Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
Section 10125(l)	Commenter states that this definition fails the clarity requirement of regulations as set forth in Government Code § 11349.1(a)(3) on a number of levels. The first is that it is internally inconsistent, since a "reasonable" person would not consider two dissimilar penalties in two files (where there could be thousands of files being adjusted at a location) spread out over a five year period to be a general business practice. The second is that the definition of "pattern" is inconsistent both with the common usage and definition of the word "pattern" and inconsistent with judicial interpretations of that term. In its effort to define a "general business practice" the Division has abandoned any concept of what a "reasonable person" would view as a pervasive failure to discharge obligations under the workers' compensation laws as evidenced by assessments of Labor Code § 5814 penalties. Instead, the Division has defined this term by defining "pattern" in such a way that defies the plain English definition of that term and is inconsistent with the reasonableness standard proposed in the same paragraph. This also violates the consistency standard as set forth in Government Code § 11349.1(a)(4). According to this proposed regulation, a "pattern" may consist of two violations of Labor Code § 5814 in two separate claims files. The two violations do not have to be of the same type, do not have to have occurred contemporaneously, or even remotely contemporaneously. There is no consideration	Mark E. Webb Vice President – Governmental Relations Employers Direct Insurance Company February 9, 2007 Written Comment	We disagree. The definition includes minimum standards that must be met. The definition uses the word "may" because the pattern will depend on the circumstances. Although two dissimilar penalties in two fines may not constitute a pattern, two similar penalties stemming from egregious conduct and circumstances which occurs in two different files may constitute a pattern. Thus, a reasonable person will find that there is a pattern and that a general business practice exists in that situation. The facts will differ from situation to situation and the definition allows for a case by case approach. The mitigation factors set forth in 10225.1(h) include the size of the adjusting location and may be applied to mitigate penalties. 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: 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;	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	given to the size of the adjusting facility. In fact, according to proposed 8 CCR § 10225.1(a), a "pattern" of violations is established by two claims files with Labor Code § 5814 violations separated by as much as five years.		and "practice" means "[p]erformance or application habitually engaged in ... [or] repeated or customary action." The *Dodrill v. Nationwide Mutual Insurance Co*. (1996) 201 W.Va. 1, 13; 491 S.E.2d 1 court stated: "Accordingly, we hold that to maintain a private action based upon 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." 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:	

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	In the case of Labor Code § 5814.6, a general business practice must mean a reliable sample of acts allowing a reasonable conclusion that the Section 5814 penalties were a result of more than individual errors. The proposed definition does not accomplish that objective.		"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, 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.)" There will be no sample because audits are not required in order to determine if 5814 awards have issued. DWC will review the WCAB monthly activity report to see how many 5814 awards have been issued at a single adjusting location within a five year period.	
General Comment	Commenter is a worker who was injured on the job and had trouble getting his treatment authorized by the insurance company. Commenter states that a claim examiner that improperly deny treatment should receive a prison sentence.	Mr. Owen Injured Worker February 8, 2007 Written Comment	We disagree. Labor Code section 5814.6 only provides authority to assess monetary penalties.	None.
Section 10225.l (b)	Commenter states that these regulations should be implemented as soon as possible. Further delay and denial may cause serious	Linda F. Atcherley, President California Applicant's Attorneys Association	We agree to implement these regulations as soon as possible.	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	harm to the injured worker. Commenter has a suggestion that would further the intent of this administrative penalty. However, as noted above, if making this change would further delay implementation of these regulations, commenter requests that the Division consider this change at a later time. Subdivision (b) of proposed § 10225.1 requires that the Division submit at least monthly an activity report of all § 5814 decisions, findings, and/or awards. Commenter recommends that this information be made public. 5814 penalties could further assist employers in selecting the proper insurance carrier. At the same time, commenter believes making this information public would serve as an additional incentive to claim adjusters to improve their claims operation in order to stay off this listing and gain a competitive advantage over other carriers.	February 19, 2007 Written Comment	We disagree regarding posting the 5814 activity reports. The activity reports are internal documents that include injured workers' names, case numbers, petitions filed, awards that are not final, interim orders and other non-relevant information.	
Section 10225 (1)	Commenter notes that the definition of general business practice has been amended to include the following verbiage: "The pattern of violations may consist of one type of act or omission, or separate, discrete acts or omissions in the handling of more than one claim." While this is an improvement from previous versions of the regulations, the definition is still too general. The definition in the regulations is not consistent with that which is commonly-	Darrell Brown, ARM Workers' Compensation Practice Sedgwick CMS February 19, 2007 Written Comment	We disagree. The definition includes minimum standards that must be met. The facts will differ from situation to situation and the definition allows for a case by case approach. The phrase "that can be distinguished by a reasonable person from an isolated event" would address the concern the example given regarding a very large claims administrator with two 5814 awards.	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	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."		Case law supports the definition: 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: 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." The *Dodrill v. Nationwide Mutual Insurance Co*. (1996) 201 W.Va. 1, 13; 491 S.E.2d 1 court stated: "Accordingly, we hold that to maintain a private action based upon 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	

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
			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." 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: "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, 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.)"	
	The definition does not consider the size of a particular adjusting location. Two 5814 penalty awards at a small adjusting location with perhaps 10 claims adjusters could indeed		Also, subdivision (h) allows a penalty to be mitigated for various reasons including the size of the	

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	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.		adjusting location.	
Section 10225 (l)	Commenter notes the following sentence in the definition of general business practice: "The pattern of violations may consist of one type of act or omission, or separate, discrete acts or omissions in the handling of more than one claim." As noted in § 10225.1 (a) the administrative penalties shall only be imposed under this section based on violations of Labor Code section 5814 after more than one penalty awards have been issued …..for unreasonable delay or refusal to pay compensation within a five year time period. This definition is inconsistent, since a "reasonable" person would not consider two dissimilar penalties in two files (when an adjusting site could be handling thousands of claims) spread out over a 5-year period. In addition, the definition of "pattern" is inconsistent both with the common usage and definition of the word "pattern." By adopting a definition of general business practice that elevates an unrepresentative, statistically irrelevant number of dissimilar violations with no indication that such violations were pursuant to a policy of the employer or insurer or were anything other than simple human error, the Division is	Tina Coakley Legislative & Regulatory Analyst The Boeing Company February 20, 2007 Written Comment	We disagree that the definition is unclear. If there are two very dissimilar penalties that a reasonable people would consider isolated events, then there is no general business practice and the penalty would not be imposed. However, as stated by the commenter above: "Two 5814 penalty awards at a small adjusting location with perhaps 10 claims adjusters could indeed represent a general business practice." The definition includes minimum standards that must be met. If the minimum standards are not met, then the penalties will not be imposed. The facts will differ from situation to situation and the definition allows for a case by case approach. The term "general business practice" itself has been approved in several cases in other states, without requiring mathematical certainty. (See above.)	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	improperly combining 5814.6 liability with the penalty under Section 5814. In the case of Labor Code § 5814.6, a general business practice must mean a reliable sample of acts allowing a reasonable conclusion that the Section 5814 penalties were a result of more than individual errors. The proposed definition does not accomplish that objective. Commenter refers to the "CA Final Statement of Reasons (Subject Matter: Workers' Compensation – Audit Regulations Title 8, CA Code of Regulations Section 10100.2 et seq.) Under Section 10100.2 Definitions it notes it was modified to set forth that the definitions will apply "for audits conducted on or after January 1, 2003". Section 10100.2(p) was modified in response to comments that the handling of a single claim should not constitute a general business practice. ***The definition of a general business practice no longer includes separate acts or omissions in the handling of a single claim.*** The clarification of the definition of a general business practice is necessary so that the regulated community is aware of the type of conduct that may subject it to civil penalties. Prior cases as well as the comments evidence the fact that there is confusion within the regulated community regarding when the civil penalty is applicable. ***The definition will also decrease litigation concerning the application of the civil penalty for general business practices."***		The definition of "general business practice" in section 10225(l) also states "The pattern of violations must occur in the handling of more than one claim."	
General Comment	Commenter is disappointed to find that this fifth iteration of the proposed regulations for	Steven Suchil Assistant Vice President	We disagree. The definition states in part: "'General business practice'"	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	implementation of Labor Code Section 5814.6 continues to ignore serious flaws that have been repeatedly commented upon by AIA and others in the workers' compensation community that will be affected by the proposed changes. It is the egregious violations made over and over again, with conscious knowledge that one is acting in violation of statutory and regulator requirements, which Labor Code Section 5814.6 was targeting. This proposal applies the same penalty to all types of violations, including rare and isolated errors. As a result, the proposed regulations over-reach their statutory authority and consistency as provided in Government Code Section 11349.1. Commenter supports the Division's requirement and duty to identify and punish those who knowingly and repeatedly violate Labor Code Section 5814.6; however, commenter continues to object to the punitive nature of the proposed regulations that would treat good and bad actors, and inadvertent and egregious transgressions, in the same way.	Western Region American Insurance Association February 20, 2007 Written Comment	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." Therefore, rare or isolated events do not fall within the definition.	
Section 10225(l)	The definition of general business practice fails to comply with the Government Code Section 11340.1 standards of consistency and clarity. The provided "reasonable person" standard intended to "distinguish a pattern of violations from an isolated event" is unclear and provides no guidance to those affected by the regulations. Furthermore, the definition is inconsistent	Steven Suchil Assistant Vice President Western Region American Insurance Association February 20, 2007 Written Comment	We disagree. The definition includes minimum standards that must be met. The facts will differ from situation to situation and the definition allows for a case by case approach. Although case law holds that mathematical certainty is not required, the regulations do provide that there must be at least two 5814 violations, they must occur in more than one	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	with the penalty provisions in Section 10225.l. An isolated event is insufficient to constitute a general business practice; the term can only apply where a pattern of violations has been established. As most recently revised, however, any two Labor Code Section 5814 penalties, of any nature, in a five-year period could result in a minimum $100,000 administrative penalty, whether the total number of claims adjusted were 5 or 50,000 or 500.00. The definition language thus renders the proposed rules inconsistent and unclear and fails to meet the statutory requirement because no pattern and practice of violations need be established.		claim file and they must occur within a 5 year period. Also, subdivision (h) allows a penalty to be mitigated for various reasons including the size of the adjusting location.	
Section 10225.1	This section fails to meet the Government Code Section 11349.1 authority and consistency standards by failing to scale the application of administrative penalties to the size of an adjusting location and failing to implement an unambiguous statutory mandate. The Administrative Director, while enjoying some latitude in implementing and interpreting statues, is nevertheless bound by statutory language and is required to give effect to the intent of the legislature. Labor Code Section 5814.6 reserves the largest and most severe penalties for claims administrators who so frequently violate their obligation to pay benefits when due as to indicate a general business practice. The Legislature clearly did not intend that such serious penalties might be award for isolated instances of misconduct, but that is precisely what the proposed language would do.	Steven Suchil Assistant Vice President Western Region American Insurance Association February 20, 2007 Written Comment	We disagree. The definition of "general business practice" is based on the current audit definition of general business practice (8 CCR §10100.2(p), with slight adjustments for further clarity. The definition includes minimum standards that must be met. The facts will differ from situation to situation and the definition allows for a case by case approach. Although case law holds that mathematical certainty is not required, the regulations do provide that there must be at least two 5814 violations, they must occur in more than one claim file and they must occur within a 5 year period. The definition precludes the award of penalties for isolated instances of misconduct by the words: "pattern of violations of Labor Code section	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	Claims administrators and their staffs are human beings. Even the hardest working most conscientious among them will inevitably make an error. With 600,000 new claims each year, and an inventory of open claims from previous years, it is unquestioned that mistakes will occur, and there are numerous penalties assessable for such negligence. Assessing severe penalties for minor errors is inconsistent with, and not authorized by, Labor Code Section 5814.6.		5814 at a single adjusting location that can be distinguished by a reasonable person from an isolated event." The definition of "knowingly" is based on the current audit definition contained in 8 CCR §10100.2(u) and case law. "[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 known by corporate managers. More specifically, *FMC* held that knowledge of rank-and-file employees could be imputed to an insured corporation to find that the corporation "expected" its activities to cause pollution damage. Its liability insurance policies did not cover "expected" pollution damage. The court applied normal rules of agency that impute an agent's knowledge to the principal: "Civil Code §2332: [B]oth principal and agent are deemed to have notice of whatever either has	

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			notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." In line with normal rules of agency, *FMC* noted the rule is limited to "[k]nowledge … [the] employee receives or has in mind when acting in the course of his or her employment …, [and that] concerns a matter within the scope of the employee's duties." (*Id.*, p. 1212-1213.) Also in line with normal rules of agency, *FMC* held that a corporation has the knowledge of its employee "whether [the] employee communicated [that] knowledge to the [corporation] or not". *Id.* at 1212. In the case of *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395, 402, the appellate court held that an owner of a bar is responsible for the acts of the bartender who "knowingly permitted" the illegal sale of narcotics, despite the fact that the owner testified that she spent little time at the bar, that she did not personally know of the illegal activities and that she had no reason to suspect the illegal activities. The bartender's "knowledge and permission are imputed to appellant as his employer (the owner, operator and licensee) within the scope of the	

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
			principle that a 'licensed employer may be disciplined to the extent or revocation of his license for the acts of his employees. (Cites omitted.)." Finally, in *The People v. Taylor* (1992) 7 Cal.App.4th 677, 692, the court analyzed the meaning of "knowingly" as it is used in Health and Safety Code §25189.5, which provides that it is unlawful for a person to "knowingly" dispose of hazardous waste. The defendant argued that he did not know that his action of abandonment constituted an unlawful "disposal" and therefore, the act was not done "knowingly." The court held that knowingly does not require any knowledge of the unlawfulness of the act, but simply the knowledge that the facts exist which bring the act or omission within the provisions of the code. "California case law has long held that the requirement of 'knowingly' is satisfied where the person involved has knowledge of the facts, though not the law." (*Id*. at p. 692) In the *Taylor* case, the court determined that the defendant was aware of the actual facts surrounding his vacating of the manufacturing premises and his permanently leaving behind hazardous waste materials.	
Section 10225	Commenter would like to thank DWC for considering his comments during the past	Jose Ruiz Claims Operations	We agree. No changes requested.	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	year, but at this time has no comment regarding the recent proposed changes.	Manager State Compensation Insurance Fund February 20, 2007 Written comment		
Section 10225(1)	The administrative director (AD) has fine-tuned the proposed regulations implementing Labor Code section 5814.6, adding specificity, clarifying some procedural issues for appeal, and sharpening the triggers for doubling or tripling the administrative penalties for repeat violators. These revisions are necessary and beneficial. It is essential that the regulator and the regulated community have a common understanding of the obligations imposed by the statute. Unfortunately, the proposed regulations do not address several of the substantive policy issues raised by the Institute and others in earlier testimony. The plain language of the statute indicates that the 5814.6 penalty exists in order to sanction claims administrators who have knowingly violated section 5814 with a frequency that indicates a general business practice of the unreasonable denial or delay in the payment of workers' compensation benefits. The administrative director's definitions of "general business practice" (a penalty award in more than one case) and "knowingly" (imputed corporate knowledge of the conduct) impermissibly disconnect the implementing regulations from the enabling statute and create a review system that was never contemplated by and is not authorized by the	Michael McClain General Counsel & Vice President California Workers' Compensation Institute February 20, 2007 Written Comment	We agree. We disagree. The definition is based on the current audit definition of general business practice (8 CCR §10100.2(p), with slight adjustments for further clarity. The definition includes minimum standards that must be met. The facts will differ from situation to situation and the definition allows for a case by case approach. Although case law holds that mathematical certainty is not required, the regulations do provide that there must be at least two 5814 violations, they must occur in more than one claim file and they must occur within a 5 year period. The	None. None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	statute. Consequently, the proposed regulations continue to be an invalid exercise of administrative authority that violates the scope of the enabling statute. By its constrained definition of a "general business practice," the Division continues to disregard a key element of the statute – the frequency of section 5814 penalty awards. Commenter opines that the regulations fail to consider the number of files managed by a claims organization as a factor in determining whether "a pattern of violations" exists. While the regulations still do not expressly require the consideration of the number of files managed by the claims operation, we hope that it is implicit in the definition of "a pattern of violations." The standard definition of "pattern" is a representative sample. A representative sample of claims files managed over a 5-year period can only be established by a ratio or percentage sample. DWC reviewers should be instructed to look at the totality of the claim management process, including the total number of claims being managed within the period being reviewed, in determining whether section 5814 has been knowingly violated with a frequency that indicates a general business practice of the unreasonable denial or delay in the payment of workers' compensation benefits. The goal of this enforcement process is compliance with the statutory obligations to promptly and fully pay the workers'		definition precludes the award of penalties for isolated instances of misconduct by the words: "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." We disagree that a "pattern is a representative sample." Further, there will be no sample because audits are not required in order to determine if 5814 awards have issued. DWC will review the WCAB monthly activity report to see how many 5814 awards have been issued. We disagree that the goal is compliance with statutory obligations. That is the goal of Labor	

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	compensation benefits to which the injured worker is entitled. In order to avoid a chilling effect on permissible claims management activity, these regulations must clearly state the criteria for adherence to the statute, must establish a reasonable deterrent effect, and must be fairly applied, or the regulations will fall beyond the authority of the statute.		Code section 129 and the audit penalties. However, the goal of Labor Code section 5814.6 is to penalize employers or insurers that knowingly violate section 5814 with a frequency that indicates a general business practice. These employers or insurer have already been found to have unreasonably denied or delayed compensation benefits to injured workers.	
Section 10225(1)	The Division's definition states that a business practice that results in penalties are violations that can be distinguished by a reasonable person from an isolated event. Commenter believes 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? 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. Additionally, in light of the adjuster certification process the State has implemented, some consideration should be given to holding individuals responsible for their performance. A suggestion would be to	Philip M. Vermeulen Legislative Advocate Governmental Relations February 20, 2007 Written Comment	We disagree. There will be no sample because audits are not required in order to determine if 5814 awards have issued. DWC will review the WCAB monthly activity report to see how many 5814 awards have been issued. We disagree. Although the claims administrator may choose to hold their individual claims adjusters responsible, the company is responsible for supervising its	None. None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	withhold or suspend certification for a period of time depending on the gravity and/or frequency of violations on an individual basis.		employees and is responsible for its claims adjusting services. Further, the certification process is regulated by the Dept. of Insurance, not DWC.	
Section 10225.1(g) & 10225.2(a)	Commenter objects to the change made in the 4th 15th Day text to Title 8 CCR Section 10225.1 requiring the Administrative Director to issue a $100,000 Notice of Assessment for as few as two violations of Labor Code $5814. Although 8 CCR §10225.1(h) contains mitigation provisions, including that the Administrative Director should take into account the size of the claim adjusting location when assigning penalties, this new language would take away any and all penalty amount discretion from the Administrative Director. Commenter fears that this revised language will lead to excessive, unfair and inequitable results such as $100,000 fines being required to be issued for a new as two minor violations (such as two late payments totaling $20 and $50) out of potentially thousands of claims adjusted at a particular location. Commenter suggests that 8 CCR §10225.1(g) state as noted in the 3rd 15 Day Revision as follows: "Pursuant to Labor Code Section 5814.6, administrative penalties may be assessed against an employer and/or insurer as follows:" Commenter suggests that 8 CCR §10225.2 (a) be altered to match the more equitable former 8 CCR §10225.1 (g) as follows:	Stewart J. Brooker Associate Counsel Property & Casualty Law Department CAN February 16, 2007 Written Comment	We disagree. This is not a change, but has been the procedure since the regulations were initially noticed. Two 5814 awards is the minimum requirement for the issuance of the penalties, not the maximum. The definition of "general business practice," precludes the award of penalties for isolated instances of misconduct by requiring 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." Before any awards are issued, there must be "a general business practice."	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	"Pursuant to Labor Code Section 5814.6, the Administrative Director may issue a Notice of Assessment, the Administrative Director, or his or her designee (the investigating unit of the Division of Workers' Compensation) has reason to believe that an employer or insurer has knowingly violated section 5814 with a frequency that indicates a general business practice." Commenter respectfully notes that the suggested changes will lead to more equitable and fair application of these regulations. Commenter also notes that his suggested change is consistent with the mitigation provisions contained in 8 CCR §10225.1(h).			
Section 10225.2(a)	Commenter applauds the change in wording to require an evidentiary-based standard in order to issue a Notice of Assessment for a knowing general business practice violation of section 5814.6.	David J. Farber, Counsel American Association of Independent Claims Professionals February 20, 2007 Written Comment	We agree.	None.
Section 10225.2(k)	Commenter appreciates the replacement of "reasonable" with "sixty (60) calendar days" in order to establish a set period of time for notice of pre-hearing conference.	David J. Farber, Counsel American Association of Independent Claims Professionals February 20, 2007 Written Comment	We agree. No change requested.	None.
Section 10225(l)	Commenter points out that the Division's newly suggested language reads: "The pattern of violations may consist of one type of act or omission,	David J. Farber, Counsel American Association of Independent Claims Professionals February 20, 2007	We disagree. The definition is based on the current audit definition of general business practice (8 CCR §10100.2(p), with slight adjustments for further clarity. The definition	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	or separate, discrete acts or omissions in the handling of more than one claim." Commenter feels this language begs numerous questions. In the first part of the definition, how many, or how few, acts or omissions are sufficient to constitute a pattern? Are there any limits to what can be considered an act or omission? In the second part of the definition, how can undertaking more than one type of "separate, discrete" acts or omissions (or, for that matter, more than one type of anything) constitute a pattern of behavior? The 'reasonable person' standard simply provides insufficient guidance for a field as specialized as adjusting. Commenter suggests the following language as a viable alternative: "The pattern of violations may consist of one type of act or omission knowingly committed on multiple occasions."	Written Comment	includes minimum standards that must be met. The facts will differ from situation to situation and the definition allows for a case by case approach. Although case law holds that mathematical certainty is not required, the regulations do provide that there must be at least two 5814 violations, they must occur in more than one claim file and they must occur within a 5 year period. The definition precludes the award of penalties for isolated instances of misconduct by the words: "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."	
Section 10225.1(g)(1)	Commenter cannot understand how the Division has decided to impose an additional $100,000 penalty for a knowing violation of Labor Code section 5814. As the Division's new phrasing makes clear, this penalty would come on top of the other tens of thousands of dollars in multiple, onerous penalties already contained in the draft regulations. Commenter recommends that this language be stricken.	David J. Farber, Counsel American Association of Independent Claims Professionals February 20, 2007 Written Comment	We disagree. The $100,000 penalty was not added in this revision. The penalty amount has been the same since the regulations were initially noticed. Labor Code section 5814.6 provides for penalties up to $400,000. Therefore, a $100,000 base penalty is authorized by the statute.	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
Section 10225.1(c)	Commenter believes that the Division would greatly improve its proposal to allow the Audit Unit to proceed with an investigation after two or more penalty awards if a set timeframe were included from which to move forward, not from the retroactive June 1, 2004 date this is currently included. Commenter opines that claims administrators should be able to operate under the certainty of definite parameters under which they could, or could not, be investigated, to be based on their future actions, not their past ones. Commenter requests that the timeframe of one year from this point in which to or more penalties would have had to occur in order to authorize an 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, give the fluidity in administrators' operational structure, managerial personnel and client makeup.	David J. Farber, Counsel American Association of Independent Claims Professionals February 20, 2007 Written Comment	We disagree. The effective date of the penalties was not modified in this revision. However, the June 1, 2004 and April 16, 2004 dates are based on the reasoning of *Abney*. In *Abney v. Workers' Compensation Appeals Board* (Writ Denied, 2005) 70 Cal. Comp. Cases 460, the WCAB stated: "We hold that section 5814, as enacted by SB 899 and operative June 1, 2004, applies to unreasonable delays or refusals to pay compensation that occur prior to the operative date where the finding of unreasonable delay is made on or after June 1, 2004." Because the 5814.6 penalties are related to the issuance of the 5814 awards, the reasoning behind the effective date of the statute is the same.	None.
Section 10225.1(j)(3)	Commenter believes that the Division's proposal 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 is punitive, especially in light of the $100,000 penalty added to the current draft and bears no relation to the actual denied benefits or the motive for denying benefits. Indeed, the enormous amounts proposed will have a serious chilling effect on adjuster incentives to investigate fraud, which, in turn, will harm both the public and the Division itself.	David J. Farber, Counsel American Association of Independent Claims Professionals February 20, 2007 Written Comment	We disagree. The penalty amounts were not changed in this revision. The penalty amounts were increase during the first 15 day comment period. The reasoning is as follows: 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. Similarly, 42 days of indemnity	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	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 from the time a company becomes aware of a physician's determination of Permanent and Stationary status.		could equal $5040. The penalty was increased from $5000 to $10,000, because the penalty should be more than the unpaid amount.	
Section 10225.1(I)(5)	Commenter believes the proposed penalties in this section are excessive. This section levies punitive damages up out of 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 draft still 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." That "interest and penalty" already properly serves the function that the Division 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 note existed prior to the dispute. Prospectively adding another employer payment on tope 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 Division is hoping to avoid.	David J. Farber, Counsel American Association of Independent Claims Professionals February 20, 2007 Written Comment	We disagree. The penalty amounts were not changed in this revision. Nonetheless, Labor Code section 5814.6 provides for penalties up to $400,000, clearly authorizing the penalty schedule set forth in the regulations. The penalties are stratified based on the amount of the underlying medical bill. However, there will have already been a finding that the benefits were unreasonably delayed or denied.	None.

Administrative Penalties Pursuant to Labor Code section 5814.6	RULEMAKING COMMENTS 4th 15 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
	Commenter opines that the Legislature was crystal clear in enacting SB 899 that it wished to avoid the unreasonable and irrational penalty schemes that had previously infected claims adjusting throughout the state. Comment urges the Division to withdraw its proposed penalty increases.			