, an audit may not even be required as the monthly Labor Code section 5814 activity reports will allow the audit unit to determine when and if more than one penalty award has been issued against a claims administrator at a specific adjusting location. A PAR audit (pursuant to Labor Code section 129 and as suggested by the commenter) is not necessary to determine how many 5814 penalty awards have issued against a claims administrator.<br><br>Nonetheless, Labor Code section 5814.6 is not comparable to audits conducted under Labor Code section 129. Section 129 audits are checking for ordinary claims handling practices. Labor Code section 5814.5 authorizes assessing penalties | None. |

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| | from the WCAB to monitor 5814 penalty activity. Based on 2 such penalty awards, "the Audit Unit may proceed with an investigation." These proposed new audits could easily be included in the current audit mechanism under section 129 as target audits, if the WCAB statistics establish good cause to investigate. The potential for monthly audits based on only 2 penalty awards is a distortion of the statutory standard and a waste of both the claims administrators' productivity and the Division's resources.<br><br>The Administrative Director must provide the regulated community with a more orderly and coordinated program of audits or the Division will again fail to focus its resources on the most serious offenders and fail to create an effective enforcement mechanism, which lead the Legislature to revise the entire audit process in 2002. | | when an employer or insurer knowingly violates section 5814 with a frequency that indicates a general business practice. | |
| Section 10225.1 (f) and (g) | **Recommendation -- Effective Date**<br>**Revise**: (f)(~~d~~) No administrative penalty assessed pursuant to this section shall be based solely on conduct occurring before June 1, 2004.<br><br>**Delete**: (g) 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 regardless of the date of injury, may be considered as evidence of a general business practice.<br><br>**Discussion** | Michael McClain<br>General Counsel and Vice President – CWCI<br>September 27, 2006<br>Written Comment | We agree to delete (f) and (g). | Subdivision (f) and (g) will be deleted. |

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| | **Authority**<br>Government Code section 11342.2 states:<br><br>Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.<br><br>The effective date of section 5814.6 is expressly stated in subsection (c) – June 1, 2004. There is no provision for the calculation of the new penalty to be determined by conduct occurring prior to the effective date of the statute.<br><br>Abney v WCAB (2004) 69 CCC 1552; 70 CCC 460 (Writ Denied)<br>Abney interpreted section 5814 as revised by SB 899. The Board, en banc, noted that new section 5814(i) specifically included a direction to apply the new provisions of that penalty "without regard to whether the injury occurs before, on, or after the operative date of this section." Abney does not construe the newly enacted penalty provision contained in section 5814.6, and that section contains no similar provision.<br><br>Section 49 of SB 899, the clause requiring immediate application of the new law, also does not control the effective date of section | | | |

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| | 5814.6 because section 5814.6 has an explicit operative date, June 1, 2004.<br><br>Section 5814.6 applies to specific conduct -- knowingly violating section 5814 with a frequency that indicates a general business practice. The application of the 5814.6 penalty is inextricably linked to the conduct to be sanctioned. The AD does not have the statutory authority to use conduct prior to the effective date of the statute as evidence of a general business practice sanctionable by the new penalty.<br><br>Additionally, the Legislature significantly revised the structure of section 5814, which is the foundation of any administrative penalty imposed under section 5814.6. The AD has no statutory authority to use conduct relating to the former section 5814 penalty, which no longer exists, to impose additional administrative penalties under the new section 5814.6.<br><br>The rationale from the Board's opinion in Abney does not support what is essentially a retroactive application of the statute by this proposed regulation. | | | |
| Section 10225.1(i)(1) | **Recommendation -- – Business Practice Penalty**<br><br>(1) $ 100,000 for ~~each~~ a finding by the Administrative Director, or his or her designee, that an employer or insurer, or entity acting on its behalf, knowingly violated Labor Code section 5814 with a frequency that indicates a general business practice, and for | Michael McClain<br>General Counsel and Vice President – CWCI<br>September 27, 2006<br>Written Comment | We agree to change "each" to "a." | "Each" will be replaced with "a." |

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| | each applicable penalty award, the following;<br><br>**Discussion**<br>Labor Code section 5814.6(a) states:<br><br>(a) Any employer or insurer that knowingly violates Section 5814 with a frequency that indicates a general business practice is liable for administrative penalties not to exceed four hundred thousand dollars ($400,000). Penalty payments shall be imposed by the administrative director and deposited into the Return-to-Work Fund established pursuant to Section 139.48. (Emphasis added.)<br><br>The use of 'each' in the proposed regulation connotes that there may be multiple findings by the Administrative Director that the employer or insurer knowingly violated section 5814 with a frequency indicating a general business practice. The statute does not support that interpretation and to the extent that this language is ambiguous, a clarification is required. It should be explicit that section 10225.1(i)(1) is a single penalty based on a finding by the Administrative Director that the violations of section 5814 are sufficient to indicate a general business practice. | | | |
| Section 10225.1(i) (3) and (4) | **Recommendation**<br>(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~~ of temporary disability benefits or salary | Michael McClain<br>General Counsel and Vice President – CWCI<br>September 27, 2006<br>Written Comment | We agree to revise these subdivisions. | The subdivisions will state:<br>(3) For each penalty award by a workers' compensation administrative law judge |

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| | continuation payments in lieu of temporary disability; vocational rehabilitation maintenance allowance, life pension, or death benefits:<br><br>(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 to provide ~~or deny authorization for~~ medical treatment:<br><br>**Discussion**<br>**Authority**<br>See: Government Code section 11342.2 noted above.<br><br>In Boehm & Associates (1999) 64 CCC 1350 the Court held that a regulation allowing the insurer to avoid interest payments until claim adjudicated was invalid.<br><br>"… we note that the Legislature possesses the plenary constitutional authority to create and enforce a workers' compensation system (Cal. Const., art. XIV, § 4); therefore, any decision of the appeals board or regulation promulgated by the Director of the Division of Workers' Compensation in contradiction to the Workers' Compensation Act is invalid. (See *Coca-Cola Co. v. State Bd. Of Equalization* (1945) 25 Cal.2d 918, 922 [administrative regulations may not contravene terms of statutes under which they are adopted].)" | | | 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**~~ **of** temporary disability benefits or salary continuation payments in lieu of temporary disability; vocational rehabilitation maintenance allowance, life pension, or death benefits:<br><br>(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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| | The determination of the legality of a regulation adopted by the AD includes whether it is within the scope of authority conferred by the statute and whether it is reasonably necessary to effectuate purpose of statute. San Diego Nursery Co., Inc. v. Agricultural Labor Relations Bd. (1979) 160 CR 822, 100 Cal.App.3d 128.<br><br>The references to treatment authorization and the failure to timely object are inconsistent with the provisions of Labor Code section 5814. Section 5814.6 is based solely on awards of penalties under section 5814 and that section imposes penalties only "when payment of compensation has been unreasonably delayed or refused." Section 5814 does not address the denial of authorization for medical care or the failure to timely object and the inclusion of this language is not authorized by section 5814.6.<br><br>The failure to send the proper notice and to timely object is addressed by the Administrative Director's audit regulations under Labor Code sections 129 and 129.5, but cannot serve as a basis for the imposition of administrative penalties under section 5814.6. If benefits are paid on time and medical care is provided in a timely fashion, whether notices are or are not provided, then no penalties are appropriate. Benefit notice failures or untimely objections cannot be considered under section 5814.6. | | | |
| General Comment | Commenter is concerned that the burdens associated with potential audits and penalties will discourage participation in the California | Harry Monroe, Jr. Concentra Inc. September 27, 2006 | We disagree. The penalties are mandated by Labor Code section 5814.6. | None. |

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| | workers' compensation system by quality providers of services and may result in approvals of workers' compensation claims and health care that either should not be compensable or are not medically necessary. | Written Comment | | |
| Sections 10226; 10225(l); 10225(a) | Commenter recognizes the importance of the Division having sufficient authority to investigate and penalize entities exhibiting a pattern of violations in the handling of claims, but is concerned that the expansion of the audit authority beyond the provisions of Labor Code sections 129 and 129.5, as described in §10226, as well as the broad definition of "general business practice" in §10225(l) create excessive administrative burdens for companies seeking to operate in good faith. In particular, commenter notes that the definition of "general business practice" requires that only more than one claim be handled in violation in order to trigger a potential finding that a pattern of practice exists. This definition makes no consideration of either 1) the number of claims handled by the entity involved; or 2) the amount of time that has elapsed between violations. Obviously, an entity that mishandled two out of its ten claims in a month is in a different situation than a company that has mishandled two out of 10,000 over the course of a year. The definition also does not take into consideration an entity that may have already taken steps to correct deficiencies that, prior to taking such action, might have been considered "general business practice". The definition should be revised to account for these factors. Commenter also suggests that similar alterations should be made with regard | Harry Monroe, Jr. Concentra Inc. September 27, 2006 Written Comment | Agree to require more than one penalty within a five year time period. The other factors mentioned by commenter are included as mitigating factors in section 10225.1(h).<br><br>With regard to the concern regarding an audit, Labor Code section 5814.6 authorizes the imposition of penalties when an employer or insurer knowingly violates section 5814 with a frequency that indicates a general business practice. Although the division will be able to determine if penalty awards were issued, there may be additional investigation that is required in order to meet the requirements of the statute. Labor Code section 133 provides the power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon the division under the code. | Section 10225.1(a) will be revised to state:<br>(a) Administrative penalties shall only be imposed under this section based on violations of Labor Code section 5814, after more than one penalty awards ~~ha~~ves been issued by a workers' compensation administrative law judge on or after June 1, 2004 **based on conduct occurring on or after April 19, 2004** for unreasonable delay or refusal to pay compensation **within a five year time period**. **The five year period of time shall begin on the date of issuance of any penalty award not previously subject to an administrative penalty assessment pursuant to Labor Code section 5814.6.** |

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| | to the imposition of administrative penalties based on more than one penalty award by an administrative law judge in §10225.1(a). | | | |
| Section 10225.1 (b) and (c) | Commenter believes that the Division will be performing myriad audits, many of which will be unnecessary. Commenter also believes that this proposal contradicts the directive of the Legislature as authorized under AB 749 (Chapter 6 of the 2002 Statutes) and strongly believes that these audits could be incorporated within the current audit procedures under Section 129, targeted audits. Commenter states that monthly audits based on only 2 penalty awards are excessive at best. | Philip M. Vermeulen<br>Legislative Advocate<br>Acclamation Insurance Management Services<br>Allied Managed Care<br>September 27, 2006<br>Written Comment | We disagree. DWC does not intend to perform "monthly audits." DWC will obtain monthly internal reports, which will list whether 5814 penalty awards have been issued. Based upon those reports, the audit unit will determine if more than one penalty award has issued against a claims administrator at a single adjusting location. If so, the audit unit may proceed with an investigation. It is also possible than no further investigation will be required. | None. |
| Section 10225 (f) and (g) | As currently proposed, the Division is applying retroactivity to penalty awards issued by workers' compensation administrative law judges for events occurring under the previous regulations. Subsection c clearly states that the effective date is June 1, 2004. | Philip M. Vermeulen<br>Legislative Advocate<br>Acclamation Insurance Management Services<br>Allied Managed Care<br>September 27, 2006<br>Written Comment | We agree to revise section 10225.1(a) and delete subdivisions (f) and (g). | Section 10225.1(a) will be revised to state:<br>(a) Administrative penalties shall only be imposed under this section based on violations of Labor Code section 5814, after more than one penalty award~~s~~ ha~~ve~~s been issued by a workers' compensation administrative law judge on or after June 1, 2004 **based on conduct occurring on or after April 19, 2004** for unreasonable delay or refusal to pay compensation **within a** |

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| | | | | **five year time period. The five year period of time shall begin on the date of issuance of any penalty award not previously subject to an administrative penalty assessment pursuant to Labor Code section 5814.6.**<br><br>Subdivisions (f) and (g) will be deleted. |
| Section 10225.1(i)(4) | This section should not be adopted unless clarified to directly link a "request for authorization," to an unreasonable delay or refusal to authorize medical care which is defined in regulation. | Philip M. Vermeulen<br>Legislative Advocate<br>Acclamation Insurance Management Services<br>Allied Managed Care<br>September 27, 2006<br>Written Comment | We agree. | Section 10225.1(i)(4) will revised to state:<br>(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~~: |
| Section 10225(l) | The proposed definition has language that states that a business practice that results in penalties are violations that can be | Philip M. Vermeulen<br>Legislative Advocate<br>Acclamation Insurance | We disagree that the definition is too vague. However, we will amend section 10225.1(a) to provide that the | Section 10225.1(a) will be revised to state:<br>(a) Administrative |

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| | distinguished by a reasonable person from an isolated event. Commenter believes that this is too vague a statement that will result in subjectivity and myriad other problems. So too, there is no provision to define how many violations constitutes a pattern of practice?<br><br>Commenter strongly suggests that penalties should be tied to sample size. For example, if an audit of 20 files produce 10 violations, then that could well be considered a "business practice." On the other hand if an audit of 2,000 files produces 10 violations, then is that really a "business practice?" The fines need to be weighted based on the PERCENTAGE of infractions compared to overall sample size. | Management Services Allied Managed Care September 27, 2006 Written Comment | one or more violation must occur within a five year time period. Also, the mitigation factors in 10225.1 (h) address some of the commenter's concerns. The suggestion for a percentage of sample size is unnecessary because the DWC will be able to review the WCAB awards to determine how many penalty awards have issued, without the need for an audit.<br>With regard to the definition of "general business practice," case law supports the definition:<br>The term "general business practice" itself has been approved in several cases in other states, without requiring mathematical certainty. As set forth in *Lees v. Middlesex Insurance Co* (1994) 229 Conn. 842, 849 n.8; 643 A.2d 1282:<br>The term "general business practice" is not defined in the statute, so we may look to the common understanding of the words as expressed in a dictionary. (citation). "General" is defined as "prevalent, usual [or] widespread"; Webster's Third New International Dictionary; and "practice" means "[p]erformance or application habitually engaged in ... [or] repeated or customary action."<br>The *Dodrill v. Nationwide Mutual Insurance Co*. (1996) 201 W.Va. 1, 13; 491 S.E.2d 1 court stated:<br>"Accordingly, we hold that to maintain a private action based upon | penalties shall only be imposed under this section based on violations of Labor Code section 5814, after more than one penalty awards ~~ha~~ves been issued by a workers' compensation administrative law judge on or after June 1, 2004 **based on conduct occurring on or after April 19, 2004** for unreasonable delay or refusal to pay compensation **within a five year time period**. **The five year period of time shall begin on the date of issuance of any penalty award not previously subject to an administrative penalty assessment pursuant to Labor Code section 5814.6.** |

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| | | | alleged violations of W.Va. code §33-11-4(9) in the settlement of a single insurance claim, the evidence should establish that the conduct in question constitutes more than a single violation of W.Va. code §33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be distinguished by fair minds from an isolated event."<br>*Grove v. Orkin Exterminating Co., Inc.* (1992) 18 Kan.App.2d 369, 374-375; 855 P.2d 968, a civil suit for compensatory and punitive damages for improper termite treatment, held that a state Board of Agriculture Pesticide Inspector's testimony about similar complaints his agency had received would be relevant in deciding whether the licensee's behavior in this case was a "general business practice."<br>"....Foster [the state inspector] stated that Orkin had completely failed to treat the ground underneath the concrete slab on the east end of | |

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| | | | the house and had only partially treated the slab underneath the north wall of the house. Foster stated the treatment was wholly inadequate, comparing it to building a four-sided corral with only three sides, making it impossible to contain anything or keep anything out. He also stated that his office had received several similar complaints regarding Orkin's Wichita branch."<br><br>This evidence certainly was relevant to show that Orkin's Wichita branch continually engaged in wanton conduct as a general business practice and, if the evidence is believed, would have bolstered the Groves' claim that Orkin knew the house was infested.<br><br>The *Grove* case thus allowed evidence of practices at a single branch of the company as proof of its "general business practice."<br>In *Underwriters Life Insurance Co. v. Cobb* (Tex.App. 1988) 746 S.W.2d 810, 815, the insurance company's denial of other claims on the same basis and at the same time as its denial of the Cobbs' claim, was admissible to show that Underwriters' refusal to pay the Cobbs' claim was committed or performed with such frequency as to indicate a general business practice.<br><br>*In re Midland Insurance Co.* | |

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| | | | (1979) 167 N.J.Super. 237, 244; 400 A.2d 813 was an appeal from a determination by the New Jersey Insurance Commissioner imposing fines and ordering an insurer to cease and desist from certain unfair claim settlement practices. The court approved a finding that 135 violations of the statute showed a "frequency of performance rising to the level of a general business practice:"<br><br>A violation under [New Jersey Statutes §17:29B-4](9)(f) occurs where an insurance company as a general business practice fails to attempt in good faith a prompt and fair settlement of claims in which liability is reasonably clear. ....<br>The "claims" forming the basis of the charged violations of (9)(f) are forfeitures and judgments. With respect to judgments, the Commissioner correctly found liability under this provision. As the record discloses, there were numerous judgments which were not paid within a reasonable time, thus evincing a frequency of performance rising to the level of a general business practice. … Thus, the Commissioner's finding of liability in this regard as to judgments and the resulting order to cease and desist must be affirmed.<br>Several California cases have | |

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| | | | construed the term "business practice" (lacking the qualifying adjective "general") on the same terms that have been used to define "general business practice".<br>The court in *Barquis v. Merchants Collection Ass'n* (1972) 7 Cal.3d 94, 103; 101 Cal.Rptr. 745, examined Civil Code §3369 which defined "unfair competition" as "unlawful, unfair or fraudulent business practice." The court held that intentionally filing collections in improper venues, "when utilized as a general practice by a collection agency whose primary business is litigation, ... constitutes an 'unlawful ... business practice' ..."<br>In *State of California v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1169-1170; 252 Cal.Rptr. 221, the court interpreted the term "unlawful, unfair or fraudulent business practice" as used in the Unfair Practices Act, Cal. Bus. & Prof. Code §17200 (formerly Civil Code §3369), as follows:<br>"As we have said, the statute is directed at "on-going wrongful business conduct...." (People v. McKale (1979) 25 Cal.3d 626, 632 [159 Cal.Rptr. 811, 602 P.2d 731].) Thus the "practice" requirement envisions something more than a single transaction …; it contemplates a "pattern ... of conduct" (Barquis v. Merchants Collection Assn. (1972) 7 Cal.3d 94, 108 [101 Cal.Rptr. 745, | |

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| | | | 496 P.2d 817]), "on-going ... conduct" (id., at p. 111), "a pattern of behavior" (id., at p. 113), or "a course of conduct." (Ibid.) "<br><br>In *People v. Casa Blanca Convalescent Homes, Inc* (1984) 159 Cal.App.3d 509, 526-527; 206 Cal.Rptr. 164, Casa Blanca, a nursing home company, was charged with multiple violations of *Cal. Bus. & Prof. Code §17200,* including allegations of an inadequate surety bond, inadequate staffing and nursing care, failing to maintain proper patient records, and permitting unsanitary conditions. Judgment was entered against Casa Blanca for 67 violations and $167,500 in civil penalties. Casa Blanca demanded the court define in its statement of decision what was meant by a "business practice." Citing *Barquis v. Merchants Collection Assn., supra*, 7 Cal.3d 94; the Casa Blanca court stated,<br>"The Supreme Court held repeated violations of statute by acts which constituted a principal part of its business constituted an unlawful business practice and, as such, was actionable under Civil Code section 3369 (now Bus. & Prof. Code, §17200 et seq.)… The facts, admitted in the pleadings, were that Casa Blanca was in the business of operating and managing patient care | |

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| | | | hospitals and the sale of nursing home services. Nursing care was its primary business activity. This admission established, without question, the series of acts complained of was a business activity or practice. The key question presented to the trial court was not whether this was a 'business practice or activity' but rather whether this particular business activity was unlawfully conducted. The trial court, based upon more than sufficient evidence, found Casa Blanca was engaged in a variety of unlawful practices in its primary business -- rendering nursing care. "We conclude there is both a factual and legal basis for finding not only were there violations of the administrative regulations in question, but its activities constituted a pattern of behavior pursued by Casa Blanca as a 'business practice.'" | |
| Section 10225(1) – Definition of General Business Practice | Commenter believes the proposed regulation text expands on the definition to add potential liability for claims administrators by stating:<br><br>However, where a claim file with a violation of Labor Code section 5814 has been adjusted at multiple adjusting locations, that claim file may be considered when determining the general business practice of any of the adjusting locations where the violation | Stewart J. Brooker<br>Associate Counsel<br>Legal Services<br>CNA<br>September 27, 2006<br>Written Comment | We agree to revise this subsection to clarify that file may be considered with regard to the adjusting locations where the conduct that caused the violation occurred. | The subdivision will be revised to state:<br>(*l*) "General business practice" means a pattern of violations of Labor Code section 5814 at a single adjusting location that can be distinguished by a reasonable person from an isolated event. The pattern of violations |

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| | occurred even if the file has been transferred to a different adjusting location.<br><br>The proposed modification to this section could unfairly penalize larger workers' compensation insurers who use multiple offices by burdening multiple offices with violations where only one violation occurred. Recommends that this text be deleted. | | | must occur in the handling of more than one claim. However, where a claim file with a violation of Labor Code section 5814 has been adjusted at multiple adjusting locations, that claim file may be considered when determining the general business practice of any of the adjusting locations where the **conduct that caused the** violation occurred even if the file has been transferred to a different adjusting location. The pattern also may be based on evidence of violations of Labor Code section 5814 for failure to comply with an earlier compensation order in more than one claim. The conduct may include a single practice and/or separate, discrete acts or omissions in the handling of more than one claim. |
| Section 10225.1 (b) and (c) | The proposed regulation text provides for an audit procedure for the Division of Workers' Compensation's Audit Unit.<br><br>This proposed regulation text seems to indicate that the Division is contemplating | Stewart J. Brooker<br>Associate Counsel<br>Legal Services<br>CNA<br>September 27, 2006<br>Written Comment | We disagree. DWC does not intend to perform "monthly audits." DWC will obtain monthly internal reports, which will list whether 5814 penalty awards have been issued. Based upon those reports, the audit unit will | None. |

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| | monthly audits based on as few as two penalty awards. Commenter is concerned that monthly audits could create an undue burden on insurers and/or claims administrators and notes that there is already a targeted audit procedure which may be more appropriate. | | determine if more than one penalty award has issued against a claims administrator at a single adjusting location. If so, the audit unit may proceed with an investigation or audit. It is also possible than no further investigation will be required. | |
| Section 10225.1(f) and (g) | Commenter objects to the proposed modifications as being improper as Labor Code section 5814.6(c) provides a stated effective date of June 1, 2004. Accordingly commenter requests that the following change be revised to remove all references of conduct occurring prior to June 1, 2004 as follows:<br><br>(f) No administrative penalty assessed pursuant to this section shall be based on conduct occurring before June 1, 2004.<br><br>(g) For the purposes of this section, penalty awards issued by workers' compensation administrative law judges for violations of section 5814.6, regardless of the date of injury, may be considered as evidence of a general business practice. | Stewart J. Brooker<br>Associate Counsel<br>Legal Services<br>CNA<br>September 27, 2006<br>Written Comment | We agree to delete (f) and (g). | Subdivisions (f) and (g) will be deleted. |
| Section 10225.1 (i)(3)(A) through (C) | The proposed modifications to this subsection increased the penalties for penalty awards by a workers' compensation administrative law judge for unreasonable delay in making certain indemnity payments. Commenter believes these increases could be unduly burdensome considering that these could be in addition to a possible $100,000 general | Stewart J. Brooker<br>Associate Counsel<br>Legal Services<br>CNA<br>September 27, 2006<br>Written Comment | We disagree. 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 | None. |

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| | business practice penalty for a total of two delays by an employer or claims administrator in making indemnity payments. | | violate Labor Code section 5814 with a frequency that indicates a general business practice. . In general, penalties are found to be 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. | |
| Section 10225.1(5) | The proposed regulation text provides for the potential assessment of penalties of approximately ten times costs for failure of a claims administrator to make a timely reimbursement for self procured medical treatment costs. Commenter is concerned that these fines have the potential to be excessive when these could possibly be added with a $100,000 fine for as few as two failures of a claims administrator to make a timely reimbursement of self procured medical costs. For example, it appears that a failure of a claims administrator to pay two self procured medical expense invoices of $75 and $125, the claims administrator could be assessed a total of $3,000 for failure to timely reimburse $200. | Stewart J. Brooker<br>Associate Counsel<br>Legal Services<br>CNA<br>September 27, 2006<br>Written Comment | We disagree. 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 constitutional where various factors are considered including; 1) degree of culpability, 2) prior misconduct, 3) the concern of creating a financial | None. |

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| | A finding that this was a "general business practice" could mean that the failure to timely reimburse the employee medical expense invoices totaling $200 could subject the claims administrator to fines of up to $103,000. Commenter feels that this is excessive. | | 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. | |
| Section 10225.1 – Schedule of Administrative Penalties under LC section 5814.6 | The Administrative Director, while enjoying some latitude in implementing and interpreting statutes, is nevertheless is bound by statutory language and is required to give effect to the intent of the legislature. It is well settled that in construing legislative intent, regulators as well as the courts must consider a statutory provision in "light of the statutory scheme of which it is part and harmonize it with related statutes...", Abney v. Workers' Compensation Appeals Board (Writ Denied, 2005) 70 Cal. Comp. Cases 460.<br><br>The legislature, in passing SB 899, substantially revised Labor Code Section 5814. In addition to limiting penalty amounts that could be imposed for unreasonable delays, revised Lab. C. Sec. 5814 gave employers, who discovered the delays before injured workers demanded penalty awards, the opportunity to pay the entire amount due plus the self-imposed 10 percent penalty. This provision, which the court in New United Motors Manufacturing, Inc. v. WCAB | Steven Suchil<br>Assistant Vice President<br>American Insurance Association<br>September 27, 2006<br>Written Comment | We agree to revise section 10225.1(a) and delete subdivisions (f) and (g). | Section 10225.1(a) will be revised to state:<br>(a) Administrative penalties shall only be imposed under this section based on violations of Labor Code section 5814, after more than one penalty award~~s~~ ha~~ve~~s been issued by a workers' compensation administrative law judge on or after June 1, 2004 **based on conduct occurring on or after April 19, 2004** for unreasonable delay or refusal to pay compensation **within a five year time period**. **The five year period of time shall begin on the date of issuance of any** |

| Administrative Penalties Pursuant to Labor Code Section 5814.6 | RULEMAKING COMMENTS 15 DAY COMMENT PERIOD | NAME OF PERSON/ AFFILIATION | RESPONSE | ACTION |
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| | (August 15, 2006, A1 12640, I'". App. Dist., Div. 3) termed a "safe harbor", was accompanied by a new provision of law, Lab. C. Sec. 5814.6, intended to prevent abuse of the "safe harbor."<br><br>Lab. C. Sec. 5814.6 cannot, without ignoring the legislature's clear intent, be viewed separately from the amendments to Lab. C. Sec. 5814. The two provisions work together. | | | **penalty award not previously subject to an administrative penalty assessment pursuant to Labor Code section 5814.6.**<br><br>Subdivisions (f) and (g) will be deleted. |
| Section 102251.1 (f ) and (g) | Subsection (a) provides that an administrative penalty under Lab. C. Sec. 5814.6 will only be imposed after a single Lab. C. Sec. 5814 penalty has been awarded by a workers' compensation judge. By their terms, Subsections (f) and (g) would then permit consideration of Lab. C. Sec. 5814 penalties awarded before June1, 2004, determining the amount of penalty. This is both a misunderstanding and misapplication of the holding in Abney, which authorized the imposition of a Lab. C. Sec. 5814 penalty based on conduct occurring prior to June 1, 2004, and an avoidance of the limitations of the statute itself.<br><br>Abney allows pre-June 1, 2004 conduct to be considered when determining whether the claims administrator engaged in unreasonable delay, but it did not, and could not have allowed the prior standard for penalizing that violation to be applied. That is precisely what would happen under the changed regulations. The proposed consideration of Lab. C. 5814 penalties awarded before June 1, 2004 - as contrasted with behavior giving rise to penalties awarded on or after June 1, 2004 - | Steven Suchil<br>Assistant Vice President<br>American Insurance Association<br>September 27, 2006<br>Written Comment | We agree to revise section 10225.1(a) and delete subdivisions (f) and (g). | See above. |

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| | lacks any authority whatsoever, either under the clear statutory language - and intent of the legislature - or under case law. The problem can only be cured by deleting Subsections (f) and (g) entirely. | | | |
| Section 10225.1(i) | Penalties under Subsection (i) have been increased substantially in this amended proposal. Unless, as we recommend, Subsections (f) and (g) are stricken in their entirety, the increase is entirely unjustified and without legislative authority. Penalties imposed under the statute prior to passage of SB 899 were disproportionate to the violations being penalized. The penalties were so grossly excessive and arbitrary that the legislature felt compelled to change the standard. By attempting to impose additional punitive administrative penalties on top of the excessive and arbitrary penalties awarded under prior law, the proposed regulations ignore clear legislative intent and lack statutory authority. | Steven Suchil<br>Assistant Vice President<br>American Insurance Association<br>September 27, 2006<br>Written Comment | We agree to delete subdivisions (f) and (g). | Subdivisions (f) and (g) will be deleted. |
| Section 10225.1(b) and (c) | Subsections (b) and (c), added since the original proposal, would require the DWC to submit copies of WCAB decisions to the Audit Unit and would require the Audit Unit to obtain monthly Lab. C. Sec. 5814 activity reports. While sensible, the sharing of information also undermines any argument that might be advanced in support of the need for separate audits for Lab. C. Sec. 5814 violations. Those audits could just as easily be conducted under Lab. C. Sec. 129 -and they should be.<br><br>Lab. C. Sec. 129 (b) (3) states: | Steven Suchil<br>Assistant Vice President<br>American Insurance Association<br>September 27, 2006<br>Written Comment | We agree that the need to audit for Labor Code section 5814.6 violations should be minimal. It may be necessary if there are questions concerning knowledge, conduct, or to confirm the existence of penalty awards. | None. |

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| | (3) A targeted profile audit review or a full compliance audit may be conducted at any time in accordance with target audit criteria adopted by the administrative director. The target audit criteria shall be based on information obtained from benefit notices, from information and assistance officers, and from other reliable sources providing factual information that indicates an insurer, self-insured employer, or third-party administrator is failing to meet its obligations under this division or Division 4 (commencing with Section 3200) or the regulations of the administrative director.<br><br>The language clearly provides the authority the Administrative Director and Audit Unit require to conduct target audits based on Lab. C. Sec. 5814 awards. Since there is no obvious necessity for this proposed separate audit function, we recommend that the proposed Administrative Penalties Pursuant to Labor Code section 5814.6 be withdrawn in its entirety.<br><br>Commenter urges the DWC first to withdraw this proposed regulation and then to conduct audits within the framework of Lab. C. Sec. 129. Should the proposed regulation not be withdrawn, it will need to be extensively revised in order to comport with the clear intent of the legislature in revising Lab. C. Sec. 5814 and adding Lab. C. Sec. 5814.6. | | | |
| Section 10225(l) | Commenter appreciates the Department's efforts to move toward a workable definition | David J. Farber, Counsel American Association of | We agree to revise this subsection to clarify that file may be considered | The subdivision will be revised to state: |

| Administrative Penalties Pursuant to Labor Code Section 5814.6 | RULEMAKING COMMENTS 15 DAY COMMENT PERIOD | NAME OF PERSON/ AFFILIATION | RESPONSE | ACTION |
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| | of "general business practice." The current definition comes closer than earlier versions to achieving that goal. However, the addition of language that would vicariously apply a Labor Code section 5814 claim file as a "general business practice" for all adjusters who handled a claim adjusted in multiple locations is a significant step backwards.<br><br>There is simply no policy or evidentiary basis for including all adjusters in this regulation by tying an allegedly actionable claim at one adjusting location to all other adjusting locations. (In that regard, commenter also notes that the inclusion of multiple sites within the definition of an "adjusting location" is also overbroad, in that companies with multiple claims offices throughout the state risk each and every office counting towards the single "location" as defined within the regulations.) If a rogue adjuster is found to have violated a claim in a manner that violates the requirements of Section 5814, he can and should be penalized appropriately.<br><br>However, other adjusters should not have their "general business practices" called into question simply by handling another aspect or stage of the same claim. Simply put, their separate actions, separate basis of knowledge, and separate chain of command can and should be assessed separately, not vicariously. We urge the Department to at least include the exception from a "general business practice" to include not only an "isolated event," but also an "occasional but infrequent occurrence of events that deviate from normal practice | Independent Claims Professionals September 27, 2006 Written Comment | with regard to the adjusting locations where the conduct that caused the violation occurred. | (*l*) "General business practice" means a pattern of violations of Labor Code section 5814 at a single adjusting location that can be distinguished by a reasonable person from an isolated event. The pattern of violations must occur in the handling of more than one claim. However, where a claim file with a violation of Labor Code section 5814 has been adjusted at multiple adjusting locations, that claim file may be considered when determining the general business practice of any of the adjusting locations where the **conduct that caused the** violation occurred even if the file has been transferred to a different adjusting location. The pattern also may be based on evidence of violations of Labor Code section 5814 for failure to comply with an earlier compensation order in more than one claim. The conduct may include a single practice and/or separate, discrete |

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| | and regulatory requirements." | | | acts or omissions in the handling of more than one claim. |
| Section 10225.1(c) | The Department would greatly improve its proposal to allow the Audit Unit to proceed with an investigation after two or more penalty awards if a set time frame was included. Claims administrators should be able to operate under the certainty of definite parameters under which they could, or could not, be investigated. Commenter proposes a timeframe of one year in which the two or more penalties would have had to occur in order to authorize the investigation. Any more time than that would mean that the basis for the penalties would be too tangentially tied to each other to justify a linkage between them, given the fluidity in administrators' operational structure, managerial personnel, and client makeup. | David J. Farber, Counsel American Association of Independent Claims Professionals September 27, 2006 Written Comment | We agree to set a five year time frame. | Section 10225.1(a) will be revised to state: (a) Administrative penalties shall only be imposed under this section based on violations of Labor Code section 5814, after more than one penalty award~~s~~ ha~~v~~es been issued by a workers' compensation administrative law judge on or after June 1, 2004 **based on conduct occurring on or after April 19, 2004** for unreasonable delay or refusal to pay compensation **within a five year time period**. **The five year period of time shall begin on the date of issuance of any penalty award not previously subject to an administrative penalty assessment pursuant to Labor Code section 5814.6.** |
| Section 10225.1(g) | The Department's new language regarding pre- June 1, 2004 penalty awards being | David J. Farber, Counsel American Association of | We agree to revise section 10225.1(a) and delete subdivisions | We will delete subdivisions (f) and (g). |

| Administrative Penalties Pursuant to Labor Code Section 5814.6 | RULEMAKING COMMENTS 15 DAY COMMENT PERIOD | NAME OF PERSON/ AFFILIATION | RESPONSE | ACTION |
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| | considered as evidence of a general business practice unfairly penalizes companies retroactively. Simply put, companies operating prior to June 1, 2004 may well have decided to approach certain cases differently, had they known that their outcome could have been used against them as evidence of a general business practice years after the fact. Accordingly, commenter recommends that penalty awards as evidence of a general business practice only apply going forward, from the date of enactment of the regulations. | Independent Claims Professionals September 27, 2006 Written Comment | (f) and (g). | Section 10225.1(a) will be revised to state: (a) Administrative penalties shall only be imposed under this section based on violations of Labor Code section 5814, after more than one penalty award~~s~~ ha~~v~~es been issued by a workers' compensation administrative law judge on or after June 1, 2004 **based on conduct occurring on or after April 19, 2004** for unreasonable delay or refusal to pay compensation **within a five year time period. The five year period of time shall begin on the date of issuance of any penalty award not previously subject to an administrative penalty assessment pursuant to Labor Code section 5814.6.** |
| Section 10225.1(j)(3) | Commenter acknowledges and appreciates the Department's movement on some penalty issues over the course of his correspondence on this matter. However, the Department's proposal in Section 10225.1(j)(3) of the | David J. Farber, Counsel American Association of Independent Claims Professionals September 27, 2006 | We disagree.<br><br>The penalty structure of Labor Code section 5814 was reduced under SB 899, and Labor Code section 5814.6 | None. |

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| | September 12th draft to raise the penalties for 0-14 days and 15-42 days of indemnity benefits once again seems excessive.<br><br>The Department proposes to raise the 0-14 day benefit from $1,000 to $5,000 and the 15-42 day benefit from $5,000 to $10,000. Commenter continues to believe that these penalty amounts are punitive, and bear no relation to the actual denied benefits or the motive for denying benefits. Indeed, the astronomical benefit amounts proposed will have a serious chilling effect on adjuster incentives to investigate fraud, which ironically will harm both the Department and the public.<br><br>Moreover, the penalties in question should not be based on indemnity benefits in the first place. Instead, commenter believes that the length of a penalty period should be measured | Written Comment | 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 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.<br><br>We disagree that the penalty amount will have a chilling effect on the adjuster's incentive to investigate fraud. In these situations, the WCJ has already determined that there was an unreasonable delay or failure on the part of the claims administrators to provide compensation.<br><br>This comment goes beyond the scope of these regulations. The Division is required to comply with the statute, Labor Code section 5814.6. | |

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| | from the time a company becomes aware of a physician's determination of Permanent and Stationary status. An example will show why notice of Permanent and Stationary status would prove significantly more appropriate as a baseline:<br><br>Consider an employee whose temporary disability coverage ends on January 1, 2006. The company at issue sends the employee a delay letter noting that permanent disability advances are not scheduled to be paid, since the company has no indication there will be any permanent disability residuals. Eventually, on December 1, 2006, the company receives a report from a physician noting that the employee is permanent and stationary with residuals.<br><br>If the company then were to pay the claim on December 20, 2006, a mere five days late, it could be held liable for a Section 58 14 penalty. Although the delay would be minimal, the company would owe over 50 weeks worth of penalties, from January 2, 2006 through December 20, 2006, and an administrative penalty of $7,500.<br><br>This flaw in the current proposal would lead to additional litigation, Filings of Reconsideration, and Writs of Review. Again, commenter asks for notice of Permanent and Stationary status as the starting point for determination of the penalty period. | | | |
| Section 10225.1(i)(5) | The Department's proposed penalties in Section 10225.1(i)(5) are also excessive. This section levies punitive damages up out of | David J. Farber, Counsel American Association of Independent Claims | We disagree.<br><br>The penalty structure of Labor Code | None. |

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| | proportion to the dollar amount in dispute over a denial or delay in paying a claimant employee's independently obtained medical treatment. In such situations, the September 12th draft suggests an additional employer penalty of $1,000 for medical treatment costs up to $100, $2,000 for costs from $101 to $300, $3,000 for costs from $301 to $500, and $5,000 above $500. Importantly, all of those dollar amounts exclude "interest and penalty."<br><br>That "interest and penalty" already properly serves the function that the Department is trying to achieve with the additional proposed fines. If an employer loses a dispute over a delayed or denied payment, that employer will have to suffer the financial consequences: the employer would have to cover "interest and penalty" where none existed prior to the dispute. Prospectively adding another employer payment on top of that "interest and penalty" would be a superfluous burden. Moreover, that additional payment would increase the risk that some employees would seek suspect medical treatment, file inflated claims, and bring about the very sort of fee disputes that the Department is hoping to avoid.<br><br>The Legislature was crystal clear in enacting SB899 that it wished to avoid the unreasonable and irrational penalty schemes that had previously infected claims adjusting throughout the state. Commenter is disappointed that the Department has proceeded to do through regulation what the Legislature has already opposed in legislation. | Professionals<br>September 27, 2006<br>Written Comment | 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 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.<br>These regulations take these factors into consideration. | |

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| | Commenter urges the Department to withdraw its proposed penalty increases. | | | |
| Section 10225.1(j)(5) | Commenter appreciates that the Department has added length of time between violations as a mitigating factor when the Administrative Director is assessing penalties. This provision, in Section 10225.1(j)(5), fits with the rest of the discretionary provisions in Section 10225.1(j) in allowing for proper consideration of each matter on a case-by-case basis. | David J. Farber, Counsel American Association of Independent Claims Professionals September 27, 2006 Written Comment | We agree. | None requested. |
| General Comment | Commenter is disappointed to see the revised regulations are more punitive than the previous drafts and feel that the penalties in Labor Code section 129.5 are sufficient to cover all indemnity issues. Commenter notes that the medical issues are not specifically included in Labor Code section 129.5 and requests the Division incorporate these into the 129.5 regulations. | Tina Coakley Legislative & Regulatory Analyst The Boeing Company September 27, 2006 Written Comment | We disagree. These penalties are pursuant to Labor Code section 5814.6, not Labor Code section 129.5. | None. |
| Section 10225.1(i)(3)(A) | Commenter finds this penalty amount to be completely out of proportion considering that if the employee is paid the maximum daily time loss rate of $28 per day x 14 days the total time loss comes to $392. The proposed $5,000 penalty amounts to 1,176% over the amount due. Most states allow a 25% penalty of indemnity with a cap of $1,000. | Tina Coakley Legislative & Regulatory Analyst The Boeing Company September 27, 2006 Written Comment | We disagree. The maximum TD rate is currently $840 per week. Therefore, 14 days of indemnity could equal $1680. The penalty was increased from $1000 to $5000, because the penalty should be more than the unpaid amount. | None. |
| Section 10225.1(i)(3)(B) | Commenter finds this penalty amount to also be completely out of proportion considering that if the employee is paid the maximum daily time loss rate of $28 per day for 15 days ($420) through 42 days ($1,176) the proposed $10,000 penalty amounts to a range of 2,281% to 750%. Reiterates that most states allow a | Tina Coakley Legislative & Regulatory Analyst The Boeing Company September 27, 2006 Written Comment | We disagree. The maximum TD rate is currently $840 per week. Therefore, 42 days of indemnity could equal $5040. The penalty was increased from $5000 to $10,000, because the penalty should be more than the unpaid amount. | None. |

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| | 25% penalty of indemnity with a cap of $1,000. | | | |
| Section 10225.1 (i)(3)(C) | Commenter found this penalty amount to also be completely out of proportion considering that if the employee is paid the maximum daily time loss rate of $28 per day for 43 days ($1,204) the proposed $15,000 penalty amounts to 1,146% over the amount due. Reiterates that most states allow a 25% penalty of indemnity with a cap of $1,000. | Tina Coakley Legislative & Regulatory Analyst The Boeing Company September 27, 2006 Written Comment | We disagree. The maximum TD rate is currently $840 per week. This penalty is for an unreasonable delay or refusal to pay indemnity for more than 42 days (six weeks). This third tier of the penalty schedule must be higher than the previous tier and the total penalty should be more than the unpaid amount. The numbers relied on by the commenter are incorrect. | None. |
| Section 10225.1(i)(5) (A through D) | Commenter found this penalty amount to also be completely out of proportion considering that if the reimbursement to an employee for medical payments he/she made on their own are unreasonably delayed or refused, which range from $100 to more than $501 (excluding interest and penalty), the penalties, ranging from $1,000 to $5,000 amounts to increases ranging from 500% to 900%. Recommends that these amounts be reduced significantly. | Tina Coakley Legislative & Regulatory Analyst The Boeing Company September 27, 2006 Written Comment | We disagree. 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 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 | None. |

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| | | | (1980) 27 Cal.3d 348, 352. These regulations take these factors into consideration. | |
| Section 10225.1(i) (7) | Commenter notes that the penalty was raised from the prior draft from $1,000 to $2,500 for an unreasonable delay or refusal to make a timely payment to the employee as reimbursement for payment for services provided for a supplemental job displacement benefit voucher or paying the training provider causes an interruption in the employee's retraining is also out of proportion at almost 85% over the amount of the voucher. If the penalty increase of 150% was justified to correspond to § 10225.1 (i) (6) then commenter recommends that this aforementioned section be reduced to $1,000. | Tina Coakley Legislative & Regulatory Analyst The Boeing Company September 27, 2006 Written Comment | We disagree. See above. | None. |
| Section 10225.1(i)(9) | Commenter notes that the penalty was raised from the prior draft from $1,000 to $2,500 for any other penalty award by a workers' compensation administrative law judge. If the penalty increase of 150% was justified to correspond to § 10225.1 (i) (6) and § 10225.1 (i) (7) then commenter recommends that this aforementioned section be reduced to $1,000. | Tina Coakley Legislative & Regulatory Analyst The Boeing Company September 27, 2006 Written Comment | We disagree. See above. | None. |
| General Comment | Commenter supports the revisions made to the proposed regulations. Commenter is concerned that she has been hearing there is opposition among the insurers to the strengthening of the administrative penalty structure and hopes that the Division is not swayed by their arguments.<br><br>With all the cost-saving tools at the | Linda Atcherley President California Applicants' Attorneys Association September 27, 2006 Written Comment | We agree. | No revisions requested. |

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| | employer's disposal, there is no justification for a claim that these penalties will increase costs. Labor Code section 5814 is about unreasonable delay. Labor Code section 5814 is about administrative penalties for a practice of unreasonable delay.<br><br>Injured workers – particularly unrepresented workers – are at the mercy of their claims administrator, some of whom will act improperly. Years of audit results prove that. Claims administrators who have been found by a judge to have unreasonably delayed compensation, failed to timely reimburse a worker for self-procured medical treatment costs or failed to timely authorize medical treatment should be held accountable. Strong oversight is essential to keep some semblance of balance in the system.<br><br>Commenter urges the Division to adopt these revisions as soon as possible. | | | |
| General Comment | Commenter urges the adoption of these regulations, as drafted, as soon as possible.<br><br>Commenter represents thousands of injured workers who are suffering from delays caused by claims administrators who fail to properly adjust workers' compensation claims. With the limitations on total temporary disability delays are catastrophic for injured workers, particularly those caused by unreasonable delay in the approval of medical treatment.<br><br>Although it takes an enormous amount of time to get a Section 5814 penalty decision from a judge, commenter is hoping that these | Mark Hayes<br>President<br>VotersInjuredatWork.org<br>September 27, 2006<br>Written Comment | We agree. | No revisions requested. |

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| | regulations will have a sentinel effect on the behavior of the industry and thereby speed the proper benefits to injured workers. As proposed, the regulations appear to be a good first step towards protecting injured workers from unscrupulous companies. | | | |
| Audit Process – General Comment | The proposed regulations still do not include a process to follow once the Administrative Director has made a determination that an employer/insurer warrants an investigation or audit under Labor Code section 5814.6. Existing regulations for an audit or investigation include the processes used by the Division of Workers' Compensation (Sections 10106 and 10106.1) and have been a useful tool for the industry. A defined process ensures that each entity selected for audit is treated in the same manner, held to the same standards and informed of the audit process from commencement to completion.<br><br>Commenter recommends a process be established in these regulations that is consistent with existing investigation regulations used by the DWC (Sections 10106, 10106.1 and 10106.5). | Jose Ruiz<br>Claims Operations Manager<br>State Compensation Insurance Fund<br>September 27, 2006<br>Written Comment | We disagree that additional audit procedures are required for 5814.6 audits. An audit may be conducted concurrently with a Labor Code section 129.5 audit. The regulations also allow the AD to utilize Gov. Code sections 11180 through 11191. The regulations provide a selection criteria: The regulations require that one or more 5814.6 penalty awards must have issued within a five year period at a single adjusting location. | None. |
| Section 10225.1(i)(5) | The modified proposed regulation in (A) through (C) does not provide for self-procured medical treatment costs between $100.01 to $101.00, $300.01 to $301.00 and $500.00 to $501.00.<br><br>Commenter recommends the following changes:<br><br>(A) $1,000 for medical treatment costs up to $100.00, excluding interest and | Jose Ruiz<br>Claims Operations Manager<br>State Compensation Insurance Fund<br>September 27, 2006<br>Written Comment | We agree. | We will revise the subdivision to state:<br>(5) For each penalty award by ~~***a workers' compensation administrative law judge***~~ ***the Workers' Compensation Appeals Board*** for a violation of Labor Code section 5814 |

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| | penalty;<br>(B) $2,000 for medical treatment costs of $100.01 to $300.00, excluding interest and penalty;<br>(C) $3,000 for medical treatment costs of $300.01 to $500.00, excluding interest and penalty;<br>(D) $5,000 for medical treatment costs of more than $500.01, excluding interest and penalty; | | | for an unreasonable delay or refusal to reimburse an employee for self-procured medical treatment costs:<br>(A) $ 1,000 for medical treatment costs ~~***up to of***~~ ***or less***, excluding interest and penalty;<br>(B) $ 2,000 for medical treatment costs of ~~***$101***~~ ***more than $100*** to $300, excluding interest and penalty;<br>(C) $ 3,000 for medical treatment costs of ~~***$301***~~ ***more than $300*** to $500, excluding interest and penalty;<br>(D) $ 5,000 for medical treatment costs of more than ***$500*** ~~***$501***~~, excluding interest and penalty; |
| Section 10225.1(j) | The Division's Summary of Proposed Changes states the penalty may be 'mitigated." The proposed language in subdivision (j) states that the AD may "**adjust**" (i.e., increase or decrease) a penalty imposed under this section "after considering" specific factors. In an effect to achieve the intent presented in the Summary of Proposed | Jose Ruiz<br>Claims Operations Manager<br>State Compensation Insurance Fund<br>September 27, 2006<br>Written Comment | We agree. | The word "mitigate" will replace the word "adjust." |

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| | Changes with the proposed modified text, the language should be changed to reflect that the penalty may be 'mitigated.' | | | |
| Section 10225.1(i)(3) | The proposed regulations included language pertaining to issues of "proper objection to", which is not an unreasonable delay or refusal of payment of compensation.<br><br>Commenter recommends deleting the reference to "proper objection to" in this subsection. | Jose Ruiz<br>Claims Operations Manager<br>State Compensation Insurance Fund<br>September 27, 2006<br>Written Comment | We agree to make his change. | The subdivision will state:<br>(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~~ of temporary disability benefits or salary continuation payments in lieu of temporary disability; vocational rehabilitation maintenance allowance, life pension, or death benefits: |