FY 2009
CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH PROGRAM

Federal Annual Monitoring and Evaluation (FAME) Report (23g)

October 1, 2008 - September 30, 2009

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I. Executive Summary

Summary of the Report

This report assessed the Department of Industrial Relations, Division of Occupational Safety and Health's (DOSH or Cal/OSHA) progress towards achieving the performance goals established in their Federal Fiscal Year (FY) 2009 Annual Performance Plan and reviewed the effectiveness of programmatic areas related to enforcement activities during the period of October 1, 2008 to September 30, 2009. An extensive Special Study of the Cal/OSHA Contested Case Appeals Process is also a part of this report (Appendix G)

There are many areas in the California program identified in this report where improvements are needed. The State's standards and enforcement policies and procedures differ significantly from the federal and as a result raise questions regarding their equivalent effectiveness. The appeals process, as administered by the Occupational Safety and Health Appeals Board, has been the subject of much public debate and the Special Study conducted by OSHA raises serious concerns about both the procedures and the results of the process, which are widely variant from the federal precedent. OSHA looks to the head of the State OSHA program, the State Designee, who in California is the Director of the Department of Industrial Relations, to initiate whatever action is necessary – executive, legislative, or judicial – to address all problems identified with the OSHA-approved State plan regardless of his direct organizational authority. The state must develop a Corrective Action Plan that presents a reasonable expectation that the findings and recommendations in this report will be addressed and resolved.

Among the issues are the following:

California has been faced with a significant and continuing State budget crisis. As a result the Cal/OSHA program has experienced funding reductions resulting in unfilled positions and most importantly the furloughing of all staff, including field inspectors, on three Fridays every month. The State maintains a system of emergency coverage on these days. There were 44.5 vacancies that could not be filled as a result of a hiring freeze. It is unclear what impact this funding situation has had on the problems indentified in this report. The State's Fiscal Year 2010 budget moved funding for the Division of Occupational Safety and Health from the State's General Fund to a special Occupational Safety and Health Fund supported by assessments on Workers' Compensation premiums. Cal/OSHA must ensure that it has sufficient on-board staff available to provide effective worker protection. (See Recommendation #38.)

Based on the evaluation of inspection files, there were some notable issues concerning union involvement, contact with family members of fatality victims, and notification to complainants. Cal/OSHA lacked documentation that unions were included in inspection and post inspection activity. For fatality inspections, Cal/OSHA must ensure that they contact and maintain correspondence with the family members of fatality victims. Cal/OSHA should also ensure that it is responsive to its stakeholders by notifying all complainants of inspection results in a timely fashion, sending the required letters to the families of fatality victims, and documenting the opportunities that unions have been offered to participate in the inspection process, including notification of informal conferences. (See Recommendations #1, #3 and #10.)

Elements of Cal/OSHA's Policy and Procedures Manual for Compliance Personnel are deficient

in comparison to the OSHA Field Operations Manual (FOM), including, but not limited to, complaint policies, fatality policies, hazard identification policies, violation classification policies, informal conference policies and interview policies. Cal/OSHA should adopt policies equivalent to Federal OSHA's. In addition, Cal/OSHA compliance officers have not received all training per OSHA's training directive, *TED 01-00-018 Initial training Program for OSHA Compliance Personnel.* Cal/OSHA has also not established a curriculum of core courses for newly hired compliance officers and has not initiated a method to plan and track individual Compliance Officer Training. Cal/OSHA should ensure that newly hired staff members receive the Initial Compliance Course timely and establish a curriculum of core courses for newly hired compliance officers that are equivalent to Federal OSHA. (See Recommendations #5, #8, #11, #17, #45 and #46.)

Cal/OSHA must decrease lapse time between the opening conference and citation issuance. The lapse time between opening an inspection and issuing a citation has increased from 71.39 days to 73.90 days for safety and from 78.06 to 83.31 days for health. It remains significantly higher than the national average. Cal/OSHA must also ensure timely issuance of citations and completion of abatement to ensure that employee exposure to hazards is minimized. OSHA's Integrated Management Information System (IMIS) reports have not been accessed nor utilized on a consistent basis. Ongoing and regular review of the reports allows for data-entry errors to be corrected, and reports used to meaningfully track enforcement activity. Outstanding, open cases due to penalty processing and appeals issues need to be addressed. Data entry is inconsistent for complaint processing as well. (See Recommendations #19-25.)

Cal/OSHA must ensure that all Federal Program Change (FPC) standards are adopted within the six-month timeframe for complex rulemaking changes and ensure that all modifications are made prior to and after stakeholder input. Cal/OSHA has not adopted the *Employer Payment for Personal Protective Equipment, Final Rule,* published November 15, 2007 or the *Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee*, published December 12, 2008. The state adopted, effective February 18, 2010, the *Final Rule on Electrical Installation Requirements –29 CFR 1910 Subpart S,* published February 14, 2007. The state was two and a half years late adopting this rule. (See Recommendations #26 and #27.)

The Accounting Division for California's Department of Industrial Relations drew down FY 2009 funds on January 21, 2010 in the amount of $1,201,656.98 after the end of the grant year closeout. Some office rent payments were erroneously charged to current year grant funds. The Accounting Division needs to closely monitor grant draw downs of funding on a regular basis to ensure grant funds are properly managed. (See Recommendation #40.)

In the Cal/OSHA Appeals Process it was found that the California Occupational Safety and Health Appeals Board (OSHAB) is not interpreting "substantial probability" consistent with Federal OSHA interpretation, or with OSH Review Commission or Court of Appeals decisions. Cal/OSHA must work to attain Labor Code definitions for serious physical harm and serious violations that are consistent with Federal definitions. Also, OSHAB is using a more restrictive standard of evidence than the requirements for Federal compliance officers' testimony before the OSH Review Commission. Cal/OSHA must take appropriate action – administrative, judicial, or legislative -- to compel OSHAB to accept compliance officer testimony based on specified professional credentials, experience, or other recognized basis for expertise. Cal/OSHA must also take appropriate action to ensure that OSHAB's interpretation of "serious hazard" is

consistent with and at least as effective as the Federal definition. Cal/OSHA must take appropriate action to assure that their enforcement actions are appropriately defended at contest, including the use of medically qualified persons if appropriate. (See Appendix G, Recommendations #1, #3, and #5.)

Cal/OSHA regulations require that a minimum $5,000 penalty be assessed for an employer's failure to report an accident or fatality. OSHAB regularly reduces these penalties, based on their interpretation of Labor Code sections 6409.1(b) and 6602. When Cal/OSHA believes their cases are sufficiently strong and the $5,000 penalty is supportable, Cal/OSHA must file Writs of Mandate, requesting Superior Court review of cases, in order to establish precedent by which OSHAB would be bound in subsequent cases. Cal/OSHA should also file Writs of Mandate for other cases that would set precedent regarding retention of penalties overall. (See Appendix G, Recommendations #2, and #4.)

District Managers or compliance officers are typically required to prepare and present cases at OSHAB hearings without legal support, sufficient legal backgrounds and training, or the time to adequately prepare cases in order to effectively present the cases at hearing. If CSHOs are to continue to present their own cases, Cal/OSHA must provide adequate legal and administrative support to help them review the case file and prepare to testify. (See Recommendations #6 and #8.)

To ensure that Cal/OSHA is able to meet its 23(g) enforcement program operational requirements, the findings and recommendations in this report must be addressed and resolved. See Appendix A for a chart listing all the findings and recommendations in this report.

Background on the Program

The State of California implemented its Occupational Safety and Health plan under the provisions of Section 18(b) of the Occupational Safety and Health Act in 1977. The California Occupational Safety and Health Plan, commonly referred to as Cal/OSHA, has not received final approval. The Department of Industrial Relations (DIR) administers the Cal/OSHA program. The Division of Occupational Safety and Health (DOSH) is the principal executor of the plan. The Director/State Designee is responsible for managing the entire Department of Industrial Relations. The Chief of Cal/OSHA is responsible for managing DOSH. Allegations of 11(c) Whistle Blower discrimination are investigated by the Division of Labor Standards Enforcement (DLSE).

Cal/OSHA covers safety and health issues in all industries except those where they are precluded from enforcement. These include areas of exclusive Federal jurisdiction—Federal civilian employees, private sector employers on Native American lands, maritime activities on the navigable waterways of the United States, and employers that require Federal security clearances.

Cal/OSHA operates both an OSHA-approved State Plan funded under a 23(g) grant and a private sector on-site consultation program under a 21(d) cooperative agreement. The 23(g) funded State Plan covers enforcement at private and public sector workplaces and consultation to public sector employers and the 21(d) consultation program agreement covers consultation of private

sector employers. In Fiscal Year (FY) 2009, which is the period from October 1, 2008 through September 30, 2009, Cal/OSHA operated the 23(g) State Plan Program with a total final funding of $64,855,026. As of September 30, 2009, the enforcement staff was comprised of 122 safety and 71 health Compliance Officers. The state also has five full-time discrimination investigators for safety and health as well as six Administrative Law Judges (ALJs) and two Presiding Administrative Law Judges (PALJs).

Consistent with the Government Performance and Results Act (GPRA) and OSHA's requirements for State Occupational Safety and Health Plans, Cal/OSHA developed a Five-Year Strategic Plan that adopts Federal OSHA's three strategic goals to reduce occupational hazards through direct interventions, promote a safety and health culture through compliance assistance, cooperative programs and strong leadership, and maximize effectiveness and efficiency by strengthening capabilities and infrastructure.

Their plan commits resources and outlines milestones to reach a goal of reduction in injury and illness through combined efforts of enforcement and consultation. Cal/OSHA achieved and surpassed most activity measures set forth in the FY 2009 Annual Performance Plan. They conducted a total of 8,856 inspections, well surpassing the goal to conduct 8,500 inspections. During the course of these inspections, they identified 16,525 hazards, potentially affecting the estimated 2,966,139 workers employed at these establishments. Due to the furloughs, the total number of Cal/OSHA enforcement inspections decreased by 3.7% from the number of inspections conducted in FY 2008. Cal/OSHA continues to see a decrease in on-the-job total recordable case (TRC) injury and illness incidence rates.

In FY 2009 California continued to perform well in the following areas: increasing partnership programs, responding to imminent danger complaints, obtaining entry to conduct inspections when entry is denied, conducting public sector program inspections and reducing lapse time from date of contest to first level decision.

Cal/OSHA has developed three unique safety and health programs. The Heat Illness Prevention Program was designed to address extreme temperature conditions in California workplaces. Cal/OSHA has developed enforcement "heat" sweeps and Consultation on-site visits that include heat illness education into their Annual Performance Goal Plan. They also coordinate various Heat Illness Seminars throughout the State and create innovative e-tools to educate employers and employees on the importance of heat illness prevention. The High Hazard Employer Program (HHEP) was designed to eliminate hazards in specific high hazard industries utilizing workers compensation data. The Injury and Illness Prevention Program (IIPP) requires all employers to have an effective, written IIPP. In addition to this program, Cal/OSHA developed the Golden Gate Recognition Program to recognize employers with a good IIPP.

Cal/OSHA has created three specialized Enforcement units: The Economic and Employment Enforcement Coalition (EEEC); the High Hazard Unit (HHU); and the Process Safety Management (PSM) Unit. The EEEC was created as a multi-agency enforcement program that consists of investigators from the Division of Labor Standards Enforcement (DLSE), Cal/OSHA, the Employment Development Department (EDD), the Contractor's State License Board and the U.S. Department of Labor. Among other tasks, EEEC conducts "heat sweeps" inspections. The HHU was created to conduct inspections of employers in high hazard industries, and the PSM unit was created to conduct inspections of the chemical and allied products industry and the

petroleum refining and other potentially hazardous processes in other industries.

The Occupational Safety and Health Appeals Board (OSHAB) handles appeals from private and public sector employers and employees regarding citations issued by Cal/OSHA for alleged violations of workplace safety and health laws and regulations. The Board consists of three members appointed by the governor for staggered four-year terms. By statute, one member is selected from the field of management, one from the field of labor, and one from the general public. The Management member (also serves as Chair) and a Labor member is currently filled. While the third seat on the Board is vacant, the Chair is authorized to break any tie decisions by appointing a temporary member to the Board.

The Occupational Safety and Health Standards Board (OSHSB) is an independent board responsible for the promulgation of standards and the issuance of permanent variance determinations. The OSHSB is authorized to adopt, amend or repeal occupational safety and health standards.

Methodology

An onsite review of the Cal/OSHA workplace safety and health program began on February 8, 2010. The EEEC-North office and the Oakland, San Diego, Torrance and Van Nuys District offices were randomly selected for the on-site review. In each office, the case files selected for review followed the same selection criteria. All fatality inspection case files from those offices were evaluated; barring EEEC- North, which does not conduct fatalities and complaint inspections. A selection of fatality reports that led to no investigation were reviewed to determine appropriate documentation in this files.

The total sample size was 237 case files, with the following number of case files reviewed per office: The EEEC North – 22; Oakland – 51; San Diego – 50; Torrance – 51 and Van Nuys – 63. All cases occurred from October 1, 2008 through September 30, 2009. Ten construction inspections were chosen from safety and health lists according to the ratio of safety and health inspections done in each office. Ten general industry inspections were chosen from safety and health lists according to the ratio of those of safety and health inspections done in each office. Twenty phone/fax complaint investigations (10 safety and 10 health related) were chosen from all valid complaints where a serious hazard was indicated. All inspections with willful or repeat violations, or that had total penalties over $50,000, were evaluated. Also, a random sample of 13 of the 127 discrimination cases the DLSE closed in FY 2009 were selected as part of this review.

In addition to reviewing the above cited case files, data was reviewed from the Integrated Management Information System (IMIS). This review included general statistical information, complaint processing and inspection targeting of all Cal/OSHA's inspections. Also, compliance with requirements regarding contact with families of fatality victims, training and personnel retention was assessed. A financial audit of the 23(g) grant was conducted as well.

Several groups of stakeholders representing workers and employers were solicited for comment regarding their experiences with the operation of the program. WorkSafe, a California-based non-profit organization, and the California Labor Federation, AFL-CIO provided valuable insight. The review also included interviews with management and compliance staff. Sixteen managers and 28 employees were interviewed. Throughout the entire process, the staff was

cooperative, shared information, and was available to discuss cases, policies and procedures. This study assessed the California Occupational Safety and Health (Cal/OSHA) program's progress towards achieving the performance goals established in their Federal Fiscal Year (FY) 2009 Annual Performance Plan and to review the effectiveness of programmatic areas related to enforcement activities during the period of October 1, 2008 to September 30, 2009. Relevant observations from the first quarter of FY 2010 have also been included.

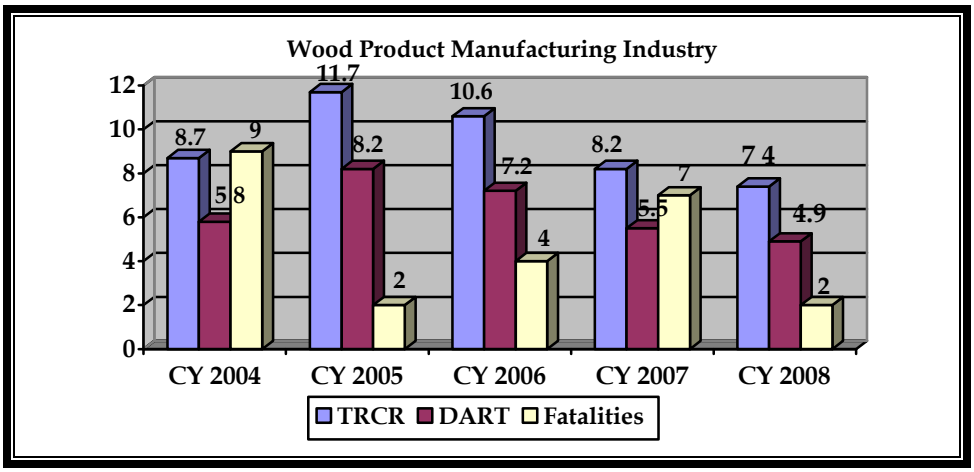
II. Summary of Recommendations and Cal/OSHA Actions from the FY 2008 FAME

Cal/OSHA provided an official response to the FY 2008 combined Federal Annual Monitoring Evaluation (FAME) Report on November 12, 2009. The recommendations from the previous evaluation, along with a summary of their response and progress towards addressing each issue, are listed below:

Cal/OSHA should direct more resources to the *Wood Product* industry, which has experienced an increase of fatalities from two in CY 2005 to four in CY 2006 to seven in CY 2007.
Cal/OSHA Response: Wood Product Manufacturing (NAICS 321) was not specifically listed as a primary target last year for high hazard enforcement. Cal/OSHA has made it a primary target for this year's inspection activity.

FY 2009 Outcome: An investigation of the Bureau of Labor Statistics (BLS) Rates for this industry revealed that the Total Recordable Case Rate (TRCR), Days Away, Restricted, or Job Transferred (DART) rate, and fatalities in Wood Product Manufacturing decreased in CY 2008 (refer to Chart 1). Since the TRCR decreased from 8.2 to 7.4, DART decreased from 5.5 to 4.9, and fatalities dropped from 7 to 2, OSHA has no further recommendations.

Chart 1



Cal/OSHA needs to decrease the time period between conducting an inspection and issuing a citation.
Cal/OSHA Response: The Deputy Chief for Enforcement has initiated a series of detailed discussions with the Regional and District Managers on this issue. The District Managers must regularly use the "Cases Open with Citations Pending" report available from IMIS to track case development by their Compliance Officers. The special notification procedure on "high profile" cases is also being reviewed with the Regional Managers to ensure that it does not unduly contribute to higher lapse times. A manager has been assigned the specific task of conducting site visits and auditing district offices as part of their commitment to reduce citation lapse time.

FY 2009 Outcome: This continues to be an issue in some of the Cal/OSHA offices. A review of the five offices revealed the following numbers of cases open more than 90 days with citations pending: Oakland five, San Diego 84, Torrance 45, and Van Nuys 59. Furthermore, the average citation lapse time for FY 2009 increased from 71.39 days to 73.90 days for safety and from 78.06 to 83.31 days for health.

Cal/OSHA should review their complaint procedures with a goal of reducing the response time to address complaints in a timely manner.
Cal/OSHA Response: The Deputy Chief for Enforcement is reviewing this issue with the Regional and District Managers. Complaint intake and evaluation procedures are under scrutiny as well as applicable Policy and Procedures Manual guidance. The goal is to identify those procedures utilized by district offices to achieve lower complaint response times so that they can be exported to the other district offices.

FY 2009 Outcome: This continues to be an issue**.** Complaints were still open on the log, even though the complaint should be closed as soon as the inspection is opened. This makes it harder to track complaints that still require action when complaints aren't closed appropriately. A review of the four offices revealed that all offices (EEEC does not conduct complaint inspections) are not consistently closing complaints when an inspection is opened. The San Diego District Office had 62.5% (60 of 96) complaint inspections on their Complaint Response Log (local report) for the timeframe.

Cal/OSHA should develop procedures to adopt standards, which are at least as effective as (ALAEA) the Federal standard within the six-month time period required by 29 CFR 1953.5.
Cal/OSHA Response: The Occupational Safety and Health Standards Board (OSHSB) has procedures in place to adopt standards which are at least as effective as (ALAEA) the Federal standard within the six-month time period required by 29 CFR 1953.5. The Standards Board strives to comply with the requirement and, in most instances, meets the time period.

FY 2009 Outcome: This continues to be an issue—Cal/OSHA does not adopt all standards within the mandated timeframe.

III. Major New Issues

Changes to Annual Performance Plan - On January 28, 2009, Cal/OSHA made the following changes to their FY 2009 Annual Performance Plan:

FY 2009 Performance Goal 1.3 (Food Flavoring): Reduce the rate of injuries, illnesses and fatalities for companies who receive either a compliance inspection or an intervention from Cal/OSHA with the goal of reducing the total DART rate and fatality rate for all industries: The paragraph under "Enforcement", which related to ergonomic problems in tortilla manufacturing, was moved to Consultation's goal and the paragraph on "abatement assistance services" was omitted from the goal.
FY 2009 Performance Goal 2.4 (Heat Illness Outreach to Employers): Cal/OSHA will supplement traditional compliance enforcement efforts directed at heat illness prevention in the construction, agriculture and other industries for FY 2009 through training, outreach, development of training tools, and promotion: The fourth paragraph under "Enforcement" on "abatement assistance services" was omitted from the goal.
FY 2009 Performance Goal 2.5 (Abatement Services): To promote employer utilization of abatement services of Cal/OSHA to accomplish abatement: This goal was omitted completely because the survey form regarding abatement service was still in "draft".

Legislation

AB 838: This bill would require OSHAB to adopt a standard for controlling the risk of occurrence of heat illness where employees work indoors on (or before) July 1, 2011. The bill was passed by the Assembly and is before the Senate Committee on Labor and Industrial Relations. The bill was passed by the Legislature and vetoed by the Governor.

AB 846: This bill would modify the assessment of civil penalties of specified state agencies. Cal/OSHA would be required to adjust the maximum amounts for all civil and administrative penalties on an annual basis to account for inflation using the Consumer Price Index. Adjustments to the regulation to account for the inflation would be exempt from the Administrative Procedures Act. Cal/OSHA would be required to impose a penalty either at the maximum level or calculate and make express findings concerning the economic benefits, if any, derived by the violator from the acts that constitute the violation and assess a penalty at a level that recovers economic benefits. An exception would exist if Cal/OSHA documents good faith efforts to comply or the inability to pay justifies a reduction. A penalty nevertheless must be imposed that would maintain a deterrent effect. The bill was passed by the Assembly but did not timely pass out of the Senate Committee on Governmental Organization and can be considered next year.

AB 990: This bill would require that a ski resort prepare an annual safety plan that conforms with the requirements of federal regulations, file a copy of the annual safety plan with the Division, post the annual safety report at a location in the ski resort where it can be viewed by the public, make the annual safety report available to anyone who requests it, and make the report available on the ski resort's internal website, if one is maintained. In addition, the ski resort would be required to submit a quarterly report containing a description of each injury and fatality that resulted from a recreational activity, such as skiing, snowboarding and sledding, that occurred on ski resort property. The report would be required to include those injuries that the

ski patrol or ski resort operating personnel are aware of and that required a hospital visit, admission to a hospital, surgery, or a visit to a medical doctor for further evaluation or care. Ski resorts would be required to establish standardized signage used to indicate a ski boundary, hazard, or other information, and a sign and key to the marking symbols would be required to be included in all trail maps and posted in conspicuous locations at the base of each run and lift entrance. Such signage would be subject to inspection. Ski resorts would also be required to establish a policy for standardized safety padding for use at lift towers, snowmaking equipment, and similar structures or equipment located on or in close proximity to ski runs and at natural hazards known to the ski resort. Lastly, Cal/OSHA would be required to use the most current aerial tramway safety standards when inspecting ski resort tramways. The bill passed out of the Assembly Committee on Labor and Employment, is currently before the Assembly Committee on Appropriations suspense file, and can be considered next year.

AB 1312: Under existing law, every health studio, as defined, must acquire an automatic external defibrillator. This requirement currently remains in effect until July 1, 2012. The bill would extend the requirements for acquisition of a defibrillator to every permanent amusement park and every golf course and extend the application of the provisions to July 1, 2014. The immunity provision applicable to health studios, which shields owners, managers, and employees from liability when an employee renders emergency care or treatment using the defibrillator, would be extended to amusement parks and golf courses. The bill was amended on June 17, 2009 to require that records of a readiness check on a defibrillator be maintained for two years after the check. The bill was passed by the Legislature and vetoed by the Governor.

AB 1561: This bill would require that Cal/OSHA collaborate with the Appeals Board to prepare an annual report that analyzes the outcomes of each citation, notification of failure to abate, special order, and order to take special action which has been appealed, for which a docket number has been assigned, and which was reviewed factually and legally in a prehearing conference or administrative hearing. The Division would be required to present the report no later than March 1 of each year—analyzing the outcomes of the prior year—to the Speaker of the Assembly and Chairperson of the Senate Committee on Rules. The bill was amended on June 26, 2009 to clarify Cal/OSHA's authority to issue an Order Prohibiting Use applies to a condition or practice, as well as a particular machine, device, apparatus, or place of employment, which constitutes an imminent hazard to employees. The bill was passed by the Legislature and was vetoed by the Governor.

SB 477: This bill would codify provisions of the existing Heat Illness Prevention Standard (8 CCR 3195) and also incorporate amendments to the regulation similar to those which were presented to the Standards Board for consideration. The bill was passed by the Senate and did not timely pass out of the Assembly Committee on Rules and can be considered next year.

SB 478: This bill would authorize the owner or operator of agricultural production, processing, and handling facilities to designate a competent employee to maintain and test the man-lifts used at the facilities in lieu of requiring such service to be performed by a person certified by Cal/OSHA as a competent conveyance mechanic. The competent person so designated would also be permitted to inspect man-lifts each month as required by applicable elector safety orders but only a certified competent conveyance mechanic would be authorized to perform the annual inspection required by law. The bill was passed by the Legislature and signed by the Governor.

IV. Assessment of State Performance on Mandated and Other Related Activities

A. Enforcement

Complaints

Cal/OSHA investigates all formal complaints with an inspection regardless of its severity. If the complainant wishes to remain anonymous, or the complainant is a non-employee, the complaint is considered non-formal (refer to CPPM C-7, page 5-6). These complaints are then evaluated for severity to determine if an inspection is warranted. The negotiated number of days to process a complaint is 3 days for inspections and 14 days for phone/fax. This is in contrast to OSHA, where complaints are evaluated to determine those that result in onsite inspections and those that result in investigations. Non-serious and non-formal complaints can be investigated by letter or by using the telephone and fax machine.

Cal/OSHA selects every "fifth satisfactory letter response" to receive an on-site inspection (refer to Cal/OSHA's policies and procedures C-7, page 11) whereas OSHA does not usually inspect if the employer's response is satisfactory (Federal FOM, page 9-12).

Cal/OSHA conducted 2,696 complaint inspections and 3,936 complaint investigations via phone/fax procedures in FY 2009. The average time to initiate a complaint inspection was 24.56 days, the shortest response time over the past 5 years but well above their goal of 3 days. (SAMM 1) The average time to initiate a complaint investigation was 14.08 days which is at their goal of 14 days.

Table 1 shows the average number of workdays Cal/OSHA took to initiate complaint inspections and investigations and the percent of complaint inspections where Cal/OSHA notified complainants timely. The table also compares this year's performance with that of previous fiscal years.

Table 1

Complaints (SAMM 1,2,3)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Goal***
Days to Initiate Inspection (SAMM 1)	**29.69 days** (85411/2876)	**31.28 days** (80061/2559)	**34.35 days** (97255/2831)	**28.93 days** (88580/3061)	**24.56 days** (66235/2696)	3 days
Days to Initiate Investigation (SAMM 2)	**16.69 days** (72723/4355)	**15.40 days** (63836/4143)	**17.49 days** (73124/4180)	**14.42 days** (63411/4396)	**14.08 days** (55440/3936)	14 days
Complainants Notified Timely (SAMM 3)	**96.90%** (2628/2712)	**97.10%** (2478/2552)	**97.97%** (2653/2708)	**96.73%** (2719/2811)	**98.11%** (2591/2641)	100%

The Cal/OSHA Policy and Procedures Manual (CPPM) does not address all elements that are required in the complaint process. For example, Cal/OSHA is lacking E-Complaint Procedures (Federal FOM, page 9-2 and 9-5 to 9-7), the Handling/Processing of Referrals from Other Agencies (Federal FOM, page 9-2), Scheduling an Inspection of an Employer in an Exempt Industry (Federal FOM, page 9-5), Union Reference (Federal FOM, page 9-11), and Complaint

Questionnaire (Federal FOM, page 9-17 to 9-20). Cal/OSHA also allows the employer to submit the written results of an investigation within 14 days (refer to CPPM C-7, page 8), whereas Federal OSHA has a 5-day requirement (Federal FOM, page 9-11).

One hundred and nine inspection and investigation case files were reviewed, of which 80 were investigation case files and 29 were inspections. For the investigations, 20 phone/fax complaint investigations, made up of 10 safety-related and 10 health-related, were chosen from all valid complaints. The EEEC-North unit does not investigate complaints.

In eleven of the 109 complaint case files reviewed, Cal/OSHA did not respond to the complaint in a timely fashion. Twenty four of the 109 complaint case files reviewed did not have initial letters to the complainant. Twenty seven case files did not include follow-up letters to the complainant.

Finding 1: In eleven of the 109 complaint case files reviewed, Cal/OSHA did not respond to the complaint in a timely fashion. Twenty four of the 109 complaint case files reviewed did not have initial letters to the complainant. Twenty seven case files did not include follow-up letters to the complainant.

Recommendation 1: Ensure that complaints are responded to in a timely fashion. Ensure that initial notifications are made and all complainants are provided the results of their complaint in a timely manner.

Finding 2: The Cal/OSHA Policy and Procedures Manual does not address elements that are required in the complaint process.

Recommendation 2: Adopt policies and procedures equivalent to Federal OSHA to include the following: E-Complaints Procedures (Federal FOM, page 9-2 and 9-5 to 9-7), the Handling/Processing of Referrals from Other Agencies (Federal FOM, page 9-2), Scheduling an Inspection of an Employer in an Exempt Industry (Federal FOM, page 9-5), Union Reference (Federal FOM, page 9-11), Complaint Questionnaire (Federal FOM, page 9-17 to 9-20), and the Five-day requirement for employer to submit written results of an investigation (Federal FOM, page 9-11).

Fatalities

California experienced 172 fatalities in FY 2009 which were entered into the IMIS system. Of the four offices visited (excluding EEEC North, which does not conduct fatality inspections), 52 fatality inspections were reviewed. Nine of the fatality cases were appropriately classified as "no jurisdiction" and were not investigated further.

In 23 of the 52 cases, the next of kin was not notified nor did the case file contain any correspondence to the families. Two fatality inspections were not initiated in a timely fashion and the reasons for the delay were not documented in the case file.

The CPPM does not address elements that are required in the OSHA fatality process. Cal/OSHA policies do not have Interview Procedures, which describes interview procedures for investigating fatalities; and Informer's Privilege, to protect the identity of informers (Federal

FOM, page 11-7). Cal/OSHA policies do not have Investigation Documentation, which includes: Personal Data—Victim, Incident Data, Equipment or Process Involved, Witness statements, Safety and Health Program, Multi-Employer Worksite, and Records Request (Federal FOM, page 11-9 to 11-10). Finally, Cal/OSHA policies do not have policies on Families of Victims, which includes Contacting Family Members, Information Letter, Letter to Victim's Emergency Contact, and Interviewing the Family (Federal FOM, page 11-12 to 11-13).

Finding 3: Twenty three of the 52 fatality inspections did not contain adequate information to determine whether Cal/OSHA communicated with the victim's family concerning the process and results of the investigations.

Recommendation 3: Ensure that family members of the fatality victim are contacted regarding the investigation and that all required correspondence is completed in a timely manner and documented in each case file.

Finding 4: Two of the 52 fatality inspections were not initiated in a timely fashion and the reasons for the delay were not documented in the case file.

Recommendation 4: Ensure that Compliance Officers initiate fatality inspections timely after initial notification and that Compliance Officers communicate and document reasons for any delays in the case file.

Finding 5: The CPPM does not address elements that are required in the fatality process.

Recommendation 5: Adopt policies equivalent to Federal OSHA's on Interview Procedures and Informer's Privilege (Federal FOM, page 11-7); on Investigation Documentation, which includes: Personal Data—Victim, Incident Data, Equipment or Process Involved, Witness statements, Safety and Health Program, Multi-Employer Worksite, and Records Request. (Federal FOM, page 11-9 to 11-10); and on Families of Victims, which includes Contacting Family Members, Information Letter, Letter to Victim's Emergency Contact, and Interviewing the Family (Federal FOM, page 11-12 to 11-13).

Targeting/Inspections

A review was conducted of Cal/OSHA's targeted/programmed inspection systems for general industry and construction. The review included IMIS inspection, enforcement statistics, and detailed scan reports for programmed inspections conducted in FY 2009.

Programmed inspections were established to target places where hazards are more likely to exist. Cal/OSHA's Programmed Inspections policies and procedures differ from OSHA's in that all programmed inspections are required to be comprehensive (refer to CPPM C-1, page 7) whereas OSHA has guidelines for "Programmed Inspections with a Limited Scope" (Federal FOM, page 2-20).

Cal/OSHA's inspection targeting system currently consists of a Special Emphasis Program (SEP) on the American Recovery and Reinvestment Act (ARRA), Agriculture Safety and Health Inspection Project (ASHIP), Construction Safety and Health Inspection Project (CSHIP), and on Outdoor and Indoor Heat Illness Prevention.

Cal/OSHA prioritizes programmed inspections using workers compensation to identify high hazard establishments, establishments with an experience modification rate at/or exceeding 125%, and/or establishments with Work Class Codes that have higher industry losses as reflected in the Pure Premium Rates. Cal/OSHA utilizes the following Integrated Management Information System (IMIS) codes to track these inspections: N 02 ARRA, SP-ASHIP, SP-CSHIP, S 18 HEAT, and S 18 INDOOR HEAT. According to the information obtained during this evaluation, Cal/OSHA's Programmed Inspection Targeting System includes the following industries:

ARRA SEP:
1. Construction (SIC 1500-1799)
2. Green Manufacturing (SIC not applicable)

ASHIP:
1. Agricultural Production—Crops (SIC 0111-0191)
2. Agricultural Production—Livestock and Animal Specialties (SIC 0211-0291)
3. Agricultural Services (SIC 0711-0783)

CSHIP:
1. General Contractors—Residential Buildings (SIC 1521, 1522 and 1531)
2. General Contractors—Non-residential Buildings (SIC 1541 and 1542)
3. Heavy Construction—Other Than Building Construction (SIC 1611 and 1622)
4. Special Trade Contractors (SIC 1711 through 1799)
5. Excavation and Trenching (SIC 1623, 1629 and 1794)

High Hazard Industries:
1. Sugar and Confectionary (NAICS 3113)
2. Dairy Product Manufacturing (NAICS 3115)
3. Animal Slaughtering (NAICS 3116)
4. Commercial Bakeries (NAICS 311812)
5. Beverage and Tobacco (NAICS 312)
6. Plate Work and Fabricated (NAICS 33231)

SEP on Outdoor and Indoor Heat Illness Prevention:
1. Agriculture (SIC 011-0971)
2. Construction (SIC 1500-1799)
3. Other

Cal/OSHA last updated the protocols for ASHIP and CSHIP in September 15, 2000 and September 18, 2000 respectively. The SEP on ARRA and Outdoor and Indoor Heat Illness Prevention were updated within the past year.

Cal/OSHA's Program Targeting System is not identifying industries where serious hazards are more likely to exist. Cal/OSHA is not finding many Serious/Willful/Repeat (S/W/R) violations during programmed inspections. The average number of violations per inspection was 0.76 for S/W/R violations and 2.63 for other-than-serious violations (Table 2, SAMM 9). The S/W/R violation numbers are significantly lower than the National Average of 2.1, while the General

violation numbers are significantly higher than the National Average of 1.2. The percent of programmed inspections with S/W/R safety violations was at 26.91% compared to 58.6% for the National Average. The percent S/W/R health violations have decreased significantly in the past year (Table 3).

Table 2

Violations per Inspection with Violations (SAMM 9)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***FY 2009 National Data (3 years)***
S/W/R	**.91** (4435/4858)	**0.86** (4825/5580)	**.88** (5233/5919)	**.79** (4703/5893)	**.76** (4200/5520)	2.1
Other	**2.53** (12315/4858)	**2.54** (14185/5580)	**2.60** (15403/5919)	**2.58** (15257/5893)	**2.63** (14554/5520)	1.2

Cal/OSHA's percent of programmed inspections with S/W/R violations was 26.91% for safety and 10.09% for health in FY 2009 (SAMM 8).

Table 3

Percent Programmed Inspections with S/W/R Violations (SAMM 8)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***FY 2009 National Data (3 years)***
Safety	**30.42%** (501/1647)	**29.73%** (695/2338)	**27.92%** (854/3059)	**26.48%** (745/2813)	**26.91%** (767/2850)	58.6%
Health	**29.30%** (46/157)	**21.19%** (32/ 151)	**28.41%** (75/264)	**22.99%** (89/374)	**10.09%** (47/466)	51.2%

Cal/OSHA's policies on violation classification are not equivalent to Federal OSHA's policies. Cal/OSHA does not have policies on the following: Supporting "Serious" Classification (Federal FOM, page 4-10 to 4-11), Supporting "Willful" Violations (Federal FOM, page 4-30 to 4-32), and Combining/Grouping Violations (Federal FOM, page 4-37 to 4-39). In addition, when determining Repeat Violations, Cal/OSHA does not consider the employer's enforcement history statewide. Instead, employer history is only considered within each of the six regions (refer to Cal/OSHA's policies and procedures C-1B, page 14).

In accordance with Cal/OSHA's policies and procedures, imminent danger complaints shall be investigated "immediately following receipt of the imminent danger complaint" (Cal/OSHA Enforcement policies and procedures C-7, page 4), which is equivalent to Federal OSHA's procedures (Federal FOM, page 11-1).

SAMM data indicates that Cal/OSHA did not respond to two imminent danger complaints within one day (Table 4); however one was determined to be a data entry error that has been corrected. The one late response was received on December 23, 2008 and mistakenly assigned to a compliance officer on leave.

Table 4

Imminent Danger (SAMM 4)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Goal***
Percent Responded to Within One Day	**87.91%** (240/273)	**86.42%** (210/243)	**92.98%** (225/242)	**97.79%** (221/226)	**99.18%** (242/244)	100%

Cal/OSHA had three denials of entry during FY 2009 of which Cal/OSHA obtained a warrant and entry for one case (SAMM 5). Cal/OSHA did not pursue a warrant for the other two cases because one was a multi-agency inspection in which the Division of Labor Standards Enforcement (DLSE) took the lead on this inspection, and the other could not be conducted due to closure of business. Cal/OSHA policies and procedures on "denials of entry" differ from Federal OSHA in that they do not have guidelines in regards to "employer interference" during an inspection once entry is obtained (Federal FOM, page 3-8).

Finding 6: Cal/OSHA has not updated its protocols for its Agriculture Safety and Health Inspection Project (ASHIP), and Construction Safety and Health Inspection Project (CSHIP) since FY2000.

Recommendation 6: Update ASHIP and CSHIP protocols at least annually.

Finding 7: Cal/OSHA's Program Targeting System is not identifying industries where serious hazards are more likely to exist.

Recommendation 7: Re-evaluate the targeting system and the focus of enforcement resources to ensure that programmed inspections are being conducted at establishments where serious hazards are most likely to exist.

Finding 8: Cal/OSHA's policy on classifying violations does not ensure violations that would be considered "Serious" under the Federal FOM are classified as Serious.

Recommendation 8: Adopt Violation Classification policies and procedures equivalent to Federal OSHA regarding descriptions on Supporting "Serious" Classification (Federal FOM, page 4-10 to 4-11), Supporting "Willful" Violations (Federal FOM, page 4-30 to 4-32), and Combining/Grouping Violations (Federal FOM, page 4-37 to 4-39).

Finding 9: When determining Repeat Violations, Cal/OSHA does not consider the employer's enforcement history statewide. Instead, employer history is only considered within each of the six regions (refer to Cal/OSHA's policies and procedures C-1B, page 14).

Recommendation 9: Consider employer history statewide when citing Repeat violations.

Employee and Union Involvement

At least 28 cases reviewed were identified as having union representation. In 19 cases, there was no documentation indicating that union representatives were notified of these activities or afforded the opportunity to participate.

Finding 10: Employee representatives were not always afforded the opportunity to participate

in all phases of the workplace inspection.

Recommendation 10: Ensure union representatives are presented the opportunity to participate in every aspect of the inspection and keep them informed as required in the Cal/OSHA Policies and Procedures Manual. If unions choose not to participate in the inspection, ensure it is documented.

Case File Reviews

Case file reviews (complaint investigations, complaint inspections, fatality inspections, fatality investigations, and general scheduled inspections) were conducted to determine if the case files contained sufficient evidence to support the violations, the appropriateness of the violation classification, and to determine if all apparent violations were cited.

All case files were deficient in describing employer knowledge. Rather than using the OSHA 1B forms that are generated by IMIS, Cal/OSHA has allowed for different variations that were created using Microsoft Word. The OSHA evaluation team identified four different versions. Although they are very similar to the IMIS generated 1B, differences were identified. The most notable difference is that there is no narrative section to describe employer knowledge. Instead the forms utilize check boxes to describe employer knowledge. Fifty case files were missing narratives or the narrative lacked specificity. Twenty-eight case files lacked complete injury and illness descriptions in the OSHA 1B that failed to identify the hazard in enough detail to clearly describe the hazard/exposure. Sixty case files did not have adequate diary sheets that reflect significant activity related to the inspection. And ninety-one cases reviewed did not have labeled photos or other written notes that identified what they were depicting. Photos pertaining to citation items should be printed and labeled.

Fifty-eight case files lacked proper documentation of employee interviews to determine employer knowledge, exposure to hazard(s), and the length of time hazardous conditions existed. In addition, interviews did not obtain the employee's full legal name, address and phone number(s). In some cases, employee interview documentation was missing entirely. The Cal/OSHA Policies and Procedures Manual does not have policies on how to conduct employee interviews in comparison to OSHA policies (Federal FOM, page 3-23 to 3-27).

Sixty-three case files did not contain copies of OSHA's Form 300 Log of Work-Related Injuries and Illnesses (OSHA 300) or indicate that the information had been entered into the IMIS system. Citations were not issued to the employer for failing to maintain the log.

Overall, the quality of documentation was substantively deficient that it made determining classification of violations difficult to ascertain. Exposure monitoring was not conducted on four health inspections prior to issuing citations to employers.

Finding 11: In Fifty-eight of 157 case files, employee interviews are not capturing employer knowledge, exposure to hazard(s), and/or the length of time hazardous conditions existed. In addition, interviews are not capturing the employee's full legal name, address and phone number(s). In all cases reviewed, employer knowledge is not being adequately documented in a narrative form to assure a legally sufficient case.

Recommendation 11: Ensure that employees are interviewed to determine employer knowledge, exposure to hazard(s), length of time hazardous condition existed, and obtain the employee's full legal name, address and phone number(s). Adopt policies for conducting employee interviews equivalent to Federal OSHA's. Train employees on interviewing techniques. (Federal FOM, page 3-23 to 3-27).

Finding 12: Sixty-three of 157 case files did not have copies of the OSHA 300 and did not indicate if information had been entered into the IMIS system. Citations were not issued to the employer for failing to maintain the log.

Recommendation 12: Ensure that compliance officers request and include copies of the 300 in the case file for each inspection for the last three years and enter the data into IMIS. If the employer cannot provide them, document it in the file and issue appropriate citations.

Finding 13: Twenty-eight of 157 case files lacked complete injury and illness descriptions and did not clearly describe the hazard or exposure. And in 91 cases, photos did not always describe the violation, exposure, specific equipment/process, location, and employee job title (if applicable), the date and time of the picture, or the inspection number.

Recommendation 13: Ensure that all aspects of the injury and illness documentation are included in the 1B or equivalent form to identify the hazard in enough detail to clearly describe the hazard or exposure. Ensure that photos identify the violation, exposure, specific equipment/process, location and employee job title (if applicable) and include the date and time of picture and the inspection number.

Finding 14: In 50 of 157 case files, narratives were either missing or lacked important details about what occurred during the inspection. And in 60 cases, diary sheets did not reflect inspection history.

Recommendation 14: Ensure that inspection narratives adequately describe the inspection and that diary sheets adequately reflect inspection activity, including but not limited to, opening conference date, closing conference date, supervisor review, telephone communications, and informal conference dates.

Finding 15: Exposure monitoring was not conducted prior to issuing citations to employers in four health inspections.

Recommendation 15: Ensure health inspectors conduct appropriate sampling to evaluate exposure and support violations. Ensure the information is properly entered into IMIS.

Penalties

Cal/OSHA's penalty structure remains the highest in the nation. In FY 2009, the average initial penalty for serious violations was $5,503.41, which continued to exceed the National average of $1,335.20 (Table 5). However, Cal/OSHA classified only 19% of its violations as serious vs. 77% in the Federal program. Cal/OSHA has the authority to issue Notice of Violations but, currently, is not utilizing these notices.

Table 5

Average Initial Penalty (SAMM 10)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***FY 2009 National Data (3 years)***
Serious	**$6226.87** (26526k/4260)	**$6272.75** (28973k/4619)	**$5936.75** (29499k/4969)	**$5811.63** (26280197k/4522)	**$5503.41** (22090709/4014)	$1335.2

Abatement

Cal/OSHA did not meet their annual performance goal of 100% abatement verification, but improved when compared to last year. Cal/OSHA timely verified abatement of 84% and 96% of the serious, willful and repeat violations in the private and public sectors respectively.

Table 6 (SAMM 6) below shows the percent of serious, willful, repeat and unclassified violations that were found and verified as abated within the abatement due date plus 30 calendar days. The table also compares this year's performance with that of the previous fiscal years.

Table 6

Percent S/W/R Violations Verified Abated (SAMM 6)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Goal***
Private Sector	**73.28%** (1119/1527)	**72.08%** (1136/1576)	**73.70%** (1149/1559)	**81.23%** (1285/1582)	**83.66%** (1065/1273)	100%
Public Sector	**70.73%** (29/41)	**59.09%** (26/44)	**85.37%** (35/41)	**95.00%** (19/20)	**95.83%** (23/24)	100%

208 Serious/Willful/Repeat (S/W/R) violations in the private sector and one S/W/R violation in the public sector were not abated timely. A review of this outlier revealed that 112 employers abated violations untimely, 31 violations in which employer filed an appeal, 23 were data entry errors (an improvement from last year's 119 errors), 12 in which employer was out of business, five had follow-up inspections to verify abatement, three due to an unresponsive employer, and 22 were from office oversight. Cal/OSHA's policy is to conduct follow-up inspections when an employer fails to provide adequate proof of abatement of serious violations.

Cal/OSHA offers an automatic 50% reduction of proposed penalties for general and serious citations corrected within the abatement period (refer to CPPM C-10, page 4 of 10) with the exception of citations that are repeat or willful, high gravity, involving a carcinogen, or that lead to death, serious injury, illness or exposure. This 50% reduction is revoked if abatement is not completed within the agreed upon timeframe (CPPM C-1A, page 14 of 15). In comparison, OSHA offers a 15% quick fix option, provided hazards are immediately abated during the inspection. (See Appendix G, Recommendation #12.)

Finding 16: There were 209 Serious/Willful/Repeat (S/W/R) violations identified in the SAMM Report that were not abated timely.

Recommendation 16: Develop a tracking system to ensure all violations are abated timely and/or ensure abatement data is accurately entered into IMIS.

Review Procedures

It is the policy of the State to encourage any employer who has been issued a citation or notice, or another affected person, to participate in an informal conference. Informal conferences can cover many topics, including the evidence of the alleged condition, the classification of the alleged violation and/or the proposed penalty calculation. Informal conferences can resolve issues of disagreement between the employer, another affected person, and Cal/OSHA.

The District Manager or designee conducts each informal conference by means of face-to- face contact between the District Manager, the employer or employer representative(s), and/or employee(s) or employee representative(s). All parties meet at the same physical location in order to ensure equal access to any evidentiary material presented during the informal conference.

Cal/OSHA does not allow informal conferences to be held via telephone unless the following two conditions are met: (1) one or more of the participating parties are geographically remote and (2) the District Manager or designee receives prior approval from the Regional Manager to conduct the informal conference by telephone (CPPM C-20, page 1-2). Cal/OSHA allows informal conferences to occur any time during the appeal process (CPPM C-20, page 3). Federal OSHA requires informal conferences to be held within the 15 working day contest period (Federal FOM, page 7-2).

Cal/OSHA does not have the following policies that can be compared to OSHA: Assistance of Counsel should an employer bring an attorney to the informal conference (Federal FOM, page 7-3), Posting Requirements—Cal/OSHA doesn't require employers to post informal conference information in an area accessible to all affected parties (Federal FOM, page 7-4), and Specific guidelines for the "Conduct of the Informal Conference," which includes conference subjects, subjects not to be addressed, and closing remarks (Federal FOM, page 7-4 to 7-5).

Pre-contest (informal conferences) data for Cal/OSHA indicates that most citations are upheld. In FY 2009, Cal/OSHA continued to sustain both violations and penalties during informal conferences. Only 1.6% of violations reviewed in informal conferences were vacated and 2.7% of violations were reclassified. Although the number of violations reclassified continues to climb, it is well below the Federal data. Penalty retention remained low at 53.2% and has been trending downward for the past 4 years. (Table 7, SIR C-7,8,9).

Table 7

Pre-Contest (SIR C7, C8, C9)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Federal Data***
Violations Vacated (C7)	**1.9%** (226/12141)	**1.6%** (221/13458)	**1.9%** (227/11942)	**1.6%** (185/11779)	**1.6%** (168/10308)	5.1
Reclassified (C8)	**1.3%** (156/12141)	**1.4%** (189/13458)	**1.6%** (192/11942)	**2.2%** (264/11779)	**2.7%** (280/10308)	4.8
Penalty Retention (C9)	**45.4%** (915k/2017k)	**62.2%** (8206k/13192k)	**59.1%** (5341k/9032k)	**54.6%** (5810k/1064k)	**53.2%** (8007k/1504k)	63.2

It is also the policy of the Division to be prepared to fully participate in a pre-hearing conference initiated by the Occupational Safety and Health Appeals Board. Table 8 shows that the percent of violations reclassified during post-contest procedures continues to increase, but remains lower than the National Average.

Table 8

Post-Contest (SIR E1, E2, E3)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Federal Data***
Violations Vacated(E1)	**14.3%** (153/1069)	**16.1%** (462/2867)	**15.8%** (537/3392)	**16.1%** (1091/6783)	**13.8%** (1222/8873)	23.4%
Reclassified (E2)	**8.9%** (95/1069)	**8.8%** (253/2867)	**7.6%** (257/3392)	**9.4%** (639/6783)	**11.2%** (996/8873)	15.1%
Penalty Retention (E3)	**37.1%** (940k/2534k)	**38.3%** (2623k/6856k)	**38.5%** (3279k/8507k)	**35.6%** (5865k/1649k)	**34.2%** (7986k/2334k)	58.5%

Finding 17: Informal Conference policy allows conferences to be held beyond 15 days and lacks guidance on obtaining counsel and does not require conference information to be posted properly and consistently throughout the state.

Recommendation 17: Provide specific guidelines for the "Conduct of the Informal Conference," which includes conference subjects, subjects not to be addressed, and closing remarks (Federal FOM, page 7-4 to 7-5); and hold informal conferences within the 15 working day contest period (Federal FOM, page 7-2). Also ensure guidance on obtaining counsel should an employer bring an attorney to the informal conference (Federal FOM, page 7-3) is provided and that posting requirements (Federal FOM, page 7-4) are clearly articulated.

Finding 18: The percent of penalty retention during post-contest procedures has decreased since FY 2007 and the percent of violations reclassified continues to increase.

Recommendation 18: Assess pre-contest procedures to ensure violations and penalties are being appropriately reclassified and decreased respectively and develop procedures to increase the percentage of penalties being retained during the post-contest.

See section H of this report and Appendix G for a discussion of the special study of California's appeals process conducted as part of this evaluation.

Public Employee Program

Cal/OSHA's enforcement program for State and local government is identical to that in the private sector. Cal/OSHA schedules inspections and issues citations with penalties for both in the same manner. During FY 2009, 6.10% of Cal/OSHA's inspections were conducted in the public sector (Table 9).

Table 9

Percent of Total Inspections in Public Sector (SAMM 11)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***FY 2009 State Average (3 years)***
	5.61% (439/7829)	**5.43%** (447/8239)	**5.93%** (542/9142)	**6.23%** (567/9097)	**6.10%** (537/8803)	6.1%

Information Management

IMIS reports for the five subject offices were reviewed to determine the effectiveness of their information management program. Cal/OSHA has six Regional IMIS Coordinators who work with the district office staff and Regional and District Managers to resolve IMIS issues. The Regional Coordinators also run special reports for the managers as needed.

Cal/OSHA's Region I Coordinator allowed the evaluation team to use some local Ace reports developed by the Regional Coordinators to review Draft Forms, Host Rejects, and OSHA-31s in the local databases.

None of the offices had a significant number of draft forms that were not finalized. (The EEEC-North office shares a server with the Oakland High Hazard Unit and those forms can not be isolated.) Of the four offices, the Van Nuys office had the highest number of draft forms at 44. Van Nuys' oldest draft form was dated December 2, 2009. The offices reviewed are handling rejects from the host appropriately and working with the Regional Coordinators and OMDS to resolve rejects in a timely manner. There were no offices with Micro to Host rejects older than January 28, 2010. The Torrance office had 6 of 13 CSHOs with at least one missing OSHA 31 form.

The following reports were run for the five subject offices for the timeframe of October 1, 2008 to September 30, 2009 (some reports are "snapshot" reports, which capture the database at the moment the reports are run and do not reflect the specified timeframe): Open Inspections Tracker, Complaint Response Log, Referral Log, Fat/Cat Tracker, Citations Pending Unsatisfied Activity, Debt Collection Report, and Complaints Tracker – Employer Response Due.

The Open Inspections Tracker is a snapshot of all inspections open in the office at the time that it is run. When the Tracker is used effectively, it can be a tool for identifying in-compliance cases which have not been closed, cases with citations pending, cases with abatement pending, contested cases, and debt collection information which may need follow-up by a District Manager.

The Open Inspections Trackers for each of the five offices indicated many old cases with outstanding penalties. The reports are too voluminous causing them to be difficult to read and interpret. Until older cases can be cleared from the report, the Open Inspection Trackers are primarily a list of cases with penalties pending and does not allow for effective use by managers in tracking abatement, citations pending, or contested cases.

Penalties are collected by the DIR Accounting Office. The DIR Accounting Office does not use

IMIS to inform Cal/OSHA when payments have been received. Therefore Cal/OSHA does not have accurate up to date information in IMIS on the status of outstanding penalties. If penalties are being effectively collected then notification of penalties received must be forwarded to Cal/OSHA to allow for data entry.

Managers will need to rely more heavily on the other management reports available to them and will not be able to effectively use the Tracker as an overview of the open cases in their offices until this is corrected. Older cases where companies have gone out of business and the penalties are no longer collectable must be identified so that these cases can be closed. Either penalties are not being effectively collected, or penalties that are uncollectible are not being identified.

The Debt Collection Report displays information for all cases with penalties due for the selected time frame. The report also shows information on demand letters sent and referral of penalty collection to higher-level collection processing. A noticeable omission for all cases, from all offices, on the Debt Collection report, is the 15-day "due date" following issuance of the citations. For debt collection, this is the trigger date for demand letters and other processing, but this date is also useful for tracking the last date for employers to appeal.

The Complaint Response Log and Complaint Query are used to assign complaints. Cal/OSHA's goal for inspecting complaints where inspections are deemed appropriate is three days. Van Nuys completed 90 out of 187 timely; Torrance completed 69 of 74 timely; San Diego completed 65 of 92 timely, and Oakland completed 147 of 263 timely. Approximately half of all complaints were not inspected until after five days.

Complaints should be closed when an inspection is opened. When complaints are closed appropriately, the Complaint Response Log can be run to reflect only open complaints. The fewer complaints shown on this report, the more effective it can be for use in managing the active complaint load. The report shows that the four offices are not consistently closing complaints when an inspection is opened. The San Diego office had approximately 57% of all inspected complaints still open on the log. Van Nuys had 34.8%, Torrance had 29.7%, and Oakland had 11%.

The majority of complaints, both inspected and investigated, are not reflecting appropriate notification to complainants of the results of the investigation. Neither Letter Gs (for providing results of investigations to complainants) nor Letter Hs (for providing inspection results to complainants) are being consistently entered in the database. However, a Letter G or Letter H cannot be sent if a complaint is submitted anonymously.

The Complaints–Employer Response Due standard report can be used to track all complaints where an investigation letter has been sent to an employer. This report can be an effective tool to track the status of open complaint investigations. Van Nuys, San Diego, and Oakland had complaints with employer response pending on outstanding complaints dating back to October of 2008; Torrance had complaints dating back to November of 2008. A regular review of these reports should be in place to ensure that where responses are received, they are recorded in the database. The Van Nuys office had 40 complaints with responses due, including 10 with allegations of serious hazards.

The Referral Log shows all complaints responded to in the selected timeframe based on certain

parameters. It can be used as a management report to determine whether all referrals received have been appropriately inspected or investigated. The EEEC—North office's Referral Log showed three referrals. Two of these were for other-than-serious hazards and were inspected within one day. The third, which was not inspected, did not show a hazard classification and had a data entry error which left the response date blank. The Oakland District Office's Referral Log showed 40 total referral inspections. Of this number, five were inspected more than one day after receipt. This includes one referral with a serious hazard alleged, which was inspected four days after receipt. The San Diego District Office's log showed seven referrals. Six of these were inspected: four within one day, one in seven days, and one in 16 days. The un-inspected referral alleged a serious hazard. The Torrance District Office's log showed eight referrals. Six of these were inspected: four within one day, one in three days, and one in eight days. The Van Nuys office's log showed 24 referrals. Ten were inspected, but timeliness was again an issue. Two of the inspections were opened more than three days after receipt, including one allegation of a serious hazard which was not inspected for 41 days. Additionally, 12 referrals showed no response at all. This included four referrals of serious hazards and one Imminent Danger.

The Fat/Cat Tracker report reflects all OSHA-36 forms entered in IMIS during the selected timeframe. The report shows, for each accident, the description of the event as entered on the Form 36; the event date; the reported date; whether the report reflects a fatality, hospitalized, or non-hospitalized injury; whether the event was investigated; citations, where issued; and the lapse time from reported date to inspection date.

Summary data on the average lapse time for inspection, total number of events reported, number of fatalities, and number of inspections conducted revealed several issues.

The lapse time report for inspection of all accident was 7.6 days in the Oakland District Office, 18.2 for Van Nuys, 36.4 for Torrance, and 38.4 days in San Diego. The Oakland District Office opened all investigations of fatalities within one day of reporting. In San Diego nine fatalities were inspected; six were opened within one day, one in three days, one in six days, and one in 19 days. In Torrance nine fatalities were inspected; seven within one day, one in eight days, and one in 14 days. In Van Nuys 19 fatalities were inspected; 17 were opened within one day, one in two days, and one in six days. The EEEC-North office did not conduct any fatality or accident inspections.

The Unsatisfied Activity Report shows complaints that have not been satisfied/closed, referrals that have not been satisfied/closed, and accidents that have been scheduled for inspection but no inspection record exists. The EEEC unit had no unsatisfied activity; however the other offices showed unsatisfied activity including accident reports, complaints, referrals, and in the Torrance and San Diego offices, formal complaints of serious hazards.

The Citations Pending Report can be run to reflect all open cases in a District Office for which citations have not been issued. This report shows one line per inspection with citations pending, with the Compliance Officer ID, opening conference date, closing conference date, supervisor review date (if entered), and total lapse days since the opening date.

The Citations Pending Report revealed that in three of the five offices, 19 cases have citations pending that are over 180 days old. The EEEC—North office's Citations Pending Report had only 21 cases on the report and none were open more than 30 days. The Oakland District Office

had five cases open over 90 days, 37 total cases with citations pending, and no data entry for the closing conference date for 34 of those 37 cases. The San Diego office had 84 cases with citations pending, including 81 cases showing no closing conference date. 24 cases were open over 90 days and an additional three cases were open over 180 days; the oldest being open for 285 days. Torrance's report shows 45 cases with citations pending; 41 with no closing conference date, nine over 90 days and an additional 11 over 180 days, including the oldest case, which is 542 days old. Van Nuys had 59 cases with citations pending, 51 cases with no closing conference date, 14 over 90 days old, and five over 180 days old. The oldest case in this office is 401 days old.

Finding 19: Cal/OSHA does not receive accurate and up to date information on the status of outstanding penalties from the DIR Accounting Office. Penalties are not being effectively collected and those that are no longer collectible are not being identified and removed from the system in a timely manner.

Recommendation 19: Assure that the DIR Accounting office is providing information on penalty payments and update the details in IMIS. Ensure that penalties are either effectively collected and identify those cases where penalties are no longer collectible in order reduce the high number of old cases in the system.

Finding 20: The 15-day "due date" following issuance of the citations on the Debt Collection report is not entered. This date is important for tracking appeals.

Recommendation 20: Ensure that the 15-day due date is entered and the date is tracked.

Finding 21: The Complaint Response Log and Complaint Query revealed that half of all complaints inspected were not opened until after five days from receipt of the complaint. Also, the Complaint Employer Response Due standard report revealed outstanding complaints dating back to December of 2008 with employer response pending.

Recommendation 21: Ensure that complaint IMIS reports are updated and accurate so that they can assist with properly managing the complaint process, and ensure that the Employer Response Due report and Complaint Response Log are regularly updated and cases are followed up on to ensure proper response was received.

Finding 22: Complaint Letters G and H are not being consistently entered in the database.

Recommendation 22: Ensure that appropriate G and H notification letters are entered and being sent to all complainants.

Finding 23: The Referral Log identified that the five offices had referrals that had not been appropriately inspected or investigated in a timely fashion, including some referrals that were deemed Serious in nature. Thirteen referrals showed no response at all.

Recommendation 23: Generate and review the Referral Log on a regular basis and ensure that all referrals are handled appropriately and timely.

Finding 24: Seven fatalities were not opened within one day of reporting; lapse time for

inspection of all accident reports ranged from 7.6 days to 38.4 days.

Recommendation 24: Ensure accidents are opened timely. Generate and review a Fat/Cat tracker to ensure that accidents reports are being evaluated and classified appropriately in order to improve accident lapse time.

Finding 25: The Citations Pending Report revealed that in three of the five offices, 19 cases have citations pending that are over 180 days old and in the four offices, of the 225 citations that have not been issued, 207 show either no opening or no closing date. The Unsatisfied Activity Report identified unsatisfied activity in four of the five offices

Recommendation 25: Generate and Review a Citations Pending Report to monitor that citations are reviewed and issued in a timely manner. Generate and review the Unsatisfied Activity Report to identify outstanding activities which need to be scheduled for inspection.

Bureau of Labor Statistics (BLS) Rates (Illness, Injury and Fatality)

Charts 2 and 3 shows the Total Recordable Case Rates (TRCRs) and Days Away, Restricted, or Job Transfer (DART) rates for the Standard Industrial Classification (SIC) codes that Cal/OSHA chose to target under ASHIP.

Chart 2

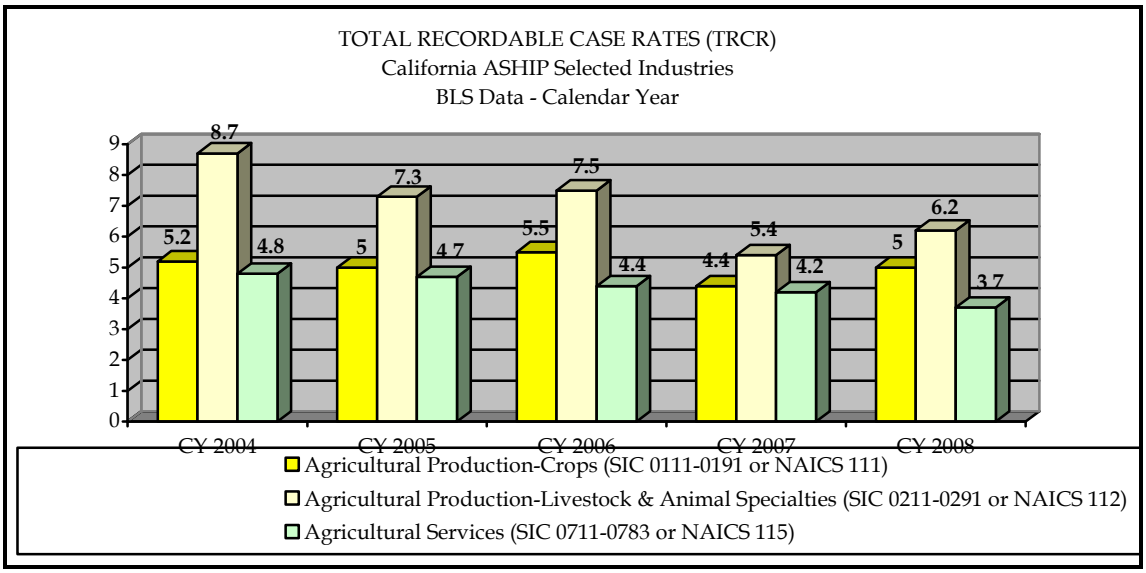


Chart 3

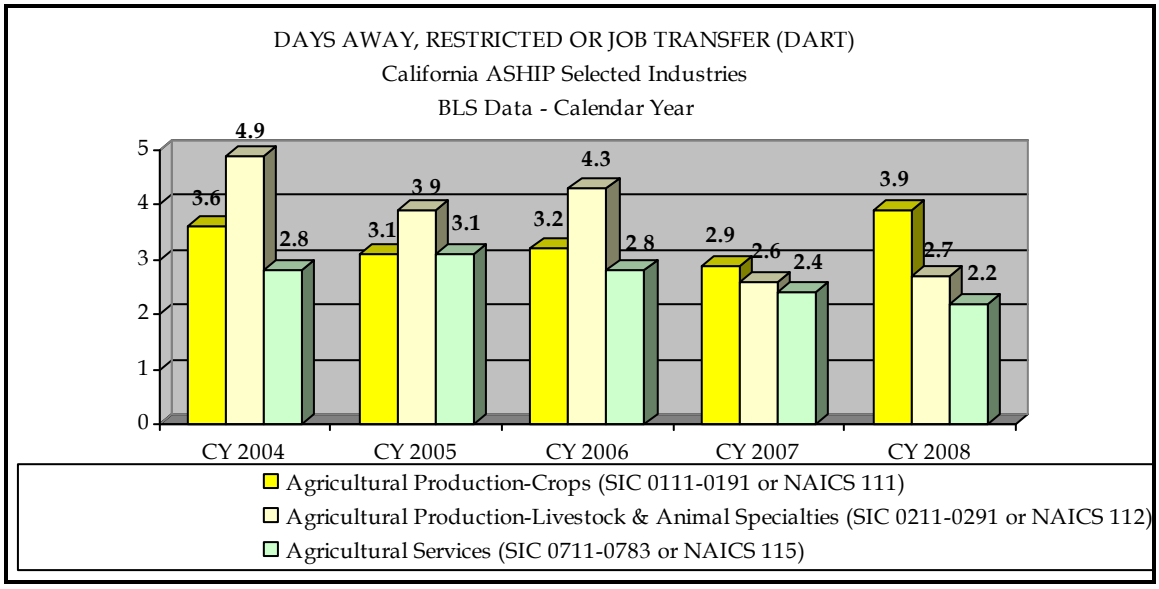
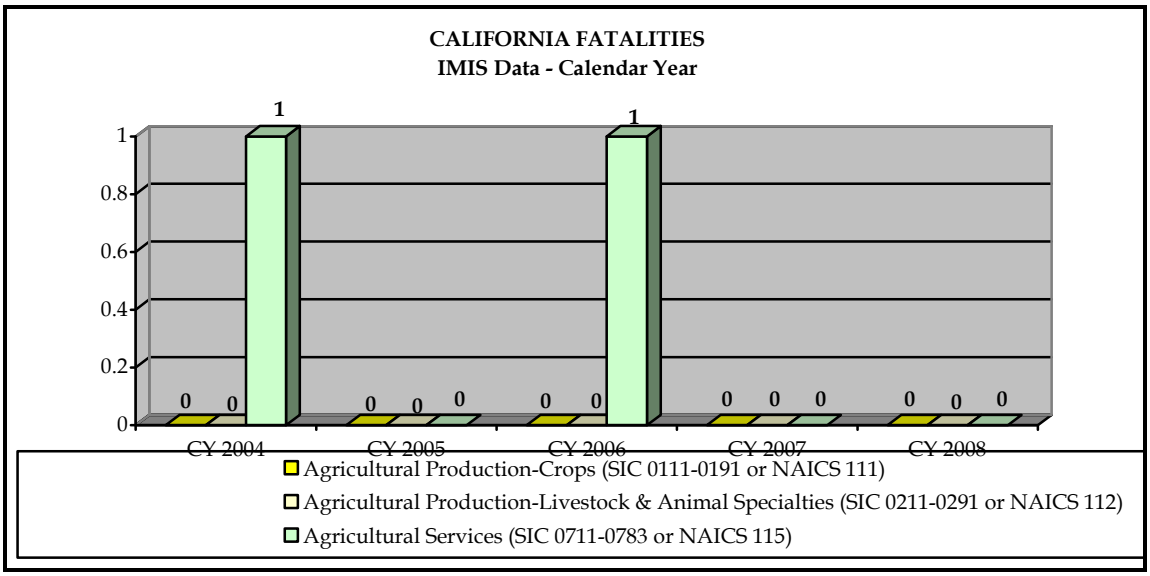


Chart 4



Charts 5 and 6 show the Total Recordable Case Rates (TRCR) and Days Away, Restricted, or Job Transfer (DART) for the highest priority North American Industry Classification System (NAICS) codes that Cal/OSHA chose to target under their FY 2009 Annual Performance Goal 1.2. Although the latest BLS data trails this evaluation period, it showed that the TRCR and DART rate for all of California's selected high hazard industries decreased.

Chart 5

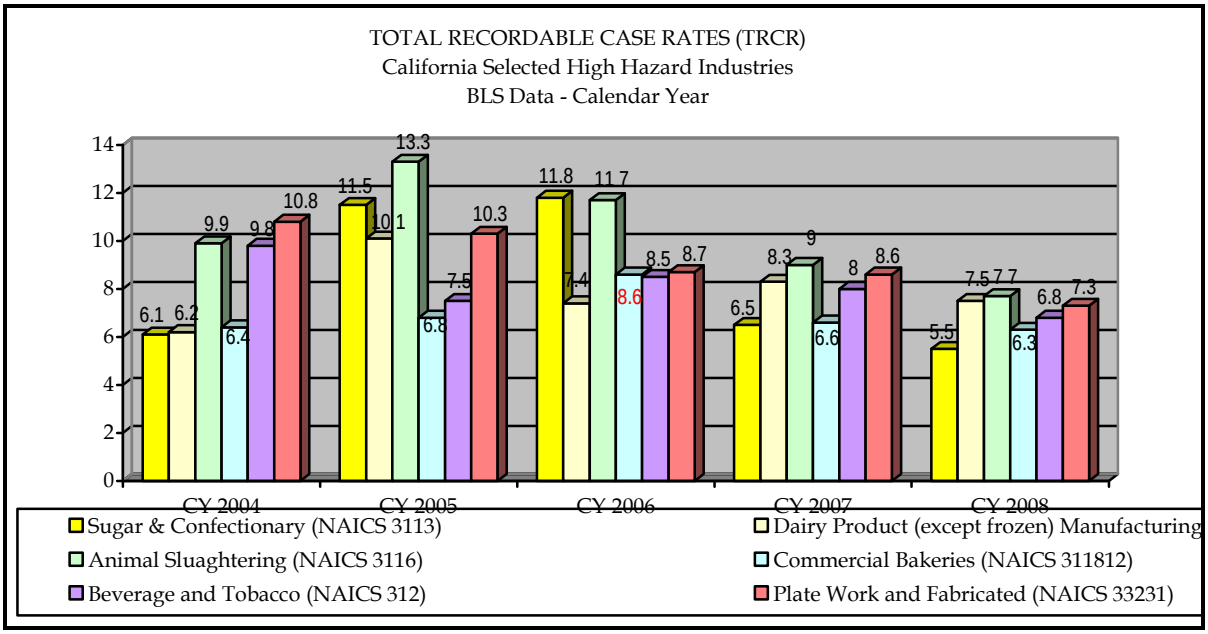


Chart 6

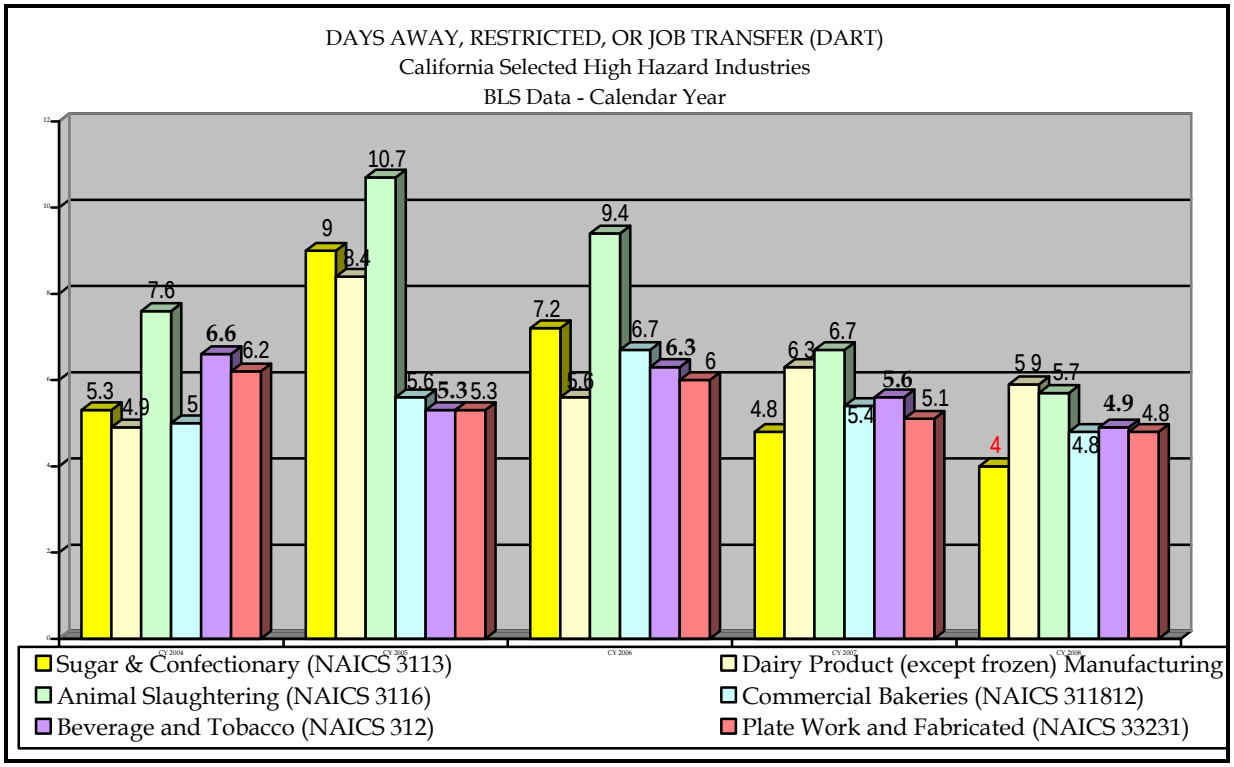


Chart 7 shows the Total Recordable Case Rates (TRCR) and Days Away, Restricted, or Job Transfer (DART) for State and Local Government. Although the latest BLS data trails this evaluation period, it showed that the TRCR and DART rate for California's public sector industries increased and remains higher than the National Average.

Chart 7

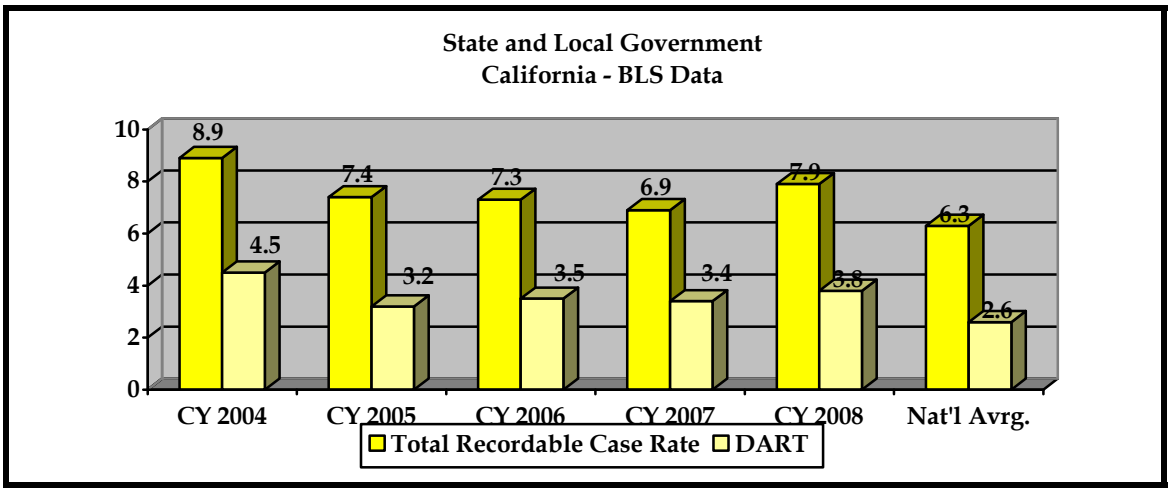
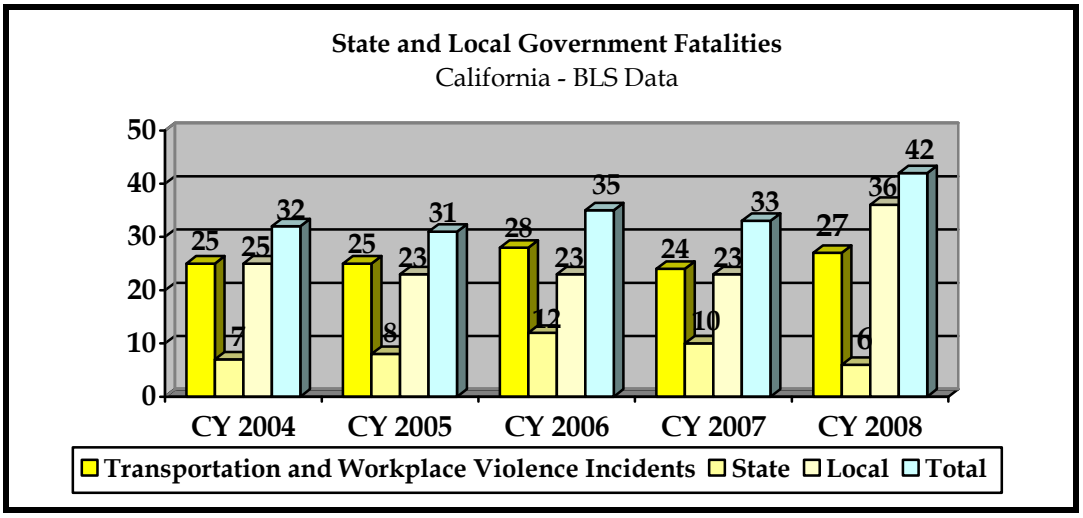


Chart 8 shows that State and Local Government fatalities have fluctuated within the past four years. When excluding transportation and workplace violence incidents, public sector fatalities have increased.

Chart 8



B. Standards and Plan Changes

The California Standards adoption process is accomplished through the Occupational Safety and Health Standards Board, an independent agency within the Division of Industrial Relations

responsible for promulgating standards within California and ensuring the state adopts standards that are at least as effective as the OSHA Standards. The Board also considers the adoption or modification of existing safety and health standards and petitions for new standards from any interested person.

Federal Program Changes

There were six Federal Program Changes published in FY 2009. The program responded to two within the required time interval, *CPL-03-00-010 2009, NEP Petroleum Refineries - Extension of Time* and *CPL-02(09-06) 2009, NEP - PSM Covered Chemical Facilities*; chose not to adopt one, *CPL-2(09-05) 2009, Site Specific Targeting; w*as untimely for one (which has not yet been adopted), *CPL-02-00-148 2009, Field Operations Manual*; and is still within the adoption period for two, *CPL-02-01-046 2010, Rescission of OSHA's de-minimis Policies Relating To Floors/Nets And Shear Connectors* and *CPL-02-09-08 2010, Injury and Illness Recordkeeping National Emphasis Program.* Additionally, there was a change on August 6, 2008 to *the Initial Training Program for OSHA Compliance Personnel, TED 01-00-018* that they have failed to adopt during this review period. (See Table 10) The State did respond to the new Federal FOM FPC on June 4, 2009 in which they indicated that they would adopt different. This is being reviewed as an "Advisory Opinion" by Region IX OSHA.

Table 10

Federal Program Changes FY 2009					
Directive Number	**Adoption Required**	**Intent Required**	**Intent to Adopt**	**Adopt Identical**	**Timely**
Field Operations Manual, CPL-02-00-148 2009	YES	YES	YES	NO	NO
Initial Training Program for OSHA Compliance Personnel, TED 01-00-018	YES	YES	YES	NO	NO
Site-Specific Targeting 2009 (SST-09), CPL-2(09-05) 2009	NO	YES	NO	N/A	N/A
NEP - PSM Covered Chemical Facilities, CPL-02(09-06) 2009	NO	YES	NO	N/A	N/A
NEP Petroleum Refineries - Extension of Time, CPL-03-00-010 2009	NO	YES	NO	N/A	N/A
Rescission of OSHA's de minimis policies relating to floors/nets and shear connectors, CPL-02-01-046 2010	NO	YES	NO	N/A	
Injury and Illness Recordkeeping National Emphasis Program, CPL-02-09-08 2010	NO	YES	YES	YES	

Information on state in itiated p lan change su pplements subm itted f or rev iew is presented in Table 11.

There were two standards related to Federal Program Changes requiring adoption during FY 2009—*Longshoring and Marine Terminals: Vertical Tandem Lifts* (06/10/2009) and *Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each*

Employee (06/12/2009). *Longshoring and Marine terminals: Vertical Tandem Lifts* was promulgated on June 18, 2009. Cal/OSHA has not adopted the *Employer Payment for Personal Protective Equipment, Final Rule,* published November 15, 2007 or the *Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee*, published December 12, 2008.

The state adopted, effective February 18, 2010, the *Final Rule on Electrical Installation Requirements –29 CFR 1910 Subpart S,* published February 14, 2007. The state was two and a half years late adopting this rule.

The Standards Board submitted 16 state-initiated Advisory Opinion (AO) requests, four 15-Day Notices of Proposed Modification, two 2nd 15-Day Notices of Proposed Modification, 17 state-initiated Plan Change Supplements (PCSs), and one terminated rulemaking during FY 2009. One state-initiated standard for *Bakery Ovens—Inspections* was finalized with requirements that OSHA Region IX determined are not as least as effective as the OSHA Standard. State initiated rulemaking to include Advisory Opinions, Program Change Supplements, 15 day notices, and terminated rulemaking are identified below in Table 11.

Table 11

FY 2009 State-Initiated Rulemaking Activities	
ADVISORY OPINIONS	**PROGRAM CHANGE SUPPLEMENTS**
Airborne Contaminants	**Aerosol Transmissible Disease**
Blue Stop Signs	**Aerosol Transmissible Disease - Zoonotics**
Crane Hoisting-Use of Outriggers, stabilizers, and Other Supports	**Bakery Ovens-Inspections**
Electric Blasting in Proximity to Radio, Television or Radio Transmitters	**Blue Stop Signs**
Fixed Ladders	**Crane Hoisting-Use of Outriggers, stabilizers, and Other Supports**
Foot Protection	**Electric Blasting in Proximity to Radio, Television or Radio Transmitters**
Heat Illness Prevention	**Fixed Ladders**
Machinery and Equipment – Definition of "Equipment"	**Foot Protection**
Medical Services and First Aid .	**Mechanical Refrigeration**
Mobile and Tower Crane-Operator Qualifications – Accreditation of Certifying Entities	**Medical Services and First Aid**
Momentary Contact Devices for Portable Power Driven Augers	**Mobile and Tower Crane-Operator Qualifications – Accreditation of Certifying Entities**
Piling Materials	**Portable and Vehicle Mounted Generators**
Portable and Vehicle- Mounted Generator.	**Powered Industrial Trucks - Seat Belts and Sig**naler
Pressurized Worksite Operations	**Properly Rigged (Handling Loads)**
Riding on Rolling Scaffolds.	**Riding on Rolling Scaffolds**

Use of High Visibility Apparel	Updating National Consensus Standards for Insulating Protective Equipment
	Use of High Visibility Apparel
15 - DAY NOTICES	**2nd 15 - DAY NOTICES**
Airborne Contaminants	Use of High Visibility Apparel
Aerosol Transmissible Disease - Zoonotics	Aerosol Transmissible Disease
Aerosol Transmissible Disease	
Electric Blasting in Proximity to Radio, Television or Radio Transmitters	
Use of High Visibility Apparel	
RULEMAKING TERMINATED	
Machinery and Equipment – Definition of Equipment	

Finding 26: Cal/OSHA's evaluation and adoption of Federal Program Changes has not been timely. Cal/OSHA has not adopted both the Employer Payment for Personal Protective Equipment, Final Rule, published November 15, 2007 and the *Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee*, published December 12, 2008. They adopted the *Final Rule on Electrical Installation Requirements –29 CFR 1910 Subpart S,* effective February 18, 2010; they were two and a half years late adopting this rule. In addition, California has not submitted a supplement in response to *CPL-02-00-148 2009, Field Operations Manual.* Many of the procedural issues discussed in this report relate to items not covered in the State's current Policies and Procedures Manual which should be addressed in the response to the Federal FOM.

Recommendation 26: Implement measures to ensure that new Federal Program Changes are evaluated and adopted in a timely manner, as per 29 CFR 1953.4(b)(1) and (b)(3).

Finding 27: State initiated rulemaking promulgated a Standard on Bakery Ovens that was deemed not to be at least as effective as Federal OSHA standards.

Recommendation 27: Ensure standards are at least as effective as Federal OSHA standards and initiate actions to update deficient standards.

Variances

OSHSB grants or denies applications for permanent variances. Any employer may apply for a permanent variance upon showing an alternate program, method, practice, means, device, or process will provide equal or superior safety for employees.

During FY 2009, OSHSB received eight permanent variance applications, with seven pending hearing as of February 25, 2010. OSHSB denied the San Francisco Bay Area Rapid Transit District variance request. No temporary variances were granted in FY 2009. Table 12 lists the

permanent variances on the Automated Tracking System (ATS):

Table 12

COMPANY	DATE REQUESTED	DATE CLOSED	GRANTED	COMMENTS
Gold Coast Ingredients, Inc.	04/09/2008	08/21/2008	No.	Variance would have allowed dust collector to be located in employer's work facility rather than outside or in a detached fire-resistant room as the state standard requires.
East Side LT Constructors	05/14/2008	09/18/2008	Yes.	Variance allows (subject to conditions) use of propane for track rail welding and cutting operations in a specified tunnel in Los Angeles. Also includes Federal standard number 1926.800(n).
CA Department of Forestry and Fire Protection	05/01/2008	10/16/2008	Yes.	Cal/OSHA #3382(d)(1) and 3404(a)(1); federal #1910.133(a)(1), 1910.133(a)(2) and 1910.133(b) state fire agency, under limited circumstances, may allow personnel involved in chainsaw operations attendant to wild land fire fighting/prevention/training to wear certain wire mesh goggles for eye protection.
Vulcan Materials Company-Fresno River Rock	08/13/2007	01/15/2009	Yes.	Cal/OSHA Standards No. 1592(a), 1592(b) and 3666(a). Subject to several conditions, the variance allows use of radar-activated back-up warning devices during hours of darkness. One condition states that a strobe light device that operates continuously when the vehicle is placed in reverse is to be used during hours of darkness.
Multiple CA Date Growers	10/01/2008	08/20/2009	Yes.	Federal Standard No. 1910.178(m)(5)(i), (ii) and (iii). Subject to conditions, the variance permits a lift truck to travel with employees on a guardrailed personnel platform that must be lowered during travel as specified in the conditions. The variance also allows one operator to control and oversee up to three lift trucks and leave operator's position when the personnel platform is elevated subject to a number of conditions, among which are that the operator must remain within a limited area and maintain visual and audible contact while employees are on the elevated platform.

C. Public Sector Consultation Activities

Cal/OSHA provides consultation services to both public and private sector employers through its Consultation, Education and Training Section. The following section covers consultation services provided solely to public sector employers that are funded under Section 23(g) of the OSH Act. Although public sector consultation programs are not funded under section 21(d) or directly subject to the requirements of 29 CFR Part 1908, the consultation programs should be at least as effective as the provisions for 21(d) consultation programs.

Cal/OSHA's public sector consultation program is funded under 23(g) grant monies and maintains a consultation program which is at least as effective as the provisions for 21(d) consultation programs and conducted in a manner similar to that of the private sector (refer to the

FY 2009 RACER for a review of private sector MARCs). Overall performance has been consistent with previous years.

Cal/OSHA conducted 30 public sector consultation visits in FY 2009, which is a decrease from 53 visits in FY 2008. Of these, 28 were initial visits to high hazard employers (Table 13, Public MARC 1) and 83.33% were in smaller businesses with less than 250 employees (Table 14, Public MARC 2).

Table 13

Initial Visits in High Hazard Establishments (Public MARC 1)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Goal***
	94.55% (52/55)	**93.75%** (45/48)	**97.62%** (41/42)	**94.34%** (50/53)	**93.33%** (28/30)	Not less than 90%

Table 14

Initial Visits to Smaller Businesses less 250 (Public MARC 2)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Goal***
	94.55% (52/55)	**93.75%** (45/48)	**92.86%** (39/42)	**92.45%** (49/53)	**83.33%** (25/30)	Not less than 90%

This fiscal period, Cal/OSHA consultants conferred with employees during 100% of the initial visits (Public MARC 3). Table 15 shows the percent of initial and follow-up visits during which the consultant conferred with employees and compared this year's performance with that of previous years.

Table 15

Visits where Consultant Conferred with Employees (Public MARC 3)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Goal***
Initial	**100%** (55/55)	**100%** (48/48)	**100%** (42/42)	**100%** (53/53)	**100%** (30/30)	100%
Follow-up	**0%** (0/0)	**100%** (1/1)	**0%** (0/0)	**0%** (0/0)	**0%** (0/0)	100%

During this evaluation period, 37 serious hazards were identified. Of these, 100% were verified corrected in a timely manner (Table 1916 Public MARC 4A). None of the serious hazards needed to be referred to enforcement (Table 16, Public MARC 4C).

Table 16

Verification of Serious Hazards (Public MARC 4)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Goal***
Verified Corrected within 14 days of Correction Date (MARC 4A)	**100%** (92/92)	**100%** (84/84)	**100%** (53/53)	**100%** (78/78)	**100%** (37/37)	100%
Not Verified Co rrected with in 1 4 days of Correction Date (MARC 4B)	**0%** (0/121)	**0%** (0/92)	**0%** (0/53)	**0%** (0/78)	**0%** (0/37)	0%
Referred to enforcement (MARC 4C)	**0%** (0/121)	**0%** (0/92)	**0%** (0/53)	**0%** (0/78)	**0%** (0/37)	0%

Cal/OSHA came close to the goal of 65% by verifying correction of 64.86% of serious hazards found within the original timeframe or onsite (Public MARC 4D).

In FY 2009, Cal/OSHA didn't have any uncorrected hazards for more than 90 days past due (Public MARC 5). Cal/OSHA has maintained its goal of zero uncorrected hazards for over six

consecutive years.

D. Discrimination Program

In Fiscal Year 2009, DLSE investigated 128 discrimination cases. Of these investigations 96% were untimely as they were not completed within the 90 day federal requirement. Investigator case assignments range between 30-64 cases *per* Investigator.

A random sample of 13 of the 128 discrimination cases coded under Sections 6310 and 6311 of the California Labor Code were reviewed. Sections 6310 and 6311 are the equivalent of Federal OSHA's Section 11(c) discrimination statute. All cases were closed in Fiscal Year 2009, according to data recorded in IMIS. The cases were selected as follows: At least one case by each Investigator who investigated discrimination cases during the Fiscal Year 2009; at least one of each of the 5 types of cases closed by DLSE (dismissals, withdrawals, merit, settled, and settled other); and (3) cases that were open for varied amounts of time. The cases were categorized as follows: 5 dismissed cases, 2 withdrawn cases, 2 merit cases, 2 settled cases, and 2 settled other cases. Both merit cases were litigated and two dismissed case had been appealed.

In FY 2009, DLSE assigned five full-time Investigators to investigate occupational safety and health discrimination complaints. Regional Supervisory Investigators (RSIs), also known as team leaders do not conduct investigations. Support staff in Sacramento docket all complaints into the Case Management System (CMS). Only the Sacramento team leader and two support staff have access to IMIS and enter data into this system. According to interviews with a supervisor, none of the staff have been to the OSHA Training Institute for basic 11(c) investigation training.

Presently, Complainants have two options to file a complaint with DLSE: (1) In writing via Form 205 and, (2) in person at one of the DLSE offices by a duty officer who fills out the Form 205. DLSE does not accept or docket oral complaints unless they are later memorialized on a Form 205. Complaints are not accepted over the telephone or through email. All complaints are forwarded to the two team leaders for screening. Upon acceptance of a complaint for investigation, the Form 205 is forwarded to Sacramento for docketing and assignment.

Team leaders inform Complainants in writing if their complaint is rejected, and then they are filed by the date received. Team leaders track 6310 and 6311 complaints and referrals separately for reporting purposes. Team leaders use the CMS system to track all types of DLSE complaints but information on these forms is limited. Neither IMIS nor CMS information is placed in the case files. RCI 900 Forms (Investigator diary sheets) are used for tracking various administrative data (i.e. mailing dates for opening and closing letters, letters of determination, etc.) and Investigator actions (phone calls, etc.).

Two cases were improperly coded or categorized in IMIS; neither case was a 6311/6310 code. One case was closed with a merit finding without a merit determination documented in the file. One case was coded as withdrawn but there is no evidence to support this was Complainant's intention.

The Retaliation Complaint Investigation Manual provides guidance for the organization of the case file by describing that the Investigator will arrange the case file in chronological order. It

also describes that the "Report of Hearings, Interviews and Actions" form (DLSE 900) notes shall be kept on the right side of the file. The Retaliation Complaint Investigation Manual lacks any substantive guidance for the Retaliation Complaint Investigator in regards to case file organization with the exception of placing documents in chronological order. As a result, the case files reviewed during the on-site visit contained poor documentation of the conduct and the evidence, making it difficult to assess the adequacy of the investigation. A majority of the case files reviewed were poorly organized. There is no consistency in case file organization among the Investigators. Additionally, administrative documents were intermixed with investigative documents. Documents were loose and unfastened to the file. Documentation was duplicative. There was no table of contents to refer to. Additional files were not used to contain copious amounts of documentation. Occasionally, exhibits were tabbed but not in a manner that would aid report writing or case review.

When a case is assigned to an Investigator, the name, address and telephone number will be included in the assignment letter. Whenever a new Investigator is assigned to an ongoing investigation, the contact information should be updated. Case files were re-assigned to different Investigators without an updated assignment letter. There is little evidence to suggest that Complainants were routinely informed of their cases being reassigned. Various notes and work product were mixed together and it was not possible to determine who produced what or how documentation was obtained.

As part of the docketing procedures, when a case is opened for investigation, a letter is sent notifying Complainant and Respondent that the complaint has been reviewed and given an official designation. Dates regarding when opening and closing letters were sent out and when the case was turned in were inconsistently documented on the DLSE 900 diary sheet. Opening and closing letters were inconsistently sent to both Complainant and Respondent or not placed in the case files. Certified mail was rarely used to verify when or if such letters were received. Phone calls were not consistently documented on the DLSE 900.

The Retaliation Complaint Investigation Manual, Chapter 3, Section IV (I)(1) instructs Investigators to send the parties a complete report upon completion of the investigation and states that there is ordinarily no need to perform a closing conference. Subsequently, Investigators are not conducting closing conferences.

The Investigator must prepare a narrative chronology of background information and events relating to the retaliation. The summary should incorporate as much of the relevant background information that has been told or discovered. The information in the summary should contain all the information necessary to support the conclusions reached. A Summary of Relevant Facts (the equivalent to OSHA's Final Investigative Reports) is not prepared and there are no narratives or memos to file telling a reader what happened during the course of the investigation or a chronology of events. There is no formal analysis of the *prima facie* elements, pretext, or dual motive. Some case files had blank outlines for analyzing *prima facie* elements and for developing chronology, but were not utilized. Narratives are only prepared for case files with a *cause* (merit) determination.

It is the Investigator's responsibility to pursue all appropriate investigative leads that develop during the course of the investigation. Contact must be made, whenever possible, with all relevant witnesses, and every attempt must be made to gather all pertinent data and materials

from available resources. Complainant interviews were not conducted or documented in each case file. Complainant and witness interviews, when obtained, did not contain contact information, where or when the interview took place, or who was present. In one case file, it appears from interview notes that multiple witnesses were interviewed at one time, which possibly negated a witness's right to confidentiality.

The Retaliation Complaint Investigation Manual states that recorded witness statements are to be obtained when feasible and, if not; it should be memorialized in an affidavit. Signed statements were not obtained when feasible.

In settled cases, the settlement agreement should be reviewed for public policy concerns before dismissing the complainant. In settled cases, DLSE is not routinely obtaining a copy of the un-redacted settlement agreements within the case file.

Finding 28: Of the 128 WB investigations, 96% were not completed within the 90-day period as required.

Recommendation 28: Take necessary measures to ensure that investigations are completed within 90 day period. (Section 11 (c) of the OSH Act and implementing regulation 29 CFR Part 1977.16. Section 98.7(e) of the California Labor Code establishes an even shorter timeframe – 60 days.)

Finding 29: Oral complaints are not accepted and docketed in WB cases.

Recommendation 29: Accept and docket orally filed and emailed complaints in IMIS upon receipt and do not require a Complainant to submit a complaint in writing (Form 205) (DIS 0-0.9 Federal Whistleblower Manual, Chapter 7, Section V (A)).

Finding 30: Opening and closing letters were inconsistently sent to both Complainant and Respondent or not placed in the case files, and dates were not recorded on the DLSE 900 diary sheet.

Recommendation 30: Consistently maintain and track opening and closing letters and phone calls in the case file. All documents received and telephone calls made during the course of the investigation should be written in the DLSE 900 diary sheet (DIS 0-0.9 Federal Whistleblower Manual, Chapter 2, Section III(D&E), Chapter 3, Sections IV(B)(1) and IV(K), and Chapter 4, Section IV(B)(2). Ensure that the DLSE 900 is regularly updated.

Finding 31: Complainant interviews were not conducted or documented in each case file and signed statements were not always obtained when feasible. Interviews with all relevant witnesses, including management and third parties are not being determined.

Recommendation 31: Ensure that complainants in all cases are interviewed. DLSE should attempt to interview all relevant witnesses, including management and third parties. Attempt to obtain signed statements from each relevant witness when possible. Witnesses should be interviewed separately and privately to avoid confusion and to maintain confidentiality. (Retaliation Complaint Investigation Manual, Chapter 3, and DIS 0-0.9 Federal Whistleblower Manual, Chapter 3)

Finding 32: Investigators do not conduct closing conferences with Complainants and the equivalent of OSHA's Final Investigative Report or similar summary of relevant facts is not prepared for all WB case files.

Recommendation 32: Conduct closing conferences with Complainants as per DIS 0-0.9 Federal Whistleblower Manual, Chapter 3, Section J, and prepare a summary of relevant facts for case files that are signed and dated by both the Investigator and the evaluating Team Leader. (DIS 0-0.9 Federal Whistleblower Manual, Chapter 4, Section III, and Chapter 5, Section IV).

Finding 33: In settled cases, the settlement agreement is reviewed and an un-redacted copy is not maintained within the case file.

Recommendation 33: Obtain and file a copy of the un-redacted settlement agreement, review it for public policy concerns such as waivers of future employment, and approve the settlement before dismissing the complaint.

E. Complaint About State Program Administration (CASPAs)

A Complaint about State Program Administration (CASPA) is an oral or written complaint about some aspect of the operation or administration of a state plan filed with OSHA by any person or group. During this evaluation period, one CASPA was received which warranted an investigation.

On July 1, 2009, Region IX received a CASPA alleging Cal/OSHA's standards are not as effective as Federal OSHA in protecting workers against Safety hazards associated with the use of mobile aerial lifts as fall arrest anchorage platforms used by United Parcel Services (UPS). The outcome of this complaint is pending the development of a Federal OSHA interpretation regarding boom supported elevating work platform. The interpretation is complex and requires coordination with multiple offices within OSHA and review by the DOL Solicitor's office.

F. Voluntary Compliance Programs

Cal/OSHA's Voluntary Protection Program (VPP), also known as Cal/VPP, is similar to OSHA's Star VPP exemption program. This program was designed to recognize employers who had implemented model safety and health programs and who had injury and illness rates at or below those for their industry. Cal/VPP only evaluates individual fixed establishments. It does not have a Merit program, a Corporate Program or a Mobile-based program.

In FY 2009, there were 70 employers designated as VPP sites. Cal/VPP certified 12 new companies as VPP sites and conducted 12 VPP renewals in FY 2009. On September 15, 2008, Cal/OSHA submitted their revised Voluntary Protection Program (VPP) policies and procedures in response to the Federal Program Change (FPC) CSP 03-01-003 Voluntary Protection Programs (VPP) Policies and Procedures Manual.

In order to qualify as an applicant the last three years of a company's inspection history must indicate an employer's good faith attempt to abate unsafe conditions. Willful, repeat, or willful-

repeat final order citations for a site in the last three years would disqualify the applicant from participation (Cal/OSHA Consultation policies and procedures (CCPP), page 2 item 7 and 8). In addition to willful, repeat or willful-repeat citations, the OSHA VPP Policies and Procedures Manual disqualifies applicants for open enforcement investigations; pending or open contested citations or notices under appeal at the time of application; affirmed 11(c) violations; and unresolved, and outstanding enforcement actions (such as long-term abatement agreements or contests) within the last three years.

Significant organizational changes, such as mergers and takeovers, may adversely affect a VPP site and may lead to modifications to the safety and health program. Their directive requires VPP participants to submit an Annual Evaluation Report that includes changes in organization and processes (CCPP, page 12 item v and vi). Establishments are not required to inform Cal/OSHA of significant organizational, ownership, union or operation changes prior to the submittal of the Annual Evaluation Report. In comparison, CSP 03-01-003 VPP Policies and Procedures Manual requires participants to submit to OSHA within 60 days a new statement of commitment signed by both management and any authorized collective bargaining agents as appropriate.

Every on-site team must, at a minimum, include a Team Leader, a safety specialist and an industrial hygiene specialist (CCPP, page 7 item 1), however there are no detailed qualification requirements of the team members. The Federal OSHA VPP team member qualifications include the following: (1) thorough knowledge of VPP policy, (2) OSHA Course 2450 Evaluation of Safety and Health Management Systems (SHMS) or other formal training in evaluating SHMS, (3) OSHA Course 5450 Special Government Employee Training Course, and (4) working knowledge and understanding of SHMS. In addition, the Team Leader must also have experience on three on-site evaluations including once as a team member, once as a back-up team leader, and once as a team leader in training.

To evaluate the accuracy of the establishments' injury and illness records, the applicant's medical program is reviewed during the on-site visit (CCPP, D-64, Appendix A page 4, Item #11). However, a Medical Access Order (MAO) or equivalent to review establishments' medical records is not required. Federal OSHA requires submitting a Medical Access Order (MAO) form to the OSHA Office of Occupational Medicine, and the applicant must then post it in a prominent area at the worksite for 15 working days prior to the on-site visit.

The Cal/OSHA program states that "the audit team prefers to maximize its efficiency by having working lunches on-site. Each lunch should have a presentation that depicts safety and health related accomplishments for which your company is especially proud" (CCPP, D-64, Appendix A page 3, Item #4). This requirement raises an ethical issue by suggesting lunch be provided to the VPP team; working lunches should be the decision of the applicant. See the August 12, 2009 Jordan Barab memo, *Ethics Guidance on Interactions with Outside Organizations, Including Voluntary Protection Program Participants*

Finding 34: Applicants in the Cal/VPP are not disqualified for open enforcement investigations, contested citations, notices under appeal, or affirmed 11(c) violations that are unresolved or outstanding enforcement within the last three years.

Recommendation 34: Adopt Federal OSHA's specific "disqualifying" factors (CSP 03-01-003

VPP Policies and Procedures Manual, Chapter V).

Finding 35: Cal/VPP participants are not required to submit a new statement of commitment, signed by both management and any authorized collective bargaining agents, as appropriate within 60 days of a change.

Recommendation 35: Ensure a 60 day policy (or equivalent) for submission of a new statement of commitment. (CSP 03-01-003, VPP Policies and Procedures Manual, page 49) is adopted.

Finding 36: Specific Team Member qualifications are not required for participation in a Cal/VPP onsite investigation.

Recommendation 36: Adopt detailed qualifications for both the Team Leader and Special Team Member (STM) positions to ensure qualified personnel are reviewing potential VPP sites. (CSP 03-01-003, VPP Policies and Procedures Manual, Chapter VI)

Finding 37: The Cal/OSHA program does not require a Medical Access Order (MAO) or equivalent to review establishments' medical records

Recommendation 37: Adopt MAO procedures and have the employer post it prior to the on-site visit.

G. Program Administration

Funding and Fiscal Issues

The Accounting Division for California's Department of Industrial Relations monitors the budget process and expenditure for federal and state funds in accordance with federal regulation OMB Circular A-87, "Cost Principle for State Local and Indian Government" and OMB Circular A-102, "Uniform Administrative Requirements." The CAL-STAR is the Department of Industrial Relations accounting system that generates detail and summary financial reports.

An onsite audit was conducted on the financial aspects of the 23(g) grant for the period of March 7 to March 17, 2010 and April 5 to April 29, 2010 and is summarized below.

In September 2009, there were 44.5 vacancies that could not be filled as a result of a hiring freeze placed on State workers. The State has also mandated that all state employees take three furlough days every month. Cal/OSHA operated with only 375 out of 419.5 authorized positions. These 375 positions were all full-time equivalent positions. Additionally, the long standing benchmarks for Cal/OSHA inspectors have not been addressed. The State of California was issued original benchmarks according to the 1980 Court Decision establishing benchmarks. Subsequently, States were given an opportunity to submit proposals for revised benchmarks. California submitted a proposal in 1984, but it was not finalized. Since they did not move to amend, California's benchmarks are 334 for safety and 471 for health. Currently, staffing levels are below their benchmarks with 122 (36.6%) for safety and 75 (16.0%) for health.

Budgetary constraints and hiring freezes are currently impacting Cal/OSHA's ability to meet their staffing levels. Cal/OSHA is aware of this issue and is identifying ways to address this

deficiency.

In addition, during this fiscal period, California had three furlough days per month. Offices are closed on the 1st, 2nd and 3rd Friday of each month. On furlough days, Cal/OSHA provides coverage by having staff on call and by providing a general access telephone number to handle imminent danger situations, fatalities and accidents.

In FY 2009, the state of California operated the 23(g) State Plan Program with a total final funding of $64,855,026 (federal funds – $23,452,726 and state funds – $41,402,300). The grant was amended due to One-Time Only Funding on September 24, 2009 in the amount of $388,408. These funds were used to purchase Safety & Health equipment, furniture and multimedia equipment. A review of the purchase orders and invoices showed that purchases of this equipment and supplies were properly authorized and approved. However, there were two discrepancies. Funds for the purchase of 185 Laptops ($254,858.65) were obligated by the end of the fiscal year, but the laptops were not delivered until after the grant period closed and this cost was charged 100% State Funds. Also, two items (Phone System and Cat. 6 Cable Installation) were not purchased according to their plan.

During the on-site financial review, the general ledger and financial closeout report showed the recipient share was $37,854,610.64. There was a discrepancy of unused State funds in the amount of $2,318,140.67; the unliquidated obligation was $1,229,548.69. The money has now been spent, but the invoices have not been processed and the Accounting Division did not ask for an extension. They are working to process the unpaid bills, however this should have been spent by December 30, 2009, or an extension requested before any draw down was made after the end of the funding period. Also, the review of the payment Management System showed that Cal/OSHA drew down FY 2009 funds on January 21, 2009 in the amount of $1,201,656.98, after the end of the grant year closeout. OMB Circular A-102, UNIFORM ADMINISTRATIVE REQUIREMENTS, Subpart C – Post Award Requirements, Section §_.23, Period of availability of funds states: *"Liquidation of obligations – A grantee must liquidate all obligations incurred under the award no later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee."* The federal funds drawn down amounts and dates are as listing in Table 17 below.

Table 17

Date	Drawdown	Total
01/21/2010	1,201,656.98	23,452,726.00
12/17/2009	102,783.44	22,251,069.02
11/20/2009	56,262.85	22,148,285.58
10/23/2009	1,487,210.79	22,092,022.73
10/20/2009	217,903.89	20,604,811.94
09/29/2009	1,853,732.17	20,386,908.05
08/19/2009	1,644,135.23	18,533,175.88
07/21/2009	2,074,898.78	16,889,040.65
06/15/2009	1,775,771.44	14,814,141.87
05/14/2009	1,901,161.99	13,038,370.43
04/16/2009	1,984,099.51	11,137,208.44

03/19/2009	1,699,658.76	9,153,108.93
02/19/2009	1,939,014.38	7,453,450.17
01/20/2009	1,998,725.81	5,514,435.79
12/18/2008	1,731,627.05	3,515,709.98
11/21/2008	1,784,082.93	1,784,082.93

Payroll records maintained to support personnel and fringe benefit costs for 100% of participation were adequate. Costs were correctly charged in accordance with the terms and conditions of the Agreements and the Grant. A sample of payroll records showed that payroll costs were properly authorized, allowable and allocable in accordance with the federal regulations OMB Circular A-87, "Cost Principles for State and Local Government."

The Anti Discrimination Unit's time sheets were completed and showed six commissioners who were paid for 100% participation. In accordance with the budget plan, only two commissioners were authorized for 100% participation. There were other commissioners authorized in the work plan for 25% participation.

The Standards Board and Appeals Board could not provide actual hours, time-sheets or employment status of all employees at any given time. The requirement for contemporaneous source documentation of actual hours worked must be signed by the employer and/or responsible supervisor. OMB Circular A-87 "COST PRINCIPLES FOR STATE, LOCAL AND INDIAN GOVERNMENT, Title 2 Grants and Agreement, Part 225" states: *8. Compensation for personal services, h. Support of salaries and wages. These standards regarding time distribution are in addition to the standard for payroll documentation. 1) Charge to federal awards for salaries and wages, whether treated as direct or indirect costs, will be based on payroll documented in accordance with generally accepted practice of the governmental unit and approved by a responsible official of the government unit. 3) where employees are expected to work solely on a single Federal award or cost objective, charges to their salaries and wages will be supported by periodic certifications that the employees worked solely on that program at least semi-annually and will be signed by the employer or supervisory official having first hand knowledge of the work performed by the employee.*

Travel was completed in accordance with State and federal travel regulations. Of the 45 safety officers' travel vouchers reviewed, documents were properly authorized and approved, however, some of the vouchers were not properly recorded to FY 2009.

Cal/OSHA paid for items in October 2009 (FY 2010) with money from FY 2009. This is a serious error and not in accordance with the following rules: *" In accordance with CFR-29 Labor, Part 97 – UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS, Subpart C – Post Award Requirements, Section 97.23, Period of Availability of Funds. (a) General – Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period."*

Some area offices' rent payments were erroneously charged to current year grant funds.
For the most part, the procurement and property management systems were acceptable and

managed in accordance with State and federal regulations. A review of a sample of purchase orders and invoices showed that purchases of equipment and supplies were properly authorized and approved. In some cases, however, the use and occupancy of area office costs were associated with the FY 2009 federal award during the State fiscal year 2008-2009, all of which would be outside the appropriate period. Those costs were allocated to the FY 2008 funds. For example, the area office in San Bernardino Government Center showed that the total amount of $72,294.66 was paid for in June 2009 for costs obligated in the months of July 1, 2008 through December 31, 2008. Money from FY 2009, in the amount of $36,147.33 (July 1 – September 30, 2008) should have been charged to the FY 2008 funding. The amount difference (October 1, 2008-December 31, 2008) should have been charged to the FY 2009 funding. Additionally, the storage located at 736 W. Del Amo Blvd, in Torrance, California is an empty attic and costs $400 a month; this is an improper use of funds.

Finding 38: Budgetary constraints, including 3 days a month furloughs and hiring freezes, are potentially impacting Cal/OSHA's ability to provide effective enforcement coverage at workplaces throughout the State, during regular working hours and in response to emergencies.

Recommendation 38: Cal/OSHA must ensure that it has sufficient on-board staff available to provide effective worker protection.

Finding 39: Cal/OSHA operated with only 375 out of 419.5 authorized positions. Also, the current benchmark positions allocated are 122 (36.6%) for safety and 75 (16.0%) for health.

Recommendation 39: Increase efforts to hire additional staff to fill the 44.5 vacant positions. Continue to reconcile staffing levels with realistic revised benchmarks, taking into consideration allocated versus filled positions, covered workers, and employment in the State.

Finding 40: Cal/OSHA failed to process the unpaid bills of 1,229, 548.69 before December 30. Also, after the end of the grant year closeout, DIR drew down FY 2009 funds on January 21, 2009 in the amount of $1,201,656.98.

Recommendation 40: Ensure all bills are processed timely and closely monitor grant draw downs of funding to ensure grant funds are properly managed. Liquidate all obligations incurred under the award no later than 90 days after the end of the funding period.

Finding 41: The Standards Board and Appeals Board could not provide actual hours, time-sheets or employment status at any given time for all employees.

Recommendation 41: Provide periodic certifications of employment status for all employees.

Finding 42: Travel costs in October 2009 (FY 2010) were paid with money from FY 2009 and some area office rent payments were erroneously charged to the current year grant funds and some funds are used improperly.

Recommendation 42: Ensure expenditures are paid with funds from that funding period and any miss-allocated expenditures should be reallocated to State matching funds or return the grant monies that were incorrectly allocated.

Indirect Costs Charged

The appropriate indirect cost rate was not applied to accurately reflect the proper amount of indirect costs allocable to the grant for the last quarter. The applied rate for the total amount of indirect costs was based on the negotiated rate by the State of California Department of Industrial Relations and the U.S. Department of Labor. During the period of July 1, 2009 through September 30, 2010, the negotiated rate that should have been applied was 14.97% of $701,344.72. They incorrectly applied the indirect cost rate of 15%. The financial report was revised when it was brought to Cal/OSHA's attention.

Indirect expenses were not posted on the general ledger for the State expenditures. The closeout report showed that these expenditures were charged to the federal funds in the amount of $622,474.39 for Industrial Disability Leave, Non-industrial Disability Leave, Unemployment Insurance, Employee Assistance Benefits Other – Staff Benefits, Life Insurance, False Arrest Insurance, Private Vehicle Damages (Accident), and Interest Penalties**.** These are unallowable costs, as they were not included in the Negotiated Indirect Cost Rate Agreement of the grant.

Finding 43: Indirect cost rates were incorrectly applied and are not allowable costs to the grant.

Recommendation 43: Ensure that the correct indirect cost rate is properly applied to the costs associated with the appropriate period of the fiscal year. Ensure that expenditures posted to the general ledger are listed individually with as much detail as possible.

American Recovery Reinvestment Act (ARRA)

The Fiscal Year (FY) 2009 American Recovery Reinvestment Act (ARRA) Program (AR19265AR9) provides funds for construction projects, infrastructure/green energy projects, and related manufacturing support industries. Cal/OSHA's funding for FY 2009 was approved at $1,530,140 (federal portion – $765,070 and non-federal portion – $765,070) on August 19, 2009. Cal/OSHA's objective was to conduct 600 inspections. This included the use of 13 full time equivalent employees. Cal/OSHA initiated a decrease of federal funding in the total of $230,000 on April 15, 2010, and later restored it on May 3rd. Cal/OSHA has conducted roughly 470 inspections and expects to exceed the original projection of 600 inspections.

All California State Departments receiving ARRA funds are required to use the California ARRA and Accountability Tool (CAAT) for reporting to the federal government. This tool ensures California's compliance with federal reporting requirements. A Financial Status Report (SF 425) via DOL Egrants.gov is due within 10 days after the end of each quarter, in accordance with the State Plan ARRA Award Recipients' memorandum, dated June 9, 2009. Each state must also submit a "Program Report Narrative" that describes in detail the ARRA activities for each quarter. Details requested include the following: a Summary of Inspection Activity at ARRA-Related Projects (number of inspections by NAICS Code, number and types of violations cited and total penalties proposed), Significant Activities for Reporting Quarter, and Targeting and Identification of ARRA-Related Projects. OSHA has not received these Program Report Narratives from Cal/OSHA in a timely fashion.

Finding 44: A "Program Report Narrative" that describes in detail the ARRA activity for each quarter was not submitted in a timely fashion.

Recommendation 44: Submit all required ARRA reports in a complete and timely fashion.

Compliance Officer Training Program

On August 8, 2008, OSHA's Directive number TED 01-00-018 Initial Training Program for OSHA Compliance Personnel became effective. States were required to adopt this directive by February 8, 2009. Cal/OSHA submitted their draft, revised Professional Development and Training Policies and Procedures (hereinafter referred to as the Cal/OSHA training program) on January 30, 2009 with an anticipated adoption date of June 2009. There are numerous differences between the OSHA TED and the Cal/OSHA training program. Cal/OSHA uses internally developed courses rather than OSHA Training Institute (OTI) courses.

There are substantive gaps in training noted for new hires. The Initial Compliance course was not held between November 2007 and February 2010. Cal/OSHA had 32 compliance officers hired as of December 2008, who had not attended the course until February 2010.

Cal/OSHA could not provide a curriculum of core courses required by each CSHO. OSHA has three training paths for each CSHO: a health path, safety path and construction path. At a minimum, these classes include an Introduction class (1050, 1250 or 2000), 1310 Investigative Interviewing Techniques, 1410 Inspection Techniques and Legal Aspects, 1450 Evaluation of Safety and Health Management Systems, 1230 Accident Investigations, Hazard Awareness courses(1080, 1280 or 2080, and 8200 Incident Command System, and as per TED 01-00-0018.

Cal/OSHA has reported that it is developing Individual Development Plans (IDPs) for each compliance officer. In OSHA, each CSHO and his/her supervisor tracks progress via an Individual Development Plan (IDP) that is updated annually. The IDP (Form DL-80) is used as a planning and tracking document for reference by the CSHO and his/her supervisor to ensure that the CSHO receives all required training.

Cal/OSHA's training policies and procedures indicated that new hires may waive attending required courses "if a newly hired safety engineer or industrial hygienist has substantial prior safety or health experience and the required Developmental Training Program does not meet the individual's needs, the safety engineer or industrial hygienist, in conjunction with his or her supervisor, shall design an alternative Developmental Training Program, in conjunction with the IDP process, that meets the individual's needs." However, there is no indication as to how "substantial experience" for each CSHO is determined.

The Cal/OSHA training program lacks a course equivalent to OTI course #2000 Construction Standard, OTI course #2450 Evaluation of Safety and Health Management, multi-disciplinary courses (e.g. OTI course #1280 Safety Hazard Awareness for Industrial Hygienists and #1080 Health Hazard Awareness for Safety Officers). The Cal/OSHA training program lacks a course equivalent to OTI course #8200 Incident Command System I-200 in which OSHA compliance officers are required to take during the first three years of training. In addition, none of Cal/OSHA's VPP staff have attended the OTI Course #2450 Evaluation of Safety and Health Management Systems (SHMS) (refer to TED 01-00-018 Initial Training Program for OSHA Compliance Personnel, Appendix C and CSP 03-01-003 VPP Policies and Procedures Manual, pages 59-60).

Cal/OSHA does not send staff to OTI because OTI classes are not specific to the California Safety Orders. Cal/OSHA staff is provided with in-house, off-site and on-the-job training, which is often held in half the duration of the equivalent OTI course. Courses are not scheduled on a regular basis; instead, course subject matter is determined based on a variety of requirements such as hiring, regulatory changes, compliance issues, requests from managers, and budget.

A review of the training revealed that the courses have varying lengths: Labor Code and P&P Training (4-hour and 9-hour course); Cal/OSHA P&P (16-hour and 24-hour course) ;Orientation to Enforcement (28-hour and 32-hour course); Cal/OSHA Orientation (32-hour videotape or 30-hour course); Air Sampling (16-hour and 20-hour course); Bloodborne Pathogens (6-hour, 8-hour, and 12-hour course); Respirator Fit Testing (4-hour and 20-hour course); Fall Protection (4-hour and 20-hour course); Mobile Cranes and Rigging (24-hour and 32-hour course); Scaffold Safety (8-hour, 24-hour, and 32-hour course); Cal/OSHA Appeals Training (2-hour, 6-hour, 16-hour, 24-hour, 30-hour, and 32-hour course); Accident Investigation (2-hour and 18-hour course); HAZWOPER (8-hour and 40-hour course); Heat Stress Regulation (4-hour and 6-hour course); Respiratory Protection (6-hour, 24-hour, and 35-hour course); Protech Machine Guarding (16-hour and 24-hour course); Hazardous Waste Operations and Emergency Response (8-hour and 40-hour course); Industrial Toxicology (24-hour and 28-hour course); Confined Space Entry (21-hour, 24-hour, and 26-hour course); Industrial Noise (24-hour and 40-hour course); High Voltage Electrical Safety (8-hour and 24-hour course); Soil Mechanics/Trenching (16-hour and 24-hour course); and Confined Spaces (4-hour, 8-hour, and 16-hour course).

Finding 45: There are substantive gaps in training noted for new hires. Staff members hired as of December 2008 are not scheduled to take the Initial Compliance Course until February 2010. None of Cal/OSHA's VPP staff has attended the OTI Course #2450 Evaluation of Safety and Health Management Systems (SHMS). DLSE investigators and team leaders have not attended the Basic Whistleblower training course.

Recommendation 45: Ensure staff members receive appropriate training such as the Initial Compliance Course; OTI Course #2450 Evaluation of Safety and Health Management Systems (SHMS) as required by TED 01-00-018, Appendix C and CSP 03-01-003, pages 59-60; or equivalent; and ensure DLSE investigators and team leaders attend the Basic Whistleblower training course or equivalent.

Finding 46: Cal/OSHA has not established a curriculum of core courses that all CSHOs are required to take and could not provide a complete list of courses offered as classes are not scheduled on a regular basis. A review of the courses revealed a lack of consistency and appropriate length in comparison to TED 01-00-018 Initial Training Program for OSHA Compliance Personnel.

Recommendation 46: Establish a curriculum of core courses for newly hired compliance officers that are equivalent to Federal OSHA (TED 01-00-018 Initial Training Program for OSHA Compliance Personnel). Ensure that training is scheduled on a regular and timely basis and that course curriculums are equivalent to OSHA OTI courses in quality, content, and length. Need to develop a course equivalent to OTI courses 2000 Construction Standard, 2450 Evaluation of Safety and Health Management, multi-disciplinary courses (e.g. OTI course #1280 Safety Hazard Awareness for Industrial Hygienists and #1080 Health Hazard Awareness for

Safety Officers), and 8200 Incident Command System.

H. California Occupational Safety and Health Appeals Board (OSHAB) Special Study

On November 4, 2009 a special study was initiated in response to concerns expressed by several sources regarding the Appeals Process and California Occupational Safety and Health Appeals Board (OSHAB) practices. A primary source for these concerns was a June 13, 2009, Open Letter, signed by 47 Cal/OSHA staff members. The special study report is Appendix G of this EFAME Report.

The special study reviewed OSHAB Decisions and Decisions After Reconsideration (DARs), and applicable sections of the OSHAB's policies and procedures. Interviews were conducted with Cal/OSHA staff, the Division Chief, and staff attorneys for Cal/OSHA. Interviews were also conducted with the two current OSHAB members, the Board's Chief Executive Officer, and a Presiding Administrative Law Judge (ALJ). Additional information was provided by Worksafe, a non-profit watchdog organization, and the Senate Office of Research.

OSHAB is not interpreting "substantial probability" consistent with Federal OSHA interpretation, or with OSH Review Commission or Court of Appeals decisions. This study recommends that Cal/OSHA take appropriate action – administrative, judicial, ,or legislative – to ensure that OSHA's interpretation of "serious hazard" is consistent with and at least as effective as the Federal definition.

OSHAB scheduling has put pressure on Cal/OSHA to settle cases with little consideration of the merits of the case. Cal/OSHA must take appropriate action to address the problems associated with overscheduling of cases and assure that CSHOS or attorneys have adequate time between scheduled dates to prepare for upcoming hearings.

OSHAB is using a more restrictive standard of evidence than the requirements for Federal compliance officers' testimony before the OSH Review Commission. Cal/OSHA expertise is not always given appropriate weight during hearings. Cases were identified which show that an extremely high standard of evidence was required by OSHAB in order to prove classification of violations. In addition, ALJs did not always fully take into consideration Compliance Officer's ability to identify, evaluate, and document conditions in the workplace. Cal/OSHA must take appropriate action to ensure that OSHAB's test for acceptance of compliance officers' testimony is at least as effective as the test at the federal level and results in a similar classification of violations as serious.

Cal/OSHA should file Writs of Mandate requesting Superior Court review of cases believed to be sufficiently strong to establish precedent by which OSHAB would be bound in subsequent cases. This includes previous rulings with determinations supporting definitions and criteria for serious classifications. Cal/OSHA should be using the Carmona decision as a guide in pursuing higher court review of negative OSHAB Decisions.

Witness availability and travel expenses do affect the outcome of appeals for Cal/OSHA. Cal/OSHA needs to consider their ability to call witnesses when determining whether to settle a case prior to hearing and consider whether settlement of a case is warranted. Cal/OSHA must take appropriate action to address the problems associated with overscheduling of cases and

assure that CSHOs or attorneys have adequate time between scheduled dates to prepare for upcoming hearings.

Reconsideration Orders do not clearly indicate which specific issue(s) are being reconsidered in order for Cal/OSHA to submit additional information or arguments to the Board. Also, notifications are not always sent to the correct Cal/OSHA office. Cal/OSHA must take appropriate action to assure that the system for hearing contested cases includes a method of notification that ensures clear, concise, accurate and timely notification to parties involved in the appeals process and is at least as effective as the Federal system.

Prehearing conferences are not recorded and some stipulated agreements are rejected by ALJs and hearings convened. In certain instances, ALJs issue decisions the Board feel need to be amended through the Decision After Reconsideration process. Due to Furlough Fridays, OSHAB is concerned that a backlog of unwritten Decisions has been accumulating. Cal/OSHA must take appropriate action to assure that all parties are afforded opportunity for hearings in an appropriate manner consistent with the OSH Act including following the procedures outlined in the "Gold Book." Pre-hearing conferences should be formally documented in their entirety.

Cal/OSHA must determine whether the problems associated with the current system of having CSHOs defend their own cases during contest can be corrected. If not, they should utilize Cal/OSHA attorneys during the entire appeals process including settlements.

Cal/OSHA needs to determine a method to encourage more informal conferences. The percent of violations reclassified during pre-contest proceedings is increasing, while the percent of penalty retention is decreasing. Cal/OSHA should adopt policies for Informal Conferences that include: Allow District Managers to request assistance of counsel should an employer bring an attorney to the informal conference; require employers to post informal conference information in an area accessible to all affected parties; allow more Informal Conferences to be held by phone, to encourage informal settlements and reduce the number of appeals sent to OSHAB; and hold informal conferences within the 15 working day contest period.

Cal/OSHA should remove the automatic 50% abatement reduction of penalties prior to citation issuance when an employer has not abated the hazard during the inspection to encourage informal conferences. Also consider closely assessing pre-contest procedures to ensure violations and penalties are being appropriately reclassified, decreased, or upheld.

A significantly higher percentage of Cal/OSHA cases are appealed, compared to Federal OSHA. OSHAB requirements for filing do not require that an appeal must be written and include the specific aspect of the violation being appealed and the reason(s) for the appeal; and submitted within 15 working days. OSHAB Appeals forms utilize a check off box in place of the employer requirement to submit the specific aspect of the citation item being appealed and the reasons for the appeal in writing.

A copy of the Special Study is located in Appendix G and contains 13 specific Findings and Recommendations.

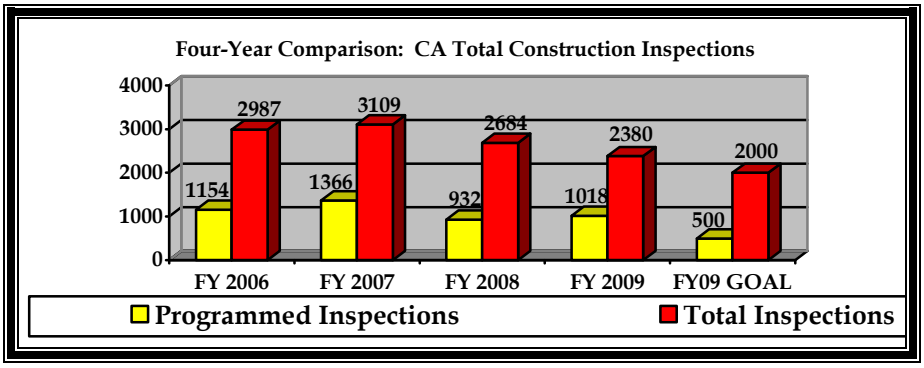
V. Assessment of Annual Performance Goals

Strategic Goal 1: Improve workplace safety and health for all workers through direct intervention methods that result in fewer hazards, reduced exposures, and fewer injuries, illnesses, and fatalities.

FY 2009 Performance Goal 1.1: To reduce fatalities and occupational injuries and illnesses in construction. CSHIP includes, but is not limited to, the following SIC Codes: (1) 1521, 1522 and 1531—General Contractors (Residential Buildings); 1541 and 1542—General Contractors (Nonresidential Buildings); 1711 through 1799—Special Trade Contractors; and 1623, 1629 and 1794—Excavation and Trenching.

Enforcement Activities: Cal/OSHA Enforcement conducted 2,380 construction industry inspections of which 1,018 were programmed inspections and 336 were in small commercial construction projects. Chart 9 below shows a Four-Year Comparison of Cal/OSHA's programmed and total construction inspections.

Chart 9



Cal/OSHA's average totals of programmed and total inspections over the past four years are 1,117 and 2,790 respectively. Cal/OSHA has consistently exceeded their goal of programmed construction inspections while the total number of inspections has declined since FY 2008.

In addition, Cal/OSHA Enforcement staff participated in 19 outreach sessions to the construction industry with an emphasis on heat illness prevention.

Outcome Measures: Available data from the Bureau of Labor Statistics (BLS) shows Cal/OSHA achieved their goal of reducing injuries, illnesses and fatalities in the construction industry. Although the latest BLS data trails this evaluation period, it shows that California's construction industry Total Recordable Case Rate (TRCR) continued to decrease from the baseline of 7.1 to 4.8. California's Days Away, Restricted, or Job Transferred (DART) rate also continued to decrease from the baseline of 4.7 to 3.1 in CY 2008 (Chart 10). Total fatalities decreased from the state's CY 2006 baseline of 117 to 67—falls declined from 30 to 15 in CY 2008 (Chart 11). (*Cal/OSHA does not investigate transportation and/or workplace violence fatalities)*.

Chart 10

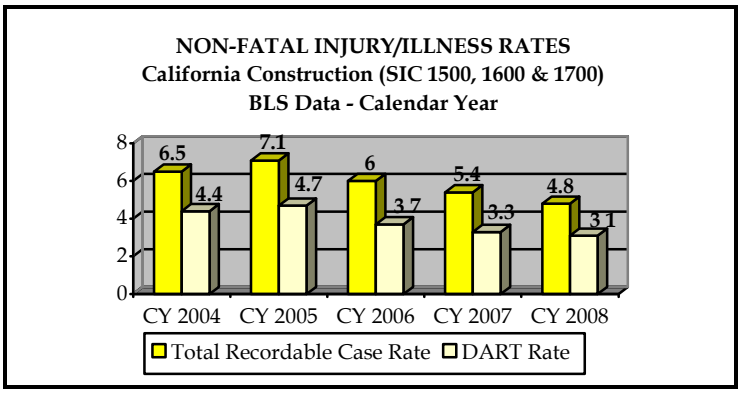
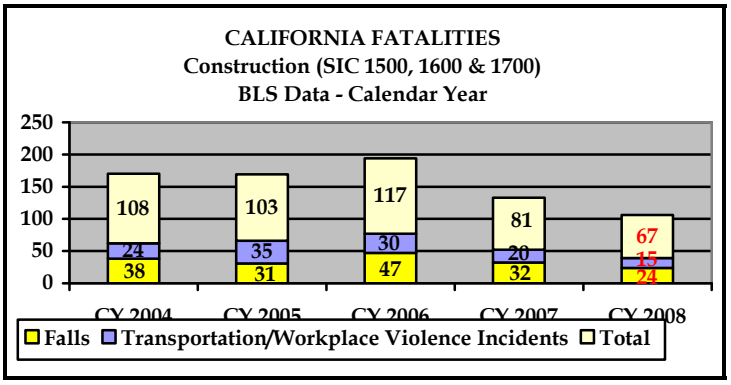


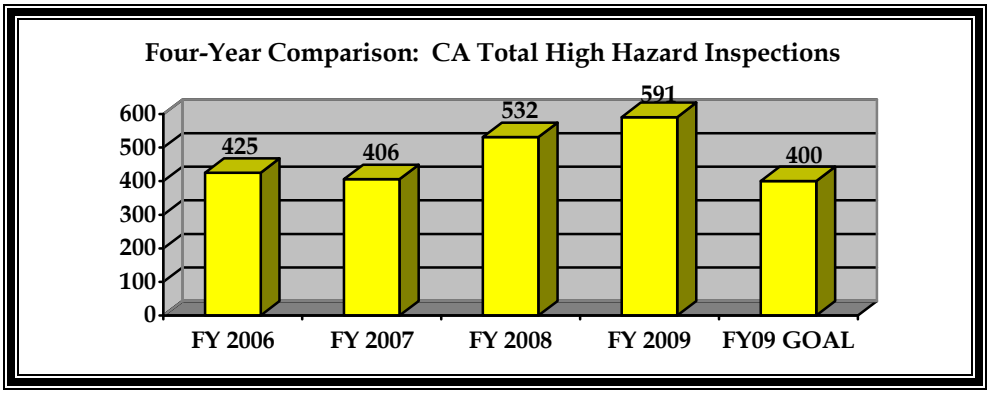
Chart 11



FY 2009 Performance Goal 1.2: To reduce injuries, illnesses and fatalities in selected high hazard industries with a goal of removing the industry from the High Hazard List due to decreased injury and illness rates. Highest priority NAICS codes are the following: 3113 (Sugar and Confectionary), 3115 (Dairy Product Manufacturing), 3116 (Animal Slaughtering), 311812 (Commercial Bakeries), 312 (Beverage and Tobacco), and 33231 (Plate Work and Fabricated).

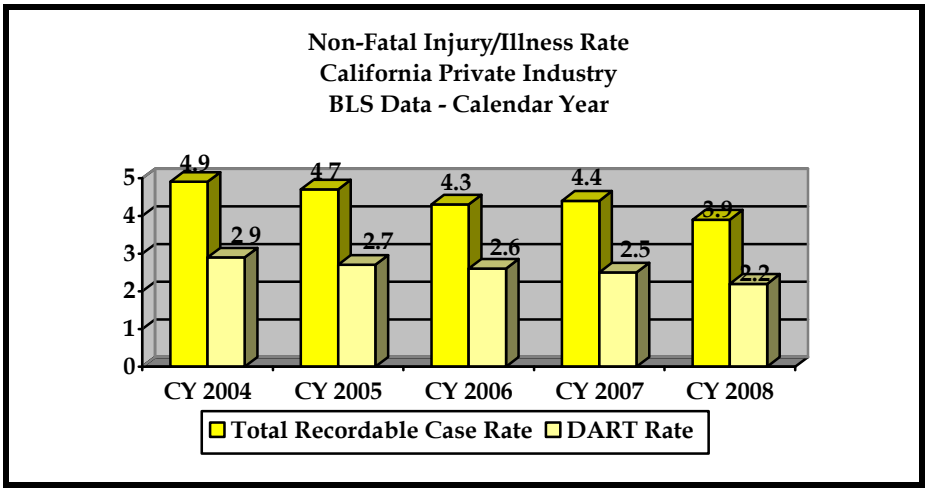
Enforcement Activities: The High Hazard Unit conducted 591 inspections, which is an increase from the previous evaluation of 532 inspections. Chart 12 below shows a Four-Year Comparison. Cal/OSHA's average total number of inspections to high hazard industries over the past four years is 488, which is slightly above their goal.

Chart 12



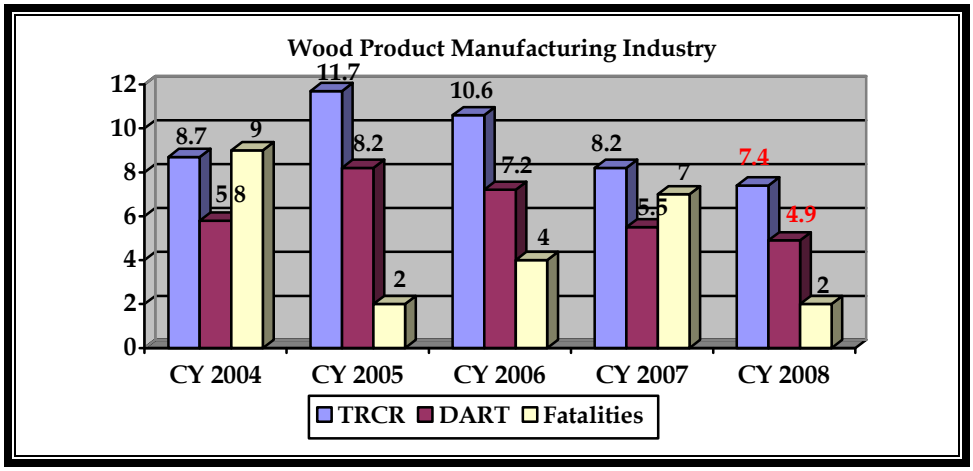
Outcome Measures: Data from the Bureau of Labor Statistics (BLS) shows the state has reduced injuries, illnesses and fatalities in the private industry. Based on the BLS data for the private sector, the total recordable injury/illness case rate and DART rate for CY 2008 are at a five-year low at 3.9 and 2.2 respectively (Chart 13). Total fatalities decreased from 421 in CY 2005 to 350 in CY 2008.

Chart 13



This FY Cal/OSHA made the Wood Product Manufacturing industry a primary target. A review of this industry revealed that the Total Recordable Case Rate (TRCR), Days Away, Restricted, or Job Transferred (DART) rate, and fatalities in Wood Product Manufacturing decreased in CY 2008 (Chart 14).

Chart 14



FY 2009 Performance Goal 1.3 (Food Processing, Food Manufacturing, and Food Flavoring): Reduce the rate of injuries, illnesses and fatalities for companies who receive either a compliance inspection or an intervention from Cal/OSHA with the goal of reducing the total DART rate and fatality rate for all industries.

Enforcement Activities: In FY 2007, Cal/OSHA initiated a pilot program to conduct inspections in the food manufacturing industry (NAICS 311 and 312). This FY they conducted a total of 328 (102 programmed) inspections in the food processing/manufacturing industries.

Outcome Measures: Cal/OSHA's on-site activities and interventions in the food processing industry have achieved a reduction in injuries and illnesses (Charts 15 and 16). This FY fatalities in the food processing/manufacturing industry increased from three to five —the state reported that no new cases on diacetyl-related illnesses have occurred.

Chart 15

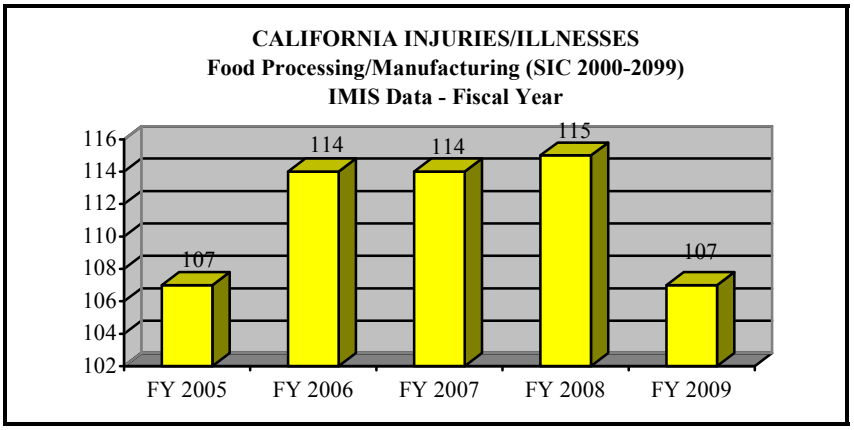
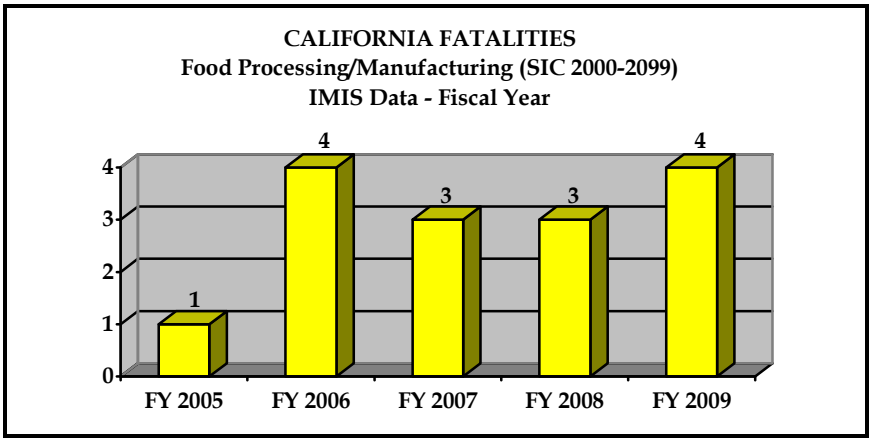


Chart 16



Strategic Goal 2: Promote workplace cultures that increase employer and employee awareness of, commitment to, and involvement in safety and health.

FY 2009 Performance Goal 2.1: Cal/OSHA will focus heat illness prevention efforts in the construction, agriculture and other outdoor industries for FY 2009 through training, outreach, development, and promotion.

Enforcement Activities: This fiscal period, Cal/OSHA Compliance Assistance participated in regular telephone conference calls with agricultural worker advocacy groups such as the United Farm Workers and the California Rural Legal Assistance.

Cal/OSHA also participated in outreach events hosted by the Mexican Consulate statewide as well as regularly scheduled radio programs, which have helped to raise awareness about workers rights and heat illness prevention within the Hispanic community. Cal/OSHA collaborated with the numerous organizations to train employers and employees on heat illness prevention throughout the summer.

Outcome Measures: Annual Performance Goal 2.1 was primarily a Consultation goal and, therefore, outcome measures will be addressed in the FY 2009 Regional Annual Consultation Evaluation Report (RACER).

FY 2009 Performance Goal 2.2: To improve communication with and education to high-risk Hispanic employee groups regarding workplace safety and health rights, responsibilities, and hazards.

Enforcement Activities: This fiscal period, Cal/OSHA Compliance Assistance distributed over 12,000 heat-related materials during outreach events and programmed outdoor heat-related inspections as well as conducted two Mixteco language radio interviews and three English television interviews. Cal/OSHA staff also participated in one Hmong outreach event.

Outcome Measures: In FY 2008, it was noted that Cal/OSHA did not meet their goal of educating high-risk employee groups. Cal/OSHA focused on only one hazard without addressing any activities in regards to other high hazards in existence in California. This fiscal period, Cal/OSHA revised this goal to identify Hispanic workers as “high-risk” workers, but did not

define the "hazards" that would be addressed under this goal.

FY 2009 Performance Goal 2.3: To maintain three existing partnerships.

Enforcement Activities: This fiscal period, Cal/OSHA maintained three ongoing partnerships with Cal/Trans, the Port of San Diego Ship Repair Association (PSDSRA), and the Construction Employers Association (CEA). Cal/OSHA also formed an Alliance with Federal OSHA—Region IX, and the OSHA Training Institutes (OTIs) in California and Nevada. They also began working on a "Permit Partnership" with the Los Angeles County Community College District; this is still under development.

Outcome Measures: Annual Performance Goal 2.3 was primarily a Consultation goal and, therefore, outcome measures will be addressed in the FY 2009 Regional Annual Consultation Evaluation Report (RACER).

FY 2009 Performance Goal 2.4: Cal/OSHA will supplement traditional compliance enforcement efforts directed at heat illness prevention in the construction, agriculture and other industries for FY 2009 through training, outreach, development of training tools, and promotion.

Enforcement Activities: Cal/OSHA conducted 3,535 total outdoor heat-related inspections statewide of which 1,697 were programmed inspections. Cal/OSHA also conducted numerous workshops/seminars in English and Spanish throughout the state to educate employers and supervisors who could then train and protect their workers.

Outcome Measures: Annual Performance Goal 2.4 was primarily a Consultation goal and, therefore, outcome measures will be addressed in the FY 2009 Regional Annual Consultation Evaluation Report (RACER).

Strategic Goal 3: Secure public confidence and maximize Cal/OSHA's capabilities by improving the effectiveness and efficiency of Cal/OSHA's programs and services.

FY 2009 Performance Goal 3.1: Further reduce the time from opening conference to issuance of a citation on a statewide basis.

Enforcement Activities: As of December 2, 2009, Cal/OSHA reported an average lapse time of 73.92 days for safety and 83.29 days for health.

Outcome Measures: During the last evaluation, it was recommended that Cal/OSHA implement procedures to reduce citation lapse time. This year, Cal/OSHA reported that the District Managers must regularly review the "Cases Open with Citations Pending" IMIS report. Table 18 below shows that Cal/OSHA's citation lapse time continues to increase. The concern is that employers are not required to abate hazards until they receive the actual citations. During FY 2009, Cal/OSHA reported that the District Managers were running SAMM reports every month to ensure discrepancies in IMIS were corrected.

Table 18

Citation Lapse Time (SAMM 7)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***FY 2009 National Data***
Safety	**93.71 days** (368595/3933)	**91.95 days** (431533/4693)	**70.58 days** (341833/4843)	**71.39 days** (345778/4843)	**73.90 days** (333987/4519)	43.8 days
Health	**102.66 days** (94552/921)	**97.35 days** (86350/887)	**78.49 days** (83592/1065)	**78.06 days** (81809/1048)	**83.31 days** (82394/989)	57.4 days

Appendix A

FY 2009 California State Plan (Cal/OSHA) Enhanced FAME Report prepared by Region IX

Summary of Findings and Recommendations

	Complaint Findings	Complaint Recommendations
1	In eleven of the 109 complaint case files reviewed, Cal/OSHA did not respond to the complaint in a timely fashion. Twenty-four of the 109 complaint case files reviewed did not have initial letters to the complainant. Twenty-seven case files did not include follow-up letters to the complainant.	Ensure that complaints are responded to in a timely fashion. Ensure that initial notifications are made and all complainants are provided the results of their complaint in a timely manner.
2	The Cal/OSHA Policy and Procedures Manual does not address elements that are required in the complaint process.	Adopt policies and procedures equivalent to Federal OSHA to include the following: E-Complaints Procedures (Federal FOM, page 9-2 and 9-5 to 9-7), the Handling/Processing of Referrals from Other Agencies (Federal FOM, page 9-2), Scheduling an Inspection of an Employer in an Exempt Industry (Federal FOM, page 9-5), Union Reference (Federal FOM, page 9-11), Complaint Questionnaire (Federal FOM, page 9-17 to 9-20), and the Five-day requirement for employer to submit written results of an investigation (Federal FOM, page 9-11)
	Fatalities Findings	**Fatalities Recommendations**
3	Twenty-three of the 52 fatality inspections did not contain adequate information to determine whether Cal/OSHA communicated with the victim's family concerning the process and results of the investigations.	Ensure that family members of the fatality victim are contacted regarding the investigation and that all required correspondence is completed in a timely manner and documented in each case file.
4	Two of the 52 fatality inspections were not initiated in a timely fashion and the reasons for the delay were not documented in the case file.	Ensure that Compliance Officers initiate fatality inspections timely after initial notification and that Compliance Officers communicate and document reasons for any delays in the case file.
5	The CPPM does not address elements that are required in the fatality process	Adopt policies equivalent to Federal OSHA's on Interview Procedures and Informer's Privilege (Federal FOM, page 11-7); on Investigation Documentation, which includes: Personal Data—Victim, Incident Data, Equipment or Process Involved, Witness statements, Safety and Health Program, Multi-Employer Worksite, and Records Request (Federal FOM, page 11-9 to 11-10); and on Families of Victims, which includes Contacting Family Members, Information Letter, Letter to Victim's Emergency Contact, and Interviewing the Family (Federal FOM, page 11-12 to 11-13).
	Targeting and Inspections Findings	**Targeting and Inspections Recommendations**
6	Cal/OSHA has not updated its protocols for its Agriculture Safety and Health Inspection Project (ASHIP), and Construction Safety and Health Inspection Project (CSHIP) since FY2000.	Update ASHIP and CSHIP protocols at least annually.
7	Cal/OSHA's Program Targeting System is not identifying industries where serious hazards are more likely to exist.	Re-evaluate the targeting system and the focus of enforcement resources to ensure that programmed inspections are being conducted at establishments where serious hazards are most likely to exist.
8	Cal/OSHA's policy on classifying violations does not ensure violations that would be considered "Serious" under the Federal FOM are classified as Serious.	Adopt Violation Classification policies and procedures equivalent to Federal OSHA regarding descriptions on Supporting "Serious" Classification (Federal FOM, page 4-10 to 4-11), Supporting "Willful" Violations (Federal FOM, page 4-30 to 4-32), and Combining/Grouping Violations (Federal FOM, page 4-37 to 4-39).
9	When determining Repeat Violations, Cal/OSHA does not consider the employer's enforcement history statewide. Instead, employer history is only considered within each of the six regions (refer to Cal/OSHA's policies and procedures C-1B, page 14).	Consider employer history statewide when citing Repeat violations.

	Employee and Union Involvement Findings	Employee and Union Involvement Recommendations
10	Employee representatives were not always afforded the opportunity to participate in all phases of the workplace inspection.	Ensure union representatives are presented the opportunity to participate in every aspect of the inspection and keep them informed as required in the Cal/OSHA Policies and Procedures Manual. If unions choose not to participate in the inspection, ensure it is documented.
	Case File Reviews Findings	**Case File Reviews Recommendations**
11	In Fifty-eight of 157 case-files Employee Interviews are not capturing employer knowledge, exposure to hazard(s), and/or the length of time hazardous conditions existed. In addition, interviews are not capturing the employee's full legal name, address and phone number(s). In all cases reviewed, employer knowledge is not being adequately documented in a narrative form to assure a legally sufficient case.	Ensure that employees are interviewed to determine employer knowledge, exposure to hazard(s), length of time hazardous condition existed, and obtain the employee's full legal name, address and phone number(s). Adopt policies for conducting employee interviews equivalent to Federal OSHA's. Train employees on interviewing techniques. (Federal FOM, page 3-23 to 3-27).
12	Sixty-three of 157 Case files were missing copies of the OSHA 300 and did not indicate if information had been entered into the IMIS system. Citations were not issued to the employer for failing to maintain the log.	Ensure that compliance officers request and include copies of the 300 in the case file for each inspection for the last three years and enter the data into IMIS. If the employer cannot provide them, document it in the file and issue appropriate citations.
13	Twenty-eight of 157 case files lacked complete injury and illness descriptions and did not clearly describe the hazard or exposure. And in 91 cases, photos did not always describe the violation, exposure, specific equipment/process, location, and employee job title (if applicable), the date and time of the picture and the inspection number.	Ensure that all aspects of the injury and illness documentation are included in the 1B or equivalent form to identify the hazard in enough detail to clearly describe the hazard or exposure. Ensure that photos identify the violation, exposure, specific equipment/process, location and employee job title (if applicable) and include the date and time of picture and the inspection number.
14	In 50 of 157 case files, narratives were either missing or lacked important details about what occurred during the inspection. And in 60 cases, diary sheets did not reflect inspection history.	Ensure that inspection narratives adequately describe the inspection and that diary sheets adequately reflect inspection activity, including but not limited to, opening conference date, closing conference date, supervisor review, telephone communications, and informal conference dates.
15	Exposure monitoring was not conducted prior to issuing citations to employers in four health inspections.	Ensure that health inspectors conduct appropriate sampling to evaluate exposure and support violations. Ensure the information is properly entered into IMIS.
	Abatement Findings	**Abatement Recommendations**
16	There were 209 Serious/Willful/Repeat (S/W/R) violations identified in the SAMM Report that were not abated timely.	Develop a tracking system to ensure all violations are abated timely and/or ensure abatement data is accurately entered into IMIS.
	Review Procedures Findings	**Review Procedures Recommendations**
17	Informal Conference policy allows conferences to be held beyond 15 days and lacks guidance on obtaining counsel and does not require conference information to be posted properly and consistently throughout the state.	Provide Specific guidelines for the "Conduct of the Informal Conference," which includes conference subjects, subjects not to be addressed, and closing remarks (Federal FOM, page 7-4 to 7-5); and hold informal conferences within the 15 working day contest period (Federal FOM, page 7-2). Also ensure guidance obtaining Counsel should an employer bring an attorney to the informal conference (Federal FOM, page 7-3) is provided and that Posting Requirements (Federal FOM, page 7-4) are clearly articulated
18	The percent of penalty retention during post-contest procedures has decreased since FY 2007 and the percent of violations reclassified continues to increase.	Assess pre-contest procedures to ensure violations and penalties are being appropriately reclassified and decreased respectively and develop procedures to Increase the percentage of penalties being retained during the post-contest.

	Information Management Findings	Information Management Recommendations
19	Cal/OSHA does not receive accurate and up to date information on the status of outstanding penalties from the DIR Accounting Office. Penalties are not being effectively collected and those that are no longer collectible are not being identified and removed from the system in a timely manner.	Assure that the DIR Accounting office is providing information on penalty payments and update the details in IMIS. Ensure that penalties are either effectively collected and identify those cases where penalties are no longer collectible in [to] order reduce the high number of old cases in the system.
20	The 15-day "due date" following issuance of the citations on the Debt Collection report is not entered. This date is important for tracking appeals.	Ensure that the 15-day due date for all issued citations is tracked
21	The Complaint Response Log and Complaint Query revealed that half of all complaints inspected were not opened until after five days from receipt of the complaint. Also, the Complaint Employer Response Due standard report revealed outstanding complaints dating back to December of 2008 with employer response pending.	Ensure that complaint IMIS reports are updated and accurate so that they can assist with properly managing the complaint process, And ensure that the Employer Response Due report and Complaint Response Log are regularly updated and cases are followed up on to ensure proper response was received.
22	Complaint Letters G and H are not being consistently entered in the database.	Ensure that appropriate G and H notification letters are entered and being sent to all complainants
23	The Referral Log identified that the five offices had referrals that had not been appropriately inspected or investigated in a timely fashion, including some referrals that were deemed Serious in nature. Thirteen referrals showed no response at all.	Generate and review the Referral Log on a regular basis and ensure that all referrals are handled appropriately and timely.
24	Seven fatalities were not opened within one day of reporting; lapse time for inspection of all accident reports ranged from 7.6 days to 38.4 days.	Ensure accidents are opened timely. Generate and review a Fat/Cat tracker to ensure that accidents reports are being evaluated and classified appropriately in order to improve accident lapse time.
25	The Citations Pending Report revealed that in three of the five offices, 19 cases have citations pending that are over 180 days old and in the four offices, of the 225 citations that have not been issued, 207 show either no opening or no closing date. The Unsatisfied Activity Report identified unsatisfied activity in four of the five offices.	Generate and Review a Citations Pending Report to monitor that citations are reviewed and issued in a timely manner. Generate and review the Unsatisfied Activity Report to identify outstanding activities which need to be scheduled for inspection.
	Federal Program Changes Findings	**Federal Program Changes Recommendations**
26	Cal/OSHA's evaluation and adoption of Federal Program Changes has not been timely. Cal/OSHA has not adopted both the Employer Payment for Personal Protective Equipment, Final Rule, published November 15 2007 and the *Clarification of Employer Duty to Provide Personal Protective Equipment and Train Each Employee,* published December 12, 2008. They adopted the *Final Rule on Electrical Installation Requirements* -29 CFR 1910 *Subpart S,* effective February 18, 2010; they were two and a half years late adopting this rule. In addition, California has not submitted a supplement in response to *CPL-02-00-148 2009, Field Operations Manual.* Many of the procedural issues discussed in this report relate to items not covered in the State's current Policies and Procedures Manual which should be addressed in the response to the Federal FOM.	Implement measures to ensure that new Federal Program Changes are evaluated and adopted in a timely manner, as per 29 CFR 1953.4(b)(1) and (b)(3).
	Standards Findings	**Standards Recommendations**
27	State initiated rulemaking promulgated a Standard on Bakery Ovens that was deemed not to be at least as effective as Federal OSHA standards.	Ensure standards are at least as effective as Federal OSHA standards and initiate actions to update deficient standards.

	Discrimination Program Findings	Discrimination Program Recommendations
28	Of the 128 WB investigations, 96% were not completed within the 90-day period as required.	Take necessary measures to ensure that investigations are completed within 90 day period (Section 11 (c) of the OSH Act and implementing regulation 29 CFR Part 1977.6 Section 98.7(e) of the California Labor Code establishes an even shorter timeframe – 60 days.)
29	Oral complaints are not accepted and docketed in WB cases.	Accept and docket orally filed and emailed complaints in IMIS upon receipt and do not require a Complainant to submit a complaint in writing (Form 205) (DIS 0-0.9 Federal Whistleblower Manual, Chapter 7, Section V (A)).
30	Opening and closing letters were inconsistently sent to both Complainant and Respondent or not placed in the case files, and dates were not recorded on the DLSE 900 diary sheet.	Consistently maintain and track opening and closing letters and phone calls in the case file. All documents received and telephone calls made during the course of the investigation should be written in the DLSE 900 diary sheet (DIS 0-0.9 Federal Whistleblower Manual, Chapter 3 and 4 2, Section IVB.2 III(D&E), Chapter 3, Sections IV (B)(1) and IV (K), and Chapter 4, Section IV(B)(2). Ensure that the DLSE 900 is regularly updated (Retaliation Complaint Investigation Manual, Chapter 2).
31	Complainant interviews were not conducted or documented in each case file and signed statements were not always obtained feasible. Interviews with all relevant witnesses, including management and third parties are not being interviewed.	DLSE should attempt to interview all relevant witnesses, including management and third parties. Attempt to obtain signed statements from each relevant witness when possible. Witnesses should be interviewed separately and privately to avoid confusion and to maintain confidentiality. (Retaliation Complaint Investigation Manual, Chapter 3 and DIS 0-0.9 Federal Whistleblower Manual, Chapter 3).
32	Investigators do not conduct closing conferences with Complainants but should do so as per OSHA's whistle blower manual (See DIS 0-0.9, Ch. 3, Section J). and the equivalent of OSHA's Final Investigative Report or similar summary of relevant facts is not prepared for all WB case files.	Conduct closing conferences with Complainants as per DIS 0-0.9 Federal Whistleblower Manual, Chapter 3, Section J, and prepare a summary of relevant facts for case files that are signed and dated by both the Investigator and the evaluating Team Leader. (DIS 0-0.9 Federal Whistleblower Manual, Chapter 4, Section III, and Chapter 5, Section IV).
33	DLSE presently does not prepare a "Summary of Relevant Facts", or the equivalent of OSHA's Final Investigative Reports for their case files and should adopt the identical format prescribed in OSHA's whistleblower manual (see DIS 0-0.9, Ch. 4, Section III).	Prepare a Summary of Relevant Facts, or the equivalent of OSHA's Final Investigative Reports, for case files. The reports should be signed and dated by both the Investigator and the evaluating Team Leader. DLSE should adopt the identical format prescribed in the DIS 0-0.9 Federal Whistleblower Manual, Chapter 4, Section III). Case files should be reviewed for accuracy and accountability regardless of the type of determination made
	Voluntary Compliance Programs Findings	**Voluntary Compliance Programs Recommendations**
34	Applicants in the Cal/VPP are not disqualified for open enforcement investigations, contested citations, notices under appeal, or affirmed 11(c) violations that are unresolved or outstanding enforcement within the last three years.	Adopt Federal OSHA's specific "disqualifying" factors (CSP 03-01-003 VPP Policies and Procedures Manual, Chapter V).
35	Cal/VPP participants are not required to submit a new statement of commitment, signed by both management and any authorized collective bargaining agents, as appropriate within 60 days of a change.	Adopt Federal OSHA's "60 day" policy for submission of a new statement of commitment. (CSP 03-01-003, VPP Policies and Procedures Manual, page 49).
36	Detailed Specific Team Member qualifications are not required for participation in a Cal/VPP onsite investigation.	Adopt detailed qualifications for both the Team Leader and Special Team Member (STM) positions to ensure qualified personnel are reviewing potential VPP sites. (CSP 03-01-003, VPP Policies and Procedures Manual, Chapter VI).

37	The Cal/OSHA program does not require a Medical Access Order (MAO) or equivalent to review establishments' medical records.	Adopt MAO procedures and have the employer post it prior to the on-site visit.
	Program Administration Findings	**Program Administration Recommendations**
38	Budgetary constraints, including 3 days a month furloughs and hiring freezes, are potentially impacting Cal/OSHA's ability to provide effective enforcement coverage at workplaces throughout the State, during regular working hours and in response to .	Cal/OSHA must ensure that it has sufficient on-board staff available to provide effective worker protection.
39	Cal/OSHA operated with only 375 out of 419.5 authorized positions. Also, the current benchmark positions allocated are 122 (36.6%) for safety and 75 (16.0%) for health.	Increase efforts to hire additional staff to fill the 44.5 vacant positions. Continue to reconcile staffing levels with realistic revised benchmarks, taking into consideration allocated versus filled positions, covered workers, and employment in the State.
40	Cal/OSHA failed to process the unpaid bills of 1,229, 548.69 before December 30. Also, after the end of the grant year closeout, DIR drew down FY 2009 funds on January 21, 2009 in the amount of $1,201,656.98.	Ensure all bills are processed timely and closely monitor grant draw downs of funding to ensure grant funds are properly managed. Liquidate all obligations incurred under the award no later than 90 days after the end of the funding period.
41	The Standards Board and Appeals Board could not provide actual hours, time-sheets or employment status at any given time for all employees.	Provide periodic certifications of employment status for all employees.
42	Travel costs in October 2009 (FY 2010) were paid with money from FY 2009 and some area office rent payments were erroneously charged to the current year grant funds and some funds are used improperly.	Ensure expenditures are paid with funds from that funding period and any miss-allocated expenditures should be reallocated to State matching funds or return the grant monies that were incorrectly allocated.
43	Indirect cost rates were incorrectly applied and are not allowable costs to the grant.	Ensure that the correct indirect cost rate is properly applied to the costs associated with the appropriate period of the fiscal year. Ensure that expenditures posted to the general ledger are listed individually with as much detail as possible.
44	A "Program Report Narrative" that describes in detail the ARRA activity for each quarter was not submitted in a timely fashion.	Submit all required ARRA reports in a complete and timely fashion.
	Training Findings	**Training Recommendations**
45	There are substantive gaps in training noted for new hires. Staff members hired as of December 2008 are not scheduled to take the Initial Compliance Course until February 2010. None of Cal/OSHA's VPP staff has attended the OTI Course #2450 Evaluation and Safety and Health Management Systems (SHMS). DLSE investigators and team leaders have not attended the Basic Whistleblower training course.	Ensure staff members receive appropriate training such as the Initial Compliance Course; OTI Course #2450 Evaluation of Safety and Health Management Systems (SHMS) as required by TED 01-00-018, Appendix C and CSP 03-01-003, pages 59-60; or equivalent; and ensure DLSE investigators and team leaders attend the Basic Whistleblower training course or equivalent.
46	Cal/OSHA has not established a curriculum of core courses that all CSHOs are required to take and could not provide a complete list of courses offered as classes are not scheduled on a regular basis. A review of the courses revealed a lack of consistency and appropriate length in comparison to TED 01-00-018 Initial Training Program for OSHA Compliance Personnel.	Establish a curriculum of core courses for newly hired compliance officers that are equivalent to Federal OSHA (TED 01-00-018 Initial Training Program for OSHA Compliance Personnel). Ensure that training is scheduled on a regular and timely basis and that course curriculums are equivalent to OSHA OTI courses in quality, content, and length. Need to develop a course equivalent to OTI courses 2000 Construction Standard, 2450 Evaluation of Safety and Health Management, multi-disciplinary courses (e.g. OTI course #1280 Safety Hazard Awareness for Industrial Hygienists and #1080 Health Hazard Awareness for Safety Officers), and 8200 Incident Command System.

Special Study on California Occupational Safety and Health Appeals Process

Prepared by Region IX

Findings and Recommendations

	Special Study Findings	Special Study Recommendations
1	In its decisions OSHAB is not defining "serious hazard" or interpreting "substantial probability" consistent with Federal OSHA interpretations, OSH Review Commission, and with Court of Appeals decisions. The "more likely than not" construct used by OSHAB is not consistent with the intent of the OSH Act nor the requirements of Section 18 that a State Plan must provide a program of standards and enforcement that is at least as effective as the OSHA program.	Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to ensure that OSHAB 's interpretation of "serious hazard" is consistent with and at least as effective as the Federal definition.
2	Writs of Mandate on OSHAB Decisions and DARs that result in loss of citations, citation classifications, or penalties are not being filed by Cal/OSHA in many cases where warranted.	Cal/OSHA must select sufficiently strong cases for appeal that would set precedent to challenge OSHAB decisions and practices regarding the classification of violations as serious in order to ensure that California meets the criteria in 29 CFR 1902.37(b)(14), which states: Wherever appropriate, the State agency has sought administrative and judicial review of adverse adjudications. This factor also addresses whether the State has taken the appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in its enforcement program resulting from an adverse administrative or judicial determination.
3	The rules of evidence used by OSHAB prevent many serious hazards from being appropriately classified without the use of "Expert" testimony and relevant medical training on specific injuries. Federally, expert testimony is not always required to establish whether a hazard is serious. In some cases, expert testimony may be needed, but the OSHAB appears to be applying a test that far exceeds well-settled law in both the OSHRC and Federal courts.	Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to ensure that OSHAB's test for acceptance of compliance officers' testimony is as least as effective as the test at the federal level and results in a similar classification of violations as serious.
	Cases have been identified showing an extreme standard of evidence to prove classification of violations where the Compliance Officer's ability to identify, evaluate, and document conditions in the workplace are not considered.	[See recommendation #3]
	A medically qualified person(s) is necessary to sustain violations based on exposure and "work relatedness" under the current Appeals process.	[See recommendation #3]
4	OSHAB's reduction of penalties including those for violations of 342(a), result in Cal OSHA's having a significantly lower percentage of penalty retention rate post content.	Cal/OSHA, using all available appeal resources, must select sufficiently strong cases for appeal that would set precedent regarding retention of penalties overall and a minimum penalty for violations of 342(a).
5	Cal/OSHA field staff do not have sufficient legal training or background to present cases at hearings.	Cal/OSHA must take appropriate action to assure that their enforcement actions are appropriately defended at contest either through attorney representation or, if necessary, through a system where Cal/OSHA field staff are trained and provided with adequate access to technical and legal resources to ensure at least as effective presentation of cases to OSHAB.
6	OSHAB schedules multiple cases for the same Cal/OSHA staff member on the same day or in the same week without consideration for the time each party indicates is necessary to present their case.	Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to address the problems associated with over scheduling of cases and assure that CSHOs or attorneys have adequate time between scheduled dates to prepare for upcoming hearings. If CSHOs are to continue to present their own cases, Cal/OSHA must provide adequate legal and administrative support to help them review the case file and prepare to testify.

7	OSHAB's notification system is inaccurate and inefficient, Reconsideration Orders are unclear on the specific issue(s) being reconsidered and notifications are not always sent to the correct Cal/OSHA office.	Cal/OSHA must take appropriate action to assure that the system for hearing contested cases includes a method of notification that ensures clear, concise, accurate and timely notification to parties involved in the appeals process and is at least as effective as the OSHRC method.
8	Prehearing conferences are not recorded, some stipulated agreements are rejected by ALJs and hearings convened, decisions are amended through the Decision After Reconsideration process and Furlough Fridays have affected the amount of time ALJs have to hear cases and issue Decisions.	Cal/OSHA must take appropriate – administrative, judicial, or legislative – action to assure that all parties are afforded opportunity for hearings in an appropriate manner consistent with the OSH Act including following the protocols outlined in the policies and procedures "Gold Book"; formally documenting the Pre-hearing conferences; and developing a system which results in timely and objective ALJ hearing procedures and decisions.
9	[See Finding #8]	Cal/OSHA must determine whether the problems associated with the current system of having CSHO's defend their own cases during contest can be corrected. (See Recommendation #6). If not, they should utilize Cal/OSHA attorneys during the entire appeals process including settlements as is done in the Federal Program and most other OSHA-approved State Plans.
10	ALJs follow the OSHAB regulations (Gold Book) for amending Cal/OSHA citations.	Cal/OSHA must take appropriate action to establish the necessary rules and/or practices with OSHAB that allow amendment of citations in a manner at least as effective as Federal case law and OSHRC procedures - including amendment for technical errors and to conform with evidence presented. Cal/OSHA should also take steps to assure that case files contain accurate information, especially regarding company name and standards cited, through staff training and improved case file review, and fully utilize all appeals processes when citations/cases are vacated for minor technical errors.
11	Witness availability has affected the outcome of appealed cases.	When an appeal does occur, Cal/OSHA should consider witnesses availability when determining whether settlement is warranted. Utilize informal conferences as a means of lowering the appeals rate and more successful retention of citations including violation classifications and appropriate penalties.
12	Cal/OSHA's Informal Conference policies do not encourage informal settlement and are not similar to the Federal Program.	Cal/OSHA must discontinue the automatic 50% reduction of proposed penalties based on an assumption of future abatement. Cal/OSHA should adopt policies on informal conferences that are at least as effective as federal policies.
13	Through its practices Cal/OSHA is effectively extending the 15 working day contest period established by statute by 10 days by accepting contests by phone, allowing 10 additional days for submission of documentation regarding the grounds for contest, and allowing the use of a "check-off box" form, in lieu of a written submission, for the filing process.	Cal/OSHA must determine whether this practice is in accordance with State Law and evaluate how these practices affect their contest rate. The State should determine whether the adoption of contest, informal conference, and settlement procedures more in line with statutory requirements and Federal practice would resolve many of the issues identified in this report. Absent a determination to change these practices, the State must submit a plan change supplement for Federal review, documenting its entire appeals process with a detailed comparison to the Federal program showing how it is "at least as effective," and a legal opinion that it is in accordance with State law.

APPENDIX B:
Enforcement Comparison Chart
FY 2009 Enforcement Activity

	California	State Plan Total	Federal OSHA
Total Inspections	**8,835**	**61,016**	**39,004**
Safety	6,972	48,002	33,221
% Safety	*79%*	*79%*	*85%*
Health	1,863	13,014	5,783
% Health	*21%*	*21%*	*15%*
Construction	2,376	26,103	23,935
% Construction	*27%*	*43%*	*61%*
Public Sector	539	7,749	N/A
% Public Sector	*6%*	*13%*	*N/A*
Programmed	3,557	39,538	24,316
% Programmed	*40%*	*65%*	*62%*
Complaint	2,237	8,573	6,661
% Complaint	*25%*	*14%*	*17%*
Accident	2,140	3,098	836
Insp w/ Viols Cited	4,794	37,978	27,165
% Insp w/ Viols Cited (NIC)	*54%*	*62%*	*70%*
% NIC w/ Serious Violations	*35%*	*62%*	*87%*
Total Violations	**18,309**	**129,363**	**87,663**
Serious	3,480	55,309	67,668
% Serious	*19%*	*43%*	*77%*
Willful	9	171	401
Repeat	59	2,040	2,762
Serious/Willful/Repeat	3,548	57,520	70,831
% S/W/R	*20%*	*44%*	*81%*
Failure to Abate	15	494	207
Other than Serious	14,746	71,336	16,615
% Other	*81%*	*55%*	*19%*
Avg # Violations/ Initial Inspection	3.3	3.3	3.1
Total Penalties	**$ 23,477,583**	**$ 60,556,670**	**$ 96,254,766**
Avg Current Penalty / Serious Violation	$ 4,929.60	$ 800.40	$ 970.20
Avg Current Penalty / Serious Viol- Private Sector Only	$ 4,816.10	$ 934.70	$ 977.50
% Penalty Reduced	64.1%	51.9%	43.7%
% Insp w/ Contested Viols	**40.4%**	**13.0%**	**7.0%**
Avg Case Hrs/Insp- Safety	21.0	15.7	17.7
Avg Case Hrs/Insp- Health	19.0	26.6	33.1
Lapse Days Insp to Citation Issued- Safety	55.8	31.6	34.3
Lapse Days Insp to Citation Issued- Health	63.2	40.3	46.7
Open, Non-Contested Cases w/ Incomplete Abatement >60 days	341	2,010	2,234

Source:
DOL-OSHA. State Plan INSP & ENFC Reports, 11-19-2009. Federal INSP & ENFC Reports, 11-9-2009. Private Sector ENFC- State Plans 12.4.09 & Federal 12.14.09

APPENDIX C
List of Acronyms

ACE	Special Report created by Cal/OSHA
ADM	OSHA Instruction—Administrative
AIHA	American Industrial Hygiene Association
ALAEA	At Least As Effective As
ALJ	Administrative Law Judge
ARRA	American Recovery and Reinvestment Act
ASHIP	Agriculture Safety and Health Inspection Project
ATS	Automated Tracking System
BLS	Bureau of Labor Statistics
Cal/OSHA	California Occupational Safety and Health
CAPR	Consultation Annual Project Report
CASPA Com	plaint About State Program Administration
CEA	Construction Employers Association
CPL	OSHA Instruction—Compliance
CSHIP	Construction Safety and Health Inspection Project
CSHO	Compliance Safety and Health Officer
CSP	OSHA Instruction—Cooperative and State Programs
CY	Calendar Year
DART	Days Away, Restricted, or Job Transferred
DIR	Department of Industrial Relations
DLSE	Division of Labor Standards Enforcement
DOSH	Division of Occupational Safety and Health (aka Cal/OSHA)
EEEC	Economic and Employment Enforcement Coalition
E-FAME	Enhanced Federal Annual Monitoring Evaluation
EOD	End of Day Report
FAME	Federal Annual Monitoring Evaluation
FAT/CAT	Fatality and/or Catastrophe (three or more employees hospitalized)
FOM	Field Operations Manual
FPC	Federal Program Change
FY	Federal Fiscal Year (October 1-September 30)
GISO	General Industry Safety Order
GPRA	Federal Government Performance and Results Act
HHEP	High Hazard Employer Program
HHU	High Hazard Unit
IDLH	Immediately Dangerous to Life and Health
IDP	Individual Development Plan
IH	Industrial Hygienist
IIPP	Injury and Illness Prevention Program
IMIS	Integrated Management Information System
IT	Information Technology
LOTO	Lock Out/Tag Out Program
MAO	Medical Access Order
MARC	Mandated Activities Report for Consultation
NAICS	North American Industrial Classification System

NCR	OSHA's Data Collection Computer System
NEP	National Emphasis Program
NIOSH	National Institute for Occupational Safety and Health
NOV	Notice of Violation
OMDS	Office of Management Data Systems
OSHA	Occupational Safety and Health Administration
OSHAB	Occupational Safety and Health Appeals Board
OSHSB	Occupational Safety and Health Standards Board
OTI	OSHA Training Institute
PALJ	Presiding Administrative Law Judge
PCS	Plan Change Supplement
PEL	Permissible Exposure Limit
PPE	Personal Protective Equipment
PSDRA	Port of San Diego Ship Repair Association
PSM	Process Safety Management
RACER	Regional Annual Consultation Evaluation Report
SAMM	State Activity Mandated Measures
SEP	Special Emphasis Program
SGE	Special Government Employee
SHARP	Safety and Health Achievement Recognition Program
SHMS	Safety and Health Management Systems
SIC	Standard Industrial Classification Code
SIR	State Indicator Report
SOAR	State OSHA Annual Report
SOD	Start of Day Report
STM	Special Team Member
S/W/R	Serious/Willful/Repeat
TED	OSHA Training Directive
TRCR	Total Recordable Case Rate
VPP	Voluntary Protection Program

List of OSHA Forms

OSHA 1	Inspection Form
OSHA 1A	Narrative
OSHA 1B	Violation Worksheet
OSHA 7	Complaint Form
OSHA 31	Weekly Program Activity Report
OSHA 36	Accident Form
OSHA 167C	Complaint Update Form
OSHA 170	Accident Investigation Summary

APPENDIX D

FY 2009 California State OSHA Annual Report (SOAR)

(available separately/upon request)

APPENDIX E

State Activity Mandated Measures (SAMM)

State: CALIFORNIA

RID: 0950600

MEASURE	From: 10/01/2008 To: 09/30/2009	CURRENT FY-TO-DATE	REFERENCE/STANDARD	
1. Average number of days to initiate Complaint Inspections	66235	1850	Negotiated fixed number for each State	
	24.56	24.34		
	2696	76		
2. Average number of days to initiate Complaint Investigations	55440	3101	Negotiated fixed number for each State	
	14.08	20.40		
	3936	152		
3. Percent of Complaints where Complainants were notified on time	2591	84	100%	
	98.11	100.00		
	2641	84		
4. Percent of Complaints and Referrals responded to within 1 day -ImmDanger	242	5	100%	
	99.18	100.00		
	244	5		
5. Number of Denials where entry not obtained	3	0	0	
6. Percent of S/W/R Violations verified				
	1065	11		
Private	83.66	25.58	100%	
	1273	43		
	23	0		
Public	95.83		100%	
	24	0		
7. Average number of calendar days from Opening Conference to Citation Issue				
	333987	12280	2489573	
Safety	73.90	80.78	43.8	National Data (1 year)
	4519	152	56880	
	82394	4002	692926	
Health	83.31	64.54	57.4	National Data (1 year)
	989	62	12071	

*FY09CA **PRELIMINARY DATA SUBJECT TO ANALYSIS AND REVISION

State: CALIFORNIA

RID: 0950600

MEASURE	From: 10/01/2008 To: 09/30/2009	CURRENT FY-TO-DATE	REFERENCE/STANDARD	
8. Percent of Programmed Inspections with S/W/R Violations				
	767	26	92328	
Safety	26.91	24.30	58.6	National Data (3 years)
	2850	107	157566	
	47	8	11007	
Health	10.09	14.29	51.2	National Data (3 years)
	466	56	21510	
9. Average Violations per Inspection with Vioations				
	4200	136	420601	
S/W/R	.76	.62	2.1	National Data (3 years)
	5520	217	201241	
	14554	502	243346	
Other	2.63	2.31	1.2	National Data (3 years)
	5520	217	201241	
10. Average Initial Penalty per Serious Violation (Private Sector Only)	22090709	745435	492362261	
	5503.41	5734.11	1335.2	National Data (3 years)
	4014	130	368756	
11. Percent of Total Inspections in Public Sector	537	9	1653	
	6.10	5.39	6.1	Data for this State (3 years)
	8803	167	27184	
12. Average lapse time from receipt of Contest to first level decision	755364	13450	4382038	
	337.66	320.23	246.1	National Data (3 years)
	2237	42	17807	
13. Percent of 11c Investigations Completed within 90 days	5	0	100%	
	3.94	.00		
	127	10		
14. Percent of 11c Complaints that are Meritorious	13	1	1466	
	10.24	10.00	20.8	National Data (3 years)
	127	10	7052	
15. Percent of Meritorious 11c Complaints that are Settled	9	0	1263	
	69.23	.00	86.2	National Data (3 years)
	13	1	1466	

APPENDIX F

4th Quarter State Indicator Report (SIR)

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CURRENT MONTH = SEPTEMBER 2009 INTERIM STATE INDICATOR REPORT (SIR) STATE = CALIFORNIA

PERFORMANCE MEASURE	3 MONTHS FED	3 MONTHS STATE	6 MONTHS FED	6 MONTHS STATE	12 MONTHS FED	12 MONTHS STATE	24 MONTHS FED	24 MONTHS STATE
C. ENFORCEMENT (PRIVATE SECTOR)								
1. PROGRAMMED INSPECTIONS (%)								
	6212	853	11892	1679	21855	2920	42572	5634
A. SAFETY	67.3	49.2	67.5	47.4	66.8	43.8	65.2	40.9
	9230	1732	17617	3542	32713	6660	65304	13766
	508	323	1004	545	1963	571	3678	895
B. HEALTH	34.5	52.0	34.1	46.9	35.3	35.5	34.0	28.8
	1471	621	2946	1162	5559	1610	10829	3110
2. PROGRAMMED INSPECTIONS WITH VIOLATIONS (%)								
	4645	562	8997	1034	16745	1840	32019	3599
A. SAFETY	67.7	57.4	65.9	55.1	65.8	54.4	65.9	52.8
	6860	979	13654	1875	25453	3382	48603	6812
	368	108	746	170	1486	228	2884	495
B. HEALTH	52.2	44.3	50.8	45.1	51.7	48.6	55.6	57.6
	705	244	1468	377	2873	469	5187	859
3. SERIOUS VIOLATIONS (%)								
	15510	734	29490	1545	56535	3049	111717	6025
A. SAFETY	81.8	20.6	81.1	21.0	80.0	20.7	79.4	20.3
	18952	3561	36371	7371	70692	14710	140747	29699
	2802	71	5343	133	10035	343	19393	656
B. HEALTH	70.1	10.7	69.9	10.5	69.7	11.8	67.7	10.7
	4000	666	7645	1261	14395	2905	28659	6136
4. ABATEMENT PERIOD FOR VIOLS								
	2938	37	5782	121	12109	298	25516	635
A. SAFETY PERCENT >30 DAYS	15.9	5.0	16.2	7.8	17.6	9.8	18.7	10.5
	18492	734	35597	1545	68607	3049	136812	6025
	256	1	577	2	1452	4	3111	9
B. HEALTH PERCENT >60 DAYS	6.3	1.4	7.5	1.5	10.0	1.2	10.9	1.4
	4078	71	7720	133	14561	343	28488	656

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CURRENT MONTH = SEPTEMBER 2009 INTERIM STATE INDICATOR REPORT (SIR) STATE = CALIFORNIA

PERFORMANCE MEASURE	3 MONTHS FED	3 MONTHS STATE	6 MONTHS FED	6 MONTHS STATE	12 MONTHS FED	12 MONTHS STATE	24 MONTHS FED	24 MONTHS STATE
C. ENFORCEMENT (PRIVATE SECTOR)								
5. AVERAGE PENALTY								
A. SAFETY								
	280876	1180345	628826	2570530	1303857	5229512	2663433	10502143
OTHER-THAN-SERIOUS	923.9	439.0	998.1	468.8	1030.7	482.6	1049.4	486.3
	304	2689	630	5483	1265	10836	2538	21598
B. HEALTH								
	83100	226394	142950	423592	294225	976498	654830	1993589
OTHER-THAN-SERIOUS	799.0	401.4	803.1	395.9	855.3	400.2	867.3	385.4
	104	564	178	1070	344	2440	755	5173
6. INSPECTIONS PER 100 HOURS								
	10459	1998	19991	4109	37160	7820	73338	16178
A. SAFETY	6.1	3.8	5.7	3.8	5.5	3.6	5.3	3.7
	1722	525	3533	1086	6727	2153	13759	4393
	1764	754	3581	1391	6701	2010	12705	3962
B. HEALTH	1.8	4.4	1.7	3.6	1.6	2.4	1.5	2.2
	994	171	2112	386	4125	833	8503	1827
	1278	44	2561	89	5139	168	10097	378
7. VIOLATIONS VACATED %	4.9	1.5	5.0	1.7	5.1	1.6	5.0	1.8
	26336	2884	51387	5339	100187	10308	201495	20633
	1130	66	2440	134	4798	280	9539	563
8. VIOLATIONS RECLASSIFIED %	4.3	2.3	4.7	2.5	4.8	2.7	4.7	2.7
	26336	2884	51387	5339	100187	10308	201495	20633
	13523966	1154523	27149245	2376798	54889469	8007858	111585445	13339069
9. PENALTY RETENTION %	63.4	58.0	62.9	55.5	63.2	53.2	62.9	53.7
	21315664	1992105	43130384	4285855	86796382	15049989	177346966	24818764

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CURRENT MONTH = SEPTEMBER 2009 INTERIM STATE INDICATOR REPORT STATE = CALIFORNIA

PERFORMANCE MEASURE	3 MONTHS PRIVATE	3 MONTHS PUBLIC	6 MONTHS PRIVATE	6 MONTHS PUBLIC	12 MONTHS PRIVATE	12 MONTHS PUBLIC	24 MONTHS PRIVATE	24 MONTHS PUBLIC
D. ENFORCEMENT (PUBLIC SECTOR)								
1. PROGRAMMED INSPECTIONS %								
	853	9	1679	16	2920	27	5634	41
A. SAFETY	49.2	13.8	47.4	10.1	43.8	9.0	40.9	6.9
	1732	65	3542	159	6660	301	13766	594
	323	8	545	12	571	16	895	24
B. HEALTH	52.0	12.5	46.9	9.8	35.5	6.8	28.8	4.6
	621	64	1162	122	1610	235	3110	517
2. SERIOUS VIOLATIONS (%)								
	734	21	1545	37	3049	67	6025	105
A. SAFETY	20.6	23.3	21.0	19.7	20.7	17.4	20.3	15.7
	3561	90	7371	188	14710	386	29699	668
	71	1	133	9	343	28	656	44
B. HEALTH	10.7	2.3	10.5	9.8	11.8	13.1	10.7	8.3
	666	43	1261	92	2905	213	6136	530

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CURRENT MONTH = SEPTEMBER 2009 COMPUTERIZED STATE PLAN ACTIVITY MEASURES STATE = CALIFORNIA

PERFORMANCE MEASURE	3 MONTHS FED	3 MONTHS STATE	6 MONTHS FED	6 MONTHS STATE	12 MONTHS FED	12 MONTHS STATE	24 MONTHS FED	24 MONTHS STATE
E. REVIEW PROCEDURES								
	446	264	875	494	1756	1222	3749	2128
1. VIOLATIONS VACATED %	22.8	16.2	24.2	15.7	23.4	13.8	24.1	14.6
	1956	1628	3609	3143	7506	8873	15528	14616
	282	182	563	356	1133	996	2274	1539
2. VIOLATIONS RECLASSIFIED %	14.4	11.2	15.6	11.3	15.1	11.2	14.6	10.5
	1956	1628	3609	3143	7506	8873	15528	14616
	2319074	1299605	4080249	2634760	10792902	7986456	20045599	12624997
3. PENALTY RETENTION %	54.1	36.3	51.5	34.8	58.5	34.2	55.9	34.3
	4286744	3585052	7922126	7565684	18457526	23344504	35865959	36806660

APPENDIX G

Appeals Process Special Study
U.S. Department of Labor
Occupational Safety and Health Administration
Region IX, San Francisco, California

Special Study covering specific issues of the
California Occupational Safety and Health Appeals Process

I. Executive Summary

On November 4, 2009, the U.S. Department of Labor – OSHA, Region IX, initiated this special study in response to a June 13, 2009 open letter from Cal/OSHA staff (attachment # 1), which expressed significant concerns with the California Occupational Safety and Health Appeals Board (OSHAB) policies and practices. The letter expressed concerns that OSHAB policies and practices have been negatively impacting Cal/OSHA's ability to ensure safety and health in California workplaces. Based on these allegations and information gathered between June and October, 2009, from other sources and stakeholders, the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) initiated this special study to review the policies, practices and labor codes affecting the California occupational safety and health appeals process.

In order to assess the concerns, sections of the OSHAB's policies and procedures were reviewed, along with case decisions and Decisions After Reconsideration (DARs). Interviews were conducted with Cal/OSHA staff, the Division Chief, and staff attorneys for Cal/OSHA. Interviews were also conducted with the two current OSHAB members, the Board's Chief Executive Officer, and a Presiding Administrative Law Judge (ALJ). Additional information was provided by Worksafe, a non-profit watchdog organization, and the Senate Office of Research. Findings and recommendations for improvement are summarized where areas of concern were identified. While both parties are generally making a good-faith effort to interpret the current Labor Code and other regulatory language as legally appropriate, current actions fall short of an appropriate Appeals Process that is at least as effective as that under the Federal Occupational Safety and Health Review Commission (OSHRC) and consistent with Federal court decisions. Cal/OSHA and the California OSHAB must ensure that the Appeals Process, which is an integral part of the approved Cal/OSHA State Plan, follows procedures and precedents that are at least as effective as those of the Federal OSHA program..

Cal/OSHA regulations require that a minimum $5,000 penalty be assessed for an employer's failure to report an accident or fatality. OSHAB regularly reduces these penalties, based on their interpretation of Labor Code sections 6409.1(b) and 6602. When Cal/OSHA believes their cases are sufficiently strong and the $5,000 penalty is supportable, Cal/OSHA must file Writs of Mandate, requesting Superior Court review of cases, in order to establish precedent by which OSHAB would be bound in subsequent cases.

OSHAB is not interpreting "substantial probability" consistent with Federal OSHA interpretation, or with OSH Review Commission or Court of Appeals decisions. OSHAB is using a more restrictive standard of evidence than the requirements for Federal compliance officers' testimony before the OSH Review Commission. Cal/OSHA must take appropriate action – administrative, judicial, or legislative - to compel OSHAB to accept compliance officer testimony based on specified professional credentials, experience, or other recognized basis for expertise, in order to meet its test for State Plan structure and performance that are at least as effective as the Federal.

OSHAB's procedures for scheduling meetings have created scheduling conflicts for Cal/OSHA staff and have placed pressure on them to settle cases. Cal/OSHA needs to take appropriate action – administrative, judicial, or legislative - to assure that OSHAB hearings are scheduled in a manner that allows sufficient time to hear a case based on Cal/OSHA and employer input. The Board needs to allow parties afforded the Appeals Process their opportunity for hearing in an appropriate manner consistent with the underlying State and Federal statutes. .

In many cases Cal/OSHA District Managers or compliance officers are required to prepare and present cases at OSHAB hearings, without legal support or sufficient training to adequately argue their cases. Cal/OSHA staff does not have sufficient legal backgrounds and training, or the time to adequately prepare cases, in order to effectively present their own cases at hearings. Cal/OSHA must ensure all appealed cases have an attorney representing the Division during the appeal process. Attorneys need to represent the Division during all aspects of the Formal settlement process.

II. Background

Section 18 of the Occupational Safety and Health Act of 1970 encourages states to develop and operate their own job safety and health programs. Federal OSHA approves and monitors State plans and provides up to 50 percent of an approved plan's operating costs. California is one of 27 states and territories approved to operate its own safety and health enforcement program. States that develop these plans must adopt standards, conduct inspections to enforce those standards, and provide an Appeals Process at least as effective as the Federal program.

Section 148(a) of the California Labor Code states: "There is in the Department of Industrial Relations the Occupational Safety and Health Appeals Board, consisting of three members appointed by the Governor, subject to the approval of the Senate. One member shall be from the field of management, one shall be from the field of labor and one member shall be from the general public. The public member shall be chosen from other than the fields of management and labor. Each member of the appeals board shall devote his full time to the performance of his duties."

Two of the three positions on the Board are currently filled, with Candice Traeger as the Management member and Chair. Art Carter (former Chief of Cal/OSHA) was appointed in 2009 and is the Labor member, and the third seat is vacant. While the third seat on the Board is vacant, the Chair is authorized to break any tie decisions by appointing a temporary member to the Board. No temporary members have been appointed for this purpose during Mr. Carter's term.

Each OSHAB member reviews every decision, order, settlement, or other action issued by the Board's ALJs. According to Section 390.3(a) of OSHAB regulations, if no petition is filed and the Board chooses not to act, the ALJs action becomes final after 30 days. In addition, even if a petition is filed, it shall be deemed to have been denied by the Appeals Board if it is not acted upon within 45 days. Resources do not allow the Board to issue Decisions After Reconsideration (DARs) on every case where they believe that the ALJ's legal reasoning was not entirely sound. Where the resulting decision was not significantly affected in such cases, the Board will not necessarily issue a DAR. The Board attempts to issue DARs in those cases where the Board members believe that precedent was not correctly followed; where there may be an opportunity to clarify an issue which has been a source of contention in past cases; if the Board feels that a previous DAR set a bad precedent that needs to reversed; if the penalty does not accurately reflect the severity of the violation; or if the Board believes that the decision is likely to discourage future compliance.

Because OSHAB members are appointed by the Governor, there is a widespread belief that certain Board configurations are likely to be more business-friendly or more labor-friendly; a precedential Decision issued by OSHAB at one point in time can be overturned by its successors.

The following issues and allegations have been evaluated in this study:

- OSHAB's interpretation of Labor Code language defining a serious hazard
- Cal/OSHA expertise and testimony is not given appropriate weight during hearings
- Cal/OSHA regulations require a minimum $5,000 penalty for an employer's failure to report an accident or fatality to Cal/OSHA; OSHAB regularly reduces these penalties, based on their interpretation of Labor Code sections 6409.1(b) and 6602
- Cal/OSHA often does not have the staff, resources, or time to successfully prepare and present their cases at hearing
- Scheduling of hearings by OSHAB has created conflicts for Cal/OSHA staff, leading to Cal/OSHA being pressured to settle cases which cannot be effectively litigated
- Cal/OSHA is not always given accurate, timely notification of hearing dates or other scheduling information
- Witness availability affects outcome of appeals; hearing schedules do not always allow for witnesses to be available for hearings
- ALJs do not always follow their policies and procedures regarding timelines, or other administrative rules
- ALJs place unreasonable demands on Cal/OSHA, and do not allow for reasonable amendments to citations
- Cal/OSHA's Informal Conference policies differ from Federal OSHA policies, and are not At Least As Effective As Federal OSHA's
- OSHAB's filing process encourages appeals and does not promote an effective process

A number of additional concerns that were identified during this study and were not fully addressed will be reviewed in a future evaluation. These issues include:

- Labor Code section 6400(a) and its relation to the General Duty Clause of the OSH Act
- OSHAB's rulings and their basis in Labor Code sections, rather than promulgated Cal/OSHA standards

- Labor Code section 6407, and the application of this section as an affirmative defense
- Evidence rules as applied by OSHAB ALJs

The Division of Occupational Safety and Health of the Department of Industrial Relations (DIR) of the California Labor and Workforce Development Agency is the designated state agency responsible for administrating the approved State Plan throughout the state. By extension, the director of DIR is the designee responsible for ensuring that all components of California's state plan, including the regulations and actions of Cal/OSHA and OSHAB, are operating under procedures and in a manner that is at least as effective as federal OSHA and the Federal OSHRC.

III. Assessment of the California Appeals Process

A. OSHAB's interpretation of Labor Code language defining a serious hazard.

When evaluating the classification of serious violations, OSHAB requires Cal/OSHA to present empirical data showing a substantial probability that an injury or illness is "more likely than not to be serious." OSHAB Decisions, supported by Decisions After Reconsideration, use a "50% + 1%" standard in these situations. OSHAB requires Cal/OSHA to present expert testimony and background studies that show that a serious violation classification is warranted. Other than the rule for carcinogens, there is no presumption of a serious or general classification for any hazard. The principle of Record Exclusivity is used in issuing decisions, meaning that no personal knowledge or opinion on classification of a hazard is brought into a hearing; it is decided based entirely on the evidence presented at the hearing.

The California Labor Code (section 6432) defines a serious violation as: *(a) As used in this part, a "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances where there is substantial probability that either of the following could result in death or great bodily injury: (1) A serious exposure exceeding an established permissible exposure limit.(2) The existence of one or more practices, means, methods, operations, or processes which have been adopted or are in use, in the place of employment. (b) Notwithstanding subdivision (a), a serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. (c) As used in this section, "substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation.*

OSHAB policy is to interpret "serious physical harm" in this definition in conjunction with section 6302(h) of the Labor Code: *(h) "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.*

The OSH Act definition of a serious violation (section 17) reads: *(k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more of the practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the violation.*

The Federal OSHRC rejected the formulation currently being used by the California OSHAB in 1972 and has repeatedly affirmed a starkly different approach through its most current decisions. In *Natkin & Co*., 1 BNA OSHC 1204, 1205 (No. 401, 1973), the Commission held:

"Serious and non-serious violations are distinguished on the basis of the seriousness of injuries which experience has shown are reasonably likely to occur. Section 13(a) of the Act provides that the Secretary may petition to restrain conditions which '. . . could reasonably be expected to cause death or serious physical harm *immediately* . . .' [Emphasis added]. Providing for an additional means of enforcement for conditions which constitute imminent dangers distinguishes section 13 violations from those of section 17(k). The difference is the immediacy of the danger. Similarly, serious and non-serious violations are differentiated on the basis of the degree of probable injury. These violations are defined primarily to provide appropriate means of enforcement. Imminent dangers may be restrained. Serious violations, unlike non-serious ones, warrant mandatory penalties. Thus, by reading these sections of the Act together, a rational distinction among the three types of violations is revealed. To require, in addition, that for serious violations the occurrence of accidents be substantially probable is inconsistent with the logical progression of violations and their concomitant remedies. That interpretation would make serious violations and those constituting imminent dangers practically indistinguishable."

In other words, the OSHRC in *Natkin & Co.* rejected the proposition, currently maintained by the California OSHAB, that violations may be classified as serious only if there is a greater than 50/50 chance that an injury could occur as inconsistent with the OSH Act. Instead, the Commission hinges serious classifications on the potential gravity or consequences of the injury, meaning that if an employee were to be injured, the injury would likely result in serious injury or death. The OSHRC has held that "[t]his does not mean that the occurrence of an injury must be a substantially probable result ... but, rather, that a serious injury is the likely result if injury does occur." *Schuler-Haas Electric Corp.*, 21 BNA OSHC 1489 (No. 03-0322, 2006) (citation omitted) (affirming as serious violation for single-day entry into asbestos-regulated area without respirator use). The forseeability of the injury (or probability as characterized by the Appeals Board) is irrelevant under OSHRC case law. *Secretary of Labor v. Consolidated Freightways Corp.*, 1991 WL 218313, 8. Longstanding pertinent federal case law, particularly the Ninth Circuit, which is applicable to California, holds similarly. The leading case, *California Stevedore & Ballast Co. v. OSHRC*, 517 F.2d 986, 988 (9th Cir. 1975), held that where violation of a regulation renders an accident resulting in death or serious injury possible, even if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation. This principle was reaffirmed in *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1239 (9th Cir. 1984), where the Court held "when human life or limb is at stake, any violation of a regulation is 'serious.'"

Findings and Recommendations

Finding: In its decisions OSHAB is not defining "serious hazard" or interpreting "substantial probability" consistent with Federal OSHA interpretations, OSH Review Commission, and with Court of Appeals decisions. The "more likely than not" construct used by OSHAB is not consistent with the intent of the OSH Act nor the requirements of Section 18 that a State Plan must provide a program of standards and enforcement that is at least as effective as the OSHA program.

Recommendation #1: Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to ensure that OSHAB 's interpretation of "serious hazard" is consistent with and at least as effective as the Federal definition.

Finding: Writs of Mandate on OSHAB Decisions and DARs that result in loss of citations, citation classifications, or penalties are not being filed by Cal/OSHA in many cases where warranted.

Recommendation #2: Cal/OSHA must select sufficiently strong cases for appeal that would set precedent to challenge OSHAB decisions and practices regarding the classification of violations as serious in order to ensure that California meets the criteria in 29 CFR 1902.37(b)(14), which states:

> Wherever appropriate, the State agency has sought administrative and judicial review of adverse adjudications. This factor also addresses whether the State has taken the appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in its enforcement program resulting from an adverse administrative or judicial determination.

B. Cal/OSHA expertise is not given appropriate weight as expert testimony during hearings.

The inspector's evaluation of a recognized hazard and its potential to cause harm does not always receive appropriate weight even when supported by any of the following objective factors: information contained in relevant MSDSs; the inspector's education or professional certification; whether the hazard is recognized by the industry; and whether the violated standard is specifically written to address a serious hazard. Cal/OSHA testimony regarding the classification of a serious hazard is often only given weight based on the number of inspections previously conducted by the inspector, for the same type of hazard at issue.

Cal/OSHA staff have testified at hearings where employer testimony was accepted as expert, even when the employer representative did not have credentials as relevant as those of the Cal/OSHA representative. ALJs have refused to accept Industrial Hygiene degrees or Certified IH credentials as sufficient for the inspectors to provide testimony on health hazards. A Medical Unit was previously utilized in preparing and presenting cases to OSHAB on health-related violations. In one case, the inspector had sufficient education, training, MSDS support, and a

recognized hazardous chemical to support a serious classification. However the classification was amended from Serious to General, citing there was no empirical research or scientific information support his assertions and citing to the fact that the investigator did not attest to conducting accident investigations involving similar chemicals previously. In similar decisions, the Board found that the inspectors lacked expertise regarding the likely injuries to be caused; therefore their testimony was discounted and the serious classification was reduced to general.

Cal/OSHA compliance staff often present their own cases at hearings, with no attorney, manager, or supervisor accompanying them. OSHAB is not bound by technical rules of evidence, however, the ALJs use the California Evidence Code as a guideline. ALJs do not accept opinion testimony without a foundation; the Evidence Code requires that foundation be laid before opinion testimony is given. Cal/OSHA staff who have conducted similar investigations can use that experience as a foundation for their testimony, but the foundation must be presented in a way that establishes relevance to the case at hand. The ALJ will take into account any objections to this testimony from opposing attorneys (or the employer, if representing himself), but even absent objections, the ALJ can assess the weight of the testimony relative to the foundation for it.

The California Evidence Code regarding Expert and Other Opinion Testimony states in part that:
800. If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony.

801. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

803. The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

Adequate allowance is not always granted to Cal/OSHA staff providing testimony which is "rationally based on the perception of the witness," as allowed in Section 800(a), above. ALJs may not consider Cal/OSHA staff to have sufficient experience or qualifications to support presentation of expert testimony, but their testimony can still be given weight as opinion

testimony. ALJs give weight to testimony based on the foundation which is laid at the hearing. Even if the employer does not object to Cal/OSHA staff's testimony being entered into the record, the ALJ could still decide that it should not be given weight, if the ALJ believes that the foundation for the testimony was not sufficient.

Cal/OSHA staff or other expert witnesses who cannot be present at a hearing can submit a Declaration in Lieu of Live Testimony, which is a sworn affidavit testifying to their knowledge of a hazardous situation, factors contributing to the serious classification, or any other related issues. This Declaration must be submitted 20 days prior to the hearing; the opposing party has the right to object and require that the witness be present for cross-examination, but in some cases it will be stipulated by both sides and can be entered into the record. Cal/OSHA staff with relevant credentials can be called upon to give Declarations in support of serious classifications and other issues which may not be effectively supported by other evidence and testimony presented at the hearing.

The OSHRC follows the Federal Rules of Evidence regarding admissibility of expert testimony. *See* Commission Rule of Procedure 71, 29 C.F.R. § 2200.71. Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles or methods, and (3) the witness has applied the principles and methods reliably to the fact of the case.

This standard allows OSHRC Administrative Law Judge's to determine if "specialized" testimony will assist in evaluating evidence. However, neither OSHRC rules nor precedent requires expert testimony in all circumstances. In fact, the OSHRC has routinely accepted CSHO testimony on the nature of serious hazards without qualifying them as experts. *See, e.g., Oberdorfer Industries,* 20 BNA OSHC 1321 (No, 97-0469 & 97-0470, 2003)**(**CSHO testimony established that if uninsulated wiring were to come into contact with the frame of a sander during operation, the result would be electrocution and the likely consequence of electrocution would be death); *Gem Industrial, Inc.* 17 BNA OSHC 1861 (No. 93-1122, 1996) (finding of serious violation based on CSHO testimony that any fall could have resulted in death or serious physical harm**);** *Atlantic Battery Company,* 16 BNA OSHC 2131 (No. 90-1747, 1994) (finding a serious violation of the Hazard Communication standard based on CHSO testimony of the hazards of exposure to certain chemicals).

Findings and Recommendations

Finding: The rules of evidence used by OSHAB prevent many serious hazards from being appropriately classified without the use of "Expert" testimony and relevant medical training on specific injuries. Federally, expert testimony is not always required to establish whether a hazard is serious. In some cases, expert testimony may be needed, but the OSHAB appears to be applying a test that far exceeds well-settled law in both the OSHRC and Federal courts.

Finding: Cases have been identified showing an extreme standard of evidence to prove classification of violations where the Compliance Officer's ability to identify, evaluate, and document conditions in the workplace are not considered.

Finding: A medically qualified person(s) is necessary to sustain violations based on exposure and "work relatedness" under the current Appeals process.

Recommendation #3: Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to ensure that OSHAB's test for acceptance of compliance officers'' testimony is as least as effective as the test at the federal level and results in a similar classification of violations as serious.

C. Cal/OSHA regulation 342(a) requires a minimum $5,000 penalty for failure to report an accident or fatality to Cal/OSHA within 8 hours. OSHAB regularly reduces these penalties based on their interpretation of Labor Code sections 6409.1(b) and 6602.

The Calloway DAR (attachment #2) in July 2006, is used by OSHAB to lower penalties for violations of CCR Title 8 342(a) and resulted in citations for a violation of this standard being the most-appealed. Cal/OSHA is required to issue a $5,000 minimum penalty for any violation of the standard.

On July 31, 2009, the Office of Legislative Council of the California legislature issued an opinion letter (attachment #3) stating "…it is our opinion that Calloway was incorrectly decided. The statutory minimum for a civil penalty assessed by the Division of Occupational Safety and Health for a violation of subdivision (d) of Section 6409.1 of the Labor Code applies to decisions of the Occupational Safety and Health Appeals Board as well."

On March 1, 2010, the Senate Office of Research, again in response to a request for clarification from Senator DeSaulnier, issued a memorandum (attachment #4) on the issue of appeal outcomes for 342(a) violations. The SOR's memo concluded significant penalty reductions were a common occurrence in decisions, and DARs upholding those reductions imply a policy of actively encouraging those reductions. The memo notes that the reductions effectively render the $5,000 statutory penalty as a maximum, rather than the minimum penalty.

OSHAB is interpreting the Labor Code, and does not consider itself bound by Cal/OSHA regulations. They consider Labor Code's section 6409.1(b) to state "An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand dollars ($5,000);"

while Cal/OSHA's CCR Title 8 Section 336(a)(6) states "Any employer who fails to timely report an employee's injury or illness, or death, in violation of section 342(a) of Title 8 of the California Code of Regulations, shall be assessed a minimum penalty of $5,000." OSHAB believes they are governed by Labor Code Section 6602, and the discretion to affirm, modify, or vacate penalties.

OSHAB indicated if cases regarding the penalties were appealed by Writ of Mandate to the Superior Court, and the $5,000 minimum penalty was upheld, OSHAB would accept such a ruling as precedent. The Board's current position is that different penalties apply where reporting is late, or an attempted report is made to another agency (MSHA, etc.), as opposed to situations where employers do not report at all. The Board will make reductions under these conditions if they feel it is warranted.

The following table shows that post-contest penalty retention for Cal/OSHA citations decreased since FY 2007. Citations for CCR Title 8 342(a) are contested more often than any other standard, and penalties are often reduced by OSHAB.

Post-Contest (SIR E1, E2, E3)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Federal Data***
Violations Vacated (SIR E1)	**14.3%** (153/1069)	**16.1%** (462/2867)	**15.8%** (537/3392)	**16.1%** (1091/6783)	**13.8%** (1222/8873)	23.4%
Violations Reclassified (SIR E2)	**8.9%** (95/1069)	**8.8%** (253/2867)	**7.6%** (257/3392)	**9.4%** (639/6783)	**11.2%** (996/8873)	15.1%
Penalty Retention (SIR E3)	**37.1%** (940k/2534k)	**38.3%** (2623k/6856k)	**38.5%** (3279k/8507k)	**35.6%** (5865k/1649k)	**34.2%** (7986k/2334k)	58.5%

Findings and Recommendations

Finding: OSHAB's reduction of penalties, including those for violations of 342(a), result in Cal OSHA's having a significantly lower percentage of penalty retention rate post content.

Recommendation #4: Cal/OSHA, using all available appeal resources, must select sufficiently strong cases for appeal that would set precedent regarding retention of penalties overall and a minimum penalty for violations of 342(a).

D. Under current procedures and practice, Cal/OSHA does not have the staff and resources to ensure they are able to adequately prepare and present their cases at hearing.

Cal/OSHA staff without legal backgrounds present cases against employers without attorney representation. Cal/OSHA does not have sufficient legal resources and the field staff do not have adequate legal training or background. In many cases, employers have more resources to prepare and obtain witnesses at these hearings.

Cal/OSHA's legal staff are assigned such a large volume of cases at the same time that it is the

practice for Cal/OSHA compliance staff to prepare and present their own cases at hearings.

When an employer has an attorney representing them at a pre-hearing conference, Cal/OSHA staff have been compelled to settle cases when no Cal/OSHA attorney is present.

In a number of cases, OSHAB does not feel that Cal/OSHA's preparation for hearings and the sufficiency of documentation of their case files is adequate. When inspectors handle their own hearings, they must present exhibits, and follow appropriate hearing procedure, just as an attorney would. Cal/OSHA does not always provide legal support, nor is there training for inspectors to deal with these hearings. OSHAB has presented workshops for all stakeholders to provide information on what to expect and how to present cases at hearings. OSHAB feels Cal/OSHA's legal staff have resisted OSHAB training for Cal/OSHA staff, because they don't agree with the Board's interpretations on some issues. This lack of consistent training has resulted in inspectors not being prepared for presenting cases to the Board.

OSHAB presented statistics showing most violations were upheld at hearings. However, Cal/OSHA does not consider a violation reduced from serious to general, with an accompanying reduction in penalty, as an acceptable result.

Cal/OSHA field staff have not received sufficient support, in time and resources, for hearing preparation or legal education and training to be able to effectively present their cases at hearing.

Findings and Recommendations

Finding: Cal/OSHA field staff do not have sufficient legal training or background to present cases at hearings.

Recommendation #5: Cal/OSHA must take appropriate action to assure that their enforcement actions are appropriately defended at contest either through attorney representation or, if necessary, through a system where Cal/OSHA field staff are trained and provided with adequate access to technical and legal resources to ensure at least as effective presentation of cases to OSHAB.

E. Scheduling of hearings by OSHAB can create conflicts for Cal/OSHA staff, leading to Cal/OSHA feeling pressured to settle cases.

Current OSHAB policy is to schedule two hearings per day, with the same ALJ, and Cal/OSHA staff. ALJs assume that one of the two cases can be settled. OSHAB procedure included identifying cases where settlements seemed likely and quickly processing cases with one or two less-complex issues.
The ALJ makes the determination on which case will be heard based on witness presence on the day of trial or employer attorney presence; at times no clear basis exists. Cal/OSHA is not provided an opportunity for input into which case is heard.

When Cal/OSHA inspectors are scheduled for multiple hearings in one day, or in one week, a single Cal/OSHA staffer is expected to prepare up to five cases during the week. Cal/OSHA is unable to sufficiently prepare for all the cases leading to pressure to settle rather than go forward

with insufficient preparation. Cal/OSHA staff also report pressure to settle due to OSHAB reluctance to re-schedule hearings when Cal/OSHA staff or other witnesses are unavailable on a hearing date, due to illness, jury duty, or other reasons.

Cal/OSHA staff report the amount of time Cal/OSHA or the employer need to present their case has no bearing on scheduling, even when these time estimates are discussed during pre-hearing conferences. OSHAB schedules two cases per day without regard to the input.

For reference: 29 CFR 2200.60: Hearings shall be at a time and place that involves as little inconvenience and expense to the parties as practicable. (OSHRC regs)

Findings and Recommendations

Finding: OSHAB schedules multiple cases for the same Cal/OSHA staff member on the same day or in the same week without consideration for the time each party indicates is necessary to present their case.

Recommendation #6: Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to address the problems associated with overscheduling of cases and assure that CSHOs or attorneys have adequate time between scheduled dates to prepare for upcoming hearings. If CSHOs are to continue to present their own cases, Cal/OSHA must provide adequate legal and administrative support to help them review the case file and prepare to testify.

F. Cal/OSHA is not always provided accurate, timely notification of hearing dates and other administrative information. Communications from OSHAB to Cal/OSHA are not always clear and specific.

Notification to Cal/OSHA of hearings, change in dates, etc., is not always addressed to the correct office, or timely. Hearing calendars are not updated, and Cal/OSHA reports staff have missed hearings due to these notification issues.

Documentation provided by Cal/OSHA staff showed multiple notices sent to incorrect offices where the Declaration of Service lists the correct office, but the address on the envelope is incorrect.

OSHAB Reconsideration Orders to Cal/OSHA are not always clear on the issue(s) under reconsideration and do not provide sufficient information to determine which issue(s) require additional input or arguments for the Board's consideration.

Reference: 29 CFR 2200.60 30 Day Hearing Notice for OSHRC
Reference: 29 CFR 2200.70 Service of Notice for OSHRC

Findings and Recommendations

Finding: OSHAB's notification system is inaccurate and inefficient, Reconsideration Orders are unclear on the specific issue(s) being reconsidered and notifications are not always sent to the correct Cal/OSHA office.

Recommendation #7: Cal/OSHA must take appropriate action to assure that the system for hearing contested cases includes a method of notification that ensures clear, concise, accurate and timely notification to parties involved in the appeals process and is at least as effective as the OSHRC method.

G. Cal/ OSHA believes that ALJs are overly supportive of contesting employers, and do not follow policies and procedures (Gold Book) regarding timelines, or other administrative rules.

ALJs coach employers on expanding an appeal or suggest affirmative defenses at the last minute prior to the hearing. This has resulted in an expanded appeal from the original issue(s). Cal/OSHA inspectors then must respond without sufficient time to prepare for the new appeal areas. Pre-hearing conferences are also not recorded.

Cal/OSHA believes ALJs do not follow the "Gold Book" (handbook of OSHAB policies and procedures) and allow employers leeway that is not provided to Cal/OSHA. They believe ALJs exceed their authority by allowing extended timelines for modification of the appeal, especially during pre-hearings, but do not feel they can challenge ALJs, who will hear their cases for years to come.

Cal/OSHA staff believe ALJ rulings are unreasonable, stipulated agreements are rejected, non-administrative agreements are not permitted and Decisions are not issued within the specified timeframes. Additionally, ALJs act as advocates for employers in that they cross-examine Cal/OSHA witnesses more intently than the employers' lawyers do and there is no parallel questioning against the employer's witnesses.

OSHAB hearings do not have a court reporter or administrative staff to label exhibits, etc, ALJs operate the recording equipment with the tape serving as the official record; transcripts are the exception and done at the cost of one of the parties. This requires ALJs to listen to tapes to review evidence presented at hearing.

ALJs' Decisions are reviewed by other ALJs before issuance and suggestions are made including foundational information for decisions, citing evidence more specifically, or adhering to appropriate precedents to ensure ALJs include a fair representation of the evidence presented. However, in accordance with the Administrative Adjudication Provisions of the California Code, ALJs issue their rulings independently and are not required to incorporate the suggestions. Rulings inconsistent with Board precedent or considered to not adequately address evidence presented during the hearing can only be amended by a DAR at the Board level.

ALJs are required to review settlements and they must be supported by good cause (applicability of a higher good faith reduction, for example). Penalties must be assessed correctly in any settlement agreement. The Department of Industrial Relations requires OSHAB orders to collect penalties on settled cases, and the orders cannot be issued on incorrectly assessed amounts.

Furlough Fridays affect the amount of time from hearing to Decision issuance. ALJs used to hear cases Monday through Thursday, and write Decisions on Friday. Three Furlough Fridays a month are resulting in a backlog of unwritten Decisions.

Findings and Recommendations

Finding: Prehearing conferences are not recorded, some stipulated agreements are rejected by ALJs and hearings convened, decisions are amended through the Decision After Reconsideration process and Furlough Fridays have affected the amount of time ALJs have to hear cases and issue Decisions.

Recommendation #8: Cal/OSHA must take appropriate – administrative, judicial, or legislative – action to assure that all parties are afforded opportunity for hearings in an appropriate manner consistent with the OSH Act including following the protocols outlined in the policies and procedures "Gold Book," formally documenting the Pre-hearing conferences; and developing a system which results in timely and objective ALJ hearing procedures and decisions.

Recommendation #9: Cal/OSHA must determine whether the problems associated with the current system of having CSHOs defend their own cases during contest can be corrected. (See Recommendation #6). If not, they should utilize Cal/OSHA attorneys during the entire appeals process including settlements as is done in the Federal Program and most other OSHA-approved State Plans.

H. Cal/OSHA believes that ALJs place unreasonable demands on the enforcement division , and do not allow reasonable amendments to citations.

ALJs do not allow Cal/OSHA to modify a cited standard during the hearing. The burden of proof is placed on Cal/OSHA for addressing technicalities, for example, in cases where the name of an employer is slightly wrong on a citation, or where the most specific or different standard has been cited.

OSHAB's Regulations establish the criteria for the modification of citations in OSHAB Regulations Article 3, "Prehearing Procedure, Discovery and Motions." Section 371, Prehearing Motions, requires any motion or request be served and filed no later than 20 days before the hearing date. OSHAB Regulations Section 371.2, "Amendments Prior to Hearing," states that once an appeal is docketed, any proposed amendment of the citation or appeal shall be made in accordance with Section 371 and any amendment by the Division that alleges a new violation may be permitted by OSHAB, but not after six months have elapsed since the occurrence of the alleged violation. No provisions for modifications are indicated in the regulations during the hearing (Gold Book).

Findings and Recommendations

Findings: ALJs follow the OSHAB regulations (Gold Book) for amending Cal/OSHA citations.

Recommendation #10: Cal/OSHA must take appropriate action to establish the necessary rules and/or practices with OSHAB that allow amendment of citations in a manner at least as effective as Federal case law and OSHRC procedures - including amendment for technical errors and to conform with evidence presented. Cal/OSHA should also take steps to assure that case files contain accurate information, especially regarding company name and standards cited, through

staff training and improved case file review, and fully utilize all appeals processes when citations/cases are vacated for minor technical errors.

I. Witness availability affects the outcome of appeals; hearing schedules do not always allow witnesses at hearings.

The distance and travel time to hearings affects a witness's ability to attend hearings. In some cases, Cal/OSHA cannot call non-Cal/OSHA witnesses due to an individual's inability to miss work, transportation issues and other considerations. Cal/OSHA's budget does not allow reimbursement of expenses if a hearing does not take place on the day it is scheduled.

If a hearing is re-scheduled, it is unlikely Cal/OSHA can arrange for witnesses to return; this inability to assure witnesses leads to an increase in settlements.

For reference: 29 CFR 2200.60: Hearings shall be at a time and place that involves as little inconvenience and expense to the parties as practicable. (OSHRC regs)

Findings and Recommendations

Finding: Witness availability has affected the outcome of appealed cases.

Recommendation #11: When an appeal does occur, Cal/OSHA should consider witnesses availability when determining whether settlement is warranted. Utilize informal conferences as a means of lowering the appeals rate and more successful retention of citations including violation classifications and appropriate penalties.

J. Cal/OSHA's Informal Conference policies differ from Federal OSHA policies.

Cal/OSHA policies do not allow District Managers to request assistance of counsel should an employer bring an attorney to the informal conference (Federal FOM, page 7-3).

Posting Requirements: Cal/OSHA doesn't require employers to post informal conference information in an area accessible to all affected parties (Federal FOM, page 7-4).

There are no specific guidelines for the "Conduct of the Informal Conference," including conference subjects, subjects not to be addressed, and closing remarks (Federal FOM, page 7-4 to 7-5).

Cal/OSHA does not allow informal conferences to be held via telephone unless the following two conditions are met: one or more of the participating parties are geographically remote; and the District Manager, or their designee, who conducts the informal conference receives prior approval from the Regional Manager to conduct the informal conference by telephone (Cal/OSHA policies and procedures C-20, page 1-2).

Cal/OSHA allows informal conferences to occur any time during the appeal process (Cal/OSHA policies and procedures C-20, page 3). Federal OSHA requires informal conferences to be held

within the 15 working day contest period (Federal FOM, page 7-2). Within Federal OSHA, when a contest has been filed, any settlement conference is through the formal process and negotiated by attorneys with ALJ approval.

The following table shows that most violations are upheld during pre-contest procedures.

Pre-Contest (SIR C7, C8, C9)						
	FY 2005	***FY 2006***	***FY 2007***	***FY 2008***	***FY 2009***	***Federal Data***
Violations Vacated (SIR C7)	**1.9%** (226/12141)	**1.6%** (221/13458)	**1.9%** (227/11942)	**1.6%** (185/11779)	**1.6%** (168/10308)	5.1
Violations Reclassified (SIR C8)	**1.3%** (156/12141)	**1.4%** (189/13458)	**1.6%** (192/11942)	**2.2%** (264/11779)	**2.7%** (280/10308)	4.8
Penalty Retention (SIR C9)	**45.4%** (915k/2017k)	**62.2%** (8206k/13192k)	**59.1%** (5341k/9032k)	**54.6%** (5810k/9261k)	**53.2%** (8007k/1504k)	63.2

Statistics for Federal Fiscal Year 2009 (October 1, 2008 – September 30, 2009), show that a high percentage of Cal/OSHA cases are contested, that Cal/OSHA holds a significantly smaller number of Informal Conferences than Federal OSHA, and that penalties are reduced in California by a significantly higher percentage than in Federal OSHA nationwide, both by OSHAB and in Informal Conferences.

Source: Micro-to-Host ENF report				
	% of Inspections Contested	***% Penalties Reduced for Contested Cases***	***% of Uncontested Inspections with Informal Conferences***	***% Penalties Reduced for Uncontested Inspections***
Cal/OSHA	**25.3%**	**68.6%**	**1.1%**	**64.3%**
Federal OSHA	**5.2%**	**50.3%**	**50.3%**	**43.8%**

Findings and Recommendations

Finding: Cal/OSHA's Informal Conference policies do not encourage informal settlement and are not similar to the Federal Program. In addition, as discussed in the Enhanced FAME Report, Cal/OSHA offers an automatic 50% reduction of proposed penalties for general and serious citations corrected within the abatement period with the exception of citations that are repeat or willful, high gravity, involving a carcinogen, or that lead to death, serious injury, illness or exposure. This 50% reduction is revoked if abatement is not completed within the agreed upon timeframe. In comparison, OSHA offers a 15% quick fix option, provided hazards are immediately abated during the inspection.

Recommendation #12: Cal/OSHA must discontinue the automatic 50% reduction of proposed penalties based on an assumption of future abatement. Cal/OSHA should adopt policies on informal conferences that are at least as effective as federal policies.

K. The OSHAB's filing process encourages appeals.

California Appeals Board Article 2, Section 359, "Filing of Appeal – Date" and Section 359.1, "Appeal Form" allows an employer to file an appeal within 15 working days with the appeal considered received by OSHAB without regard to the format it is received in, including by phone. An additional 10 days is provided to submit the appeal documents using a check off box form to indicate the category /reason(s) for the appeal and attaching the citation item.

29 CFR 1903.17 states, if an employer intends to contest, the Area Director must be notified in writing and such notification must be postmarked no later than the 15th working day after receipt of the citation and notification of penalty (working days are Monday through Friday, excluding Federal holidays); otherwise the citation becomes a final order of the Commission. The agency has no authority to modify the contest period. Employers may also be apprised their notice of contest can be sent electronically via email to the Area Director within the 15 working day period. Oral notices of contest do not satisfy the requirement to give written notification. (Federal FOM Chapter 7.I.A)

Within 15 working days of receiving a citation, an employer who wishes to contest must submit a written objection to OSHA. The OSHA Area Director forwards the objection to the Occupational Safety and Health Review Commission (OSHRC), which operates independently of OSHA.

Findings and Recommendations

Finding: Through its practices Cal/OSHA is effectively extending the 15 working day contest period established by statute by 10 days by accepting contests by phone, allowing 10 additional days for submission of documentation regarding the grounds for contest, and allowing the use of a "check-off box" form, in lieu of a written submission, for the filing process.

Recommendation #13: Cal/OSHA must determine whether this practice is in accordance with State Law and evaluate how these practices affect their contest rate. The State should determine whether the adoption of contest, informal conference, and settlement procedures more in line with statutory requirements and Federal practice would resolve many of the issues identified in this report. Absent a determination to change these practices, the State must submit a plan change supplement for Federal review, documenting its entire appeals process with a detailed comparison to the Federal program showing how it is "at least as effective," and a legal opinion that it is in accordance with State law.

IV. References

Section 148(a) of the California Labor Code:
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=00001-01000&file=148-149.5

California Labor Code Rule for Carcinogens:
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=09001-10000&file=9060-9061

Labor Code Section 6432, which specifies "serious physical harm":
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=06001-07000&file=6423-6436

Section 6302(h) of the Labor Code, defining "serious injury or illness":
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=06001-07000&file=6300-6332

OSH Act definition of a serious violation (section 17):
https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=OSHACT&p_id=3371

California Stevedore and Ballast Company vs. OSHRC:
http://openjurist.org/517/f2d/986

Carmona vs. Division of Industrial Safety:
http://scocal.stanford.edu/opinion/carmona-v-division-industrial-safety-30281

California Evidence Code:
http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=evid&codebody=&hits=20

California Evidence Code regarding Expert and Other Opinion Testimony:
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=evid&group=00001-01000&file=800-805

CCR Title 8 342(a):
https://www.dir.ca.gov/title8/342.html

Section 6409.1 of the Labor Code:
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=06001-07000&file=6400-6413.5

CCR Title 8 Section 336(a)(6):
https://www.dir.ca.gov/title8/336.html

Labor Code Section 6602:
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=06001-07000&file=6600-6633

Labor Code section 6400(b):
http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=06001-07000&file=6400-6413.5

A portion of the information from OSHAB's "Gold Book":
https://www.dir.ca.gov/oshab/oshabappealpro.html

V. Attachments:

#1 June 13, 2009, Open Letter to OSHAB

#2 Calloway Decision After Reconsideration

#3 July 31, 2009, the Office of Legislative Council of the California legislature opinion letter, in response to a request from Senator Mark DeSaulnier, Chair of the Senate Labor and Industrial Relations Committee

#4 March 1, 2010, the Senate Office of Research memorandum, in response to a request Senator DeSaulnier

June 13, 2009

Candice Traeger, Chairwoman, Management member
Robert Pacheco, Public member
Art Carter, Labor Member
Occupational Safety & Health Appeals Board
2520 Venture Oaks Way, Suite 300
Sacramento, CA 95833

Dear Members of the Board,

We write as 47 individuals who work as field inspectors, seniors and district managers who interact frequently with the Occupational Safety and Health Appeals Board to strongly protest Board policies and practices that have significantly undermined our ability to do our job of protecting the lives, health and safety of California's workers.

Over the last four years – and these policies continue to this very day – the Board has deliberately over-booked hearing days so that a single judge in the same location and the same time has as many as three or four hearings scheduled. The Board has continued to refuse to even indicate which case will be heard first. The Board has continued to hold hearings at distant locations where worker witnesses have great difficulty in appearing. The Board has continued to deny, or simply ignore, legitimate requests for continuances.

In June 2009, there are 32 days (at six locations) with three or more cases scheduled for the same judge, same location, same time. There are 14 days with four cases scheduled and one day with five cases scheduled (Oakland, June 17th).

How can we, who handle the majority of appeals for the Division, prepare exhibits, witnesses and arguments for three separate cases all scheduled for the same time? How can we convince worker witnesses to travel long distances, and then to come back after they have been sent home because their case wasn't heard?

The simple answer is that we can't.

That's why there have been hundreds more "settlements" over the last four years, many with drastic reductions of final penalties. These policies are in addition to the recent practice of the Board to dismiss cases, even those with serious injuries, on minor technicalities; and to unilaterally "interpret" legislation and ignore court rulings, so as to restrict the Division's ability to enforce the law.

The net effect of the Board's policies has been to sabotage the Division's ability to defend citations and penalties on appeal. Cal/OSHA's deterrent effect has been significantly undermined as employers learn they can "game the system" when the Division is coerced into settlements, often with penalties that are pennies on the dollar.

The people who pay the cost for these policies are California workers whose employers look at Cal/OSHA as an agency that is forced to fight with one hand tied behind its back.

We find it troubling that the Board has not processed the years-long backlog of petitions for reconsideration over which the Board has sole authority and responsibility. This again undermines worker protections in California as employers are not legally required to abate these citations which remain "under appeal" for years and years.

The voices of Cal/OSHA's front-line employees have not been heard on these issues until now because many of us feared reprisals by the Board in the handling of our individual appeals cases, or the handling of cases from the offices where we work. The deck is already so stacked against the Division that any more obstacles from the Board would be too much. But the various hearings held this spring, and the fact that the Board finally has all three members, have given us hope that the Board's unfair policies and practices can now be challenged.

As you must know, those of us representing the Division at appeal hearings are frequently "out-gunned" by the employers' corporate attorneys who have more resources, personnel and time – even before we have been tripled-booked with hearings, often in places where worker witnesses find it difficult to appear. The current case load and over-booking mean that DOSH attorneys are saddled with an impossible task of preparing multiple major cases for the same day or on sequential days.

We know that not all citations are "open and shut" cases and we believe everyone, including employers, should have the right to a speedy appeal and an impartial review of the facts. All we want is a level playing field.

We ask you to cease and desist with the Board's unfair policies and practices against Division personnel, and restore the balance to the appeals process so that employers and the Division are treated fairly and equally. California's workers have a right to, and deserve, a workplace health and safety agency that can do its job.

Sincerely,

/redaction/

/redaction cont'd/

(Positions listed for identification only)

Attachments: Charts on over-booking and hearing locations

cc: Len Welsh, Chief, Division of Occupational Safety and Health
Chris Lee, Deputy Chief for Enforcement, DOSH
Vicky Heza, Deputy Chief, Special Projects
John Duncan, Director, Department of Industrial Relations
Ted Toppin, PECG-Professional Engineers in California Government
Chris Voight, CAPS-California Association of Professional Scientists
Members of the Senate Labor and Industrial Relations Committee
Members of the Senate Rules Committee
Members of the Assembly Committee on Labor and Employment

BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of:	Docket No. 03-R2D1-2400
BILL CALLAWAY & GREG LAY dba WILLIAMS REDI MIX P.O. Box 1175 Williams, CA, 95987 Employer	**DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration in the above-entitled matter on its own motion, makes the following decision after reconsideration.

JURISDICTION

On March 13, 2003, a representative of the Division of Occupational Safety and Health (the Division) commenced an accident inspection at a place of employment maintained by Bill Callaway & Greg Lay dba Williams Redi Mix (Employer) at 26522 Capay Road, Esparto, California. On May 16, 2003, Employer was cited for a regulatory violation of section 342(a) [serious injury not immediately reported to the Division] of Title 8, California Code of Regulations,[1] with a proposed civil penalty of $5,000. Employer timely appealed the citation contesting the reasonableness of the proposed civil penalty. On August 19, 2005, a hearing was held before an Administrative Law Judge (ALJ) of the Board, at Sacramento, California. William Callaway, Owner, and Lori Walkup, Plant Manager, represented Employer. William Estakhri, District Manager, represented the Division.

On September 1, 2005, the ALJ issued a decision that reduced the civil penalty for the violation from $5,000 to $750.

On September 30, 2005, on its own motion the Board issued an order of reconsideration of the matter and stayed the decision of the ALJ pending a decision after reconsideration. On November 7, 2005, the Division filed its

[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

"Brief on Reconsideration" and a "Request for Official Notice" of certain records and legislative history.[2]

SUMMARY OF CASE

At approximately 11:00 a.m. on Saturday, March 1, 2003, truck driver Robert Wilson (Wilson) was delivering a load of cement to Employer's customer at a general contractor's work site. While taking down some attachment chutes from the truck, Wilson slipped and fell on his fingers.

The general contractor administered first aid to Wilson and then undertook various steps to have him transported to a hospital. At the hospital, Wilson was treated and released at about 5:30 p.m. that same day. He lost the tip of one finger and fractured an adjoining finger.

The general contractor telephoned Employer's office, spoke to the dispatcher and in turn the dispatcher informed Walkup by telephone of the injury and that Wilson was transported to the hospital.

Upon learning of the accident, Walkup went into her office and made telephone calls, three to the injured employee's treating physician. After receiving more complete information about the extent of the injury, at about 1 p.m. she telephoned the State Compensation Insurance Fund to file a report. Having dealt with State Compensation on various situations, she knew their office was available on weekends.

Although Walkup was aware of the requirement to report the injury to the Division, she did not know that the Division had an answering service for weekend calls, or that she was required to report the injury before the next workday. Had she known, she would have reported the accident on Saturday. Walkup telephoned the Division Monday, March 3, 2003, the first business day after the accident.

When asked whether anyone from the Division could even respond to accident reports during the weekend, Weiss replied it was possible but, given the nature of this accident, a report would not have generated an immediate response from the Division, and no one would have been assigned to it on the weekend. The District Manager assigned Weiss to conduct the investigation, on March 10, 2003. Weiss began the process three days later, ten days after the accident was reported.

Weiss evaluated Employer's safety program, toured the site, examined Employer's equipment and interviewed various employees. Had Weiss rated

[2] Section 376.3 of the Board's regulations contemplates that requests for official notice will be made before a decision is issued after an evidentiary hearing. The rules do not contemplate requests for official notice being made, for the first time, while the matter is pending on reconsideration, unless the Board itself is conducting a hearing. The Board has determined that it would not be appropriate to take official notice as requested by the Division.

Employer's safety program for penalty-computation purposes he would have assigned it a rating of "Good," the highest available rating ("effective safety program"), warranting the maximum penalty reduction credits. (§ 335) He said his investigation yielded no violations, except the reporting violation in question.

Weiss cited Employer because the injury fell within the definition of a "serious injury" (finger tip amputation),[3] Employer had not reported the injury immediately, and the 24-hour "tolling" period for "exigent circumstances" had lapsed. Weiss testified that he started with a base penalty of $5,000, which he believed is required by Labor Code section 6409.1. He concluded that he was not allowed to make any adjustments.

Labor Code section 6409.1 (AB 2837, Chapter 885, Statutes of 2002) was amended by the Legislature on January 1, 2003.[4] The Director thereafter promulgated section 336(a)(6).[5] According to the Division, Labor Code section 6409.1(b) requires it to set a minimum penalty of $5,000, which is the authority and rationale for section 336(a)(6) of its regulations.[6] The Division contends that Labor Code section 6409.1(b) is not unique[7] in its application of a mandatory penalty, and that by enacting it the Legislature limited the Appeals Board's general authority to modify penalties. The Division takes the position that Labor Code section 6409.1(b) requires the Board to assess a minimum $5,000 penalty for a section 342(a) violation. We disagree for the reasons detailed below.

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[3] See Labor Code section 6302(h): "Serious injury" is any injury occurring in connection with any employment which requires more than 24 hours of inpatient hospitalization for treatment, or in which an employee suffers a "loss of any member of the body" or suffers any "serious degree of permanent disfigurement."

[4] The amendment added subdivision (b) to section 6409.1 which states:

> In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), a report shall be made immediately by the employer to the Division of Occupational Safety and Health by telephone or telegraph. An employer who violates this subdivision *may* be assessed a civil penalty of not less than five thousand dollars ($5,000). (Italics added)

[5] The Director's regulation differs from the language found in Labor Code section 6409.1(b). Section 6409.1(b) says "may be assessed a penalty" and Title 8, section 336(a)(6) says "shall be assessed a penalty."

[6] The Division has not explained how its interpretation of Labor Code section 6409.1(b) is to be reconciled with Labor Code section 6319(g), which provides: "Based upon the evidence, the division may propose appropriate modifications concerning the characterization of violations and corresponding modifications to civil penalties as a result thereof." This provision predates Labor Code section 6409.1(b) and was not amended or referred to by the Legislature when it passed AB 2837.

[7] In support of its position, the Division cites several cases in which the Board held that certain minimum penalties set in the Labor Code were controlling. (*Emerald Produce Co., Inc.*, Cal/OSHA App. 96-2679, Decision After Reconsideration (DAR) (May 4, 1999); *Pacific Underground Construction, Inc.*, Cal/OSHA App. 89-510, DAR (Nov. 28, 1990). Those cases were anomalies, with holdings that were contrary to the predominant theme in Appeals Board precedent. In support, the Division also quotes dicta included in *Gaylord Container Corporation*, Cal/OSHA App., DAR, 99-095 (March 12, 2002)). None of the foregoing cases addressed the Board's authority to modify a statutory minimum penalty under Labor Code section 6602. The foregoing decisions are factually distinct and distinguished to the extent they hold that the Board's authority under Labor Code section 6602 is limited and qualified beyond the requirement that the Board not abuse its discretion in fashioning other appropriate relief. (See, *Stockton Tri Industries, Inc.* Cal/OSHA App. 02-4946, DAR (March 27, 2006).)

ISSUE

If a violation of section 342(a) is found, does Labor Code section 6409.1(b) require the Appeals Board to assess a penalty of no less than $5,000?

I. OVERVIEW OF THE AUTHORITY OF THE BOARD

Pursuant to the California Occupational Safety and Health Act (Labor Code section 6300 *et seq.*, [the Act]) in conjunction with other Labor Code provisions, different agencies within the Department of Industrial Relations, including the Division and the Appeals Board, are assigned different jurisdiction and responsibility regarding occupational safety and health. (*See,* Labor Code §§ 140, 142.3, 148, 148.6, 6302, 6307, *inter alia.*) Sections 6300 through 6332 of the Act set forth the jurisdiction and duties of the Division. The Division is authorized to "impose a civil penalty" (Labor Code §6317; *see, also* Labor Code §6319(b) and (c)). Employers are given the opportunity to appeal citations and any associated penalties to the Appeals Board in Labor Code sections 6319(a) and 6319(b), respectively. Labor Code section 6600 also provides that an employer "served with a citation . . . or a notice of proposed penalty under this part . . . may appeal to the appeals board . . . [the] amount of proposed penalties[.][8]"

Since passage of the Act the Appeals Board has articulated the scope of its authority to determine appropriate monetary penalties. In *Candlerock Restaurant*, Cal/OSHA App. 74-0010, DAR[9] (June 5, 1974), the Board stated in part at page 2:

> The Occupational Safety and Health Act of 1973 (hereinafter referred to as the "Act") establishes the power in the . . . Appeals Board to review and determine the propriety of a citation or a proposed penalty or both pursuant to California Labor Code section 6602. The scope of the review, as designated in said Labor Code section, is total, in that the Board may affirm, modify or vacate the Division's citation or proposed penalty.
>
> . . .
>
> The legislative intent is plainly manifested; the Division's proposals, in and of themselves, are nothing more nor less than mere proposals. It is the authority which is vested in the Appeals Board that is necessary to transform any proposed penalty into either an enforceable final order or an enforceable decision.

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[8] The term "this part" in Labor Code section 6600 refers to Part 1 of Division 5 of the Code, i.e., the California Occupational Safety and Health Act of 1973, now consisting of sections 6300 through 6719. "This part" is used to refer to the Act in other sections as well, such as section 6317.

[9] "DAR" and DDAR" in this Decision After Reconsideration refer to Appeals Board Decisions After Reconsideration and Denials of Petitions for Reconsideration, respectively.

The Board has consistently held that it assesses penalties, while the Division proposes penalties. (The Division agrees that is the proper interpretation of the law.) *York Precision Sheetmetal Works*, Cal/OSHA App. 74-149, DAR (Nov. 7, 1974), *Squaw Valley Development Company*, Cal/OSHA App. 74-167, DAR (March 18, 1975), *Ferma Corporation*, Cal/OSHA App. 74-917, DAR (Nov. 12, 1975), *John Hernstedt Farms*, Cal/OSHA App. 75-437, DDAR (Apr. 22, 1976), and *Capri Manufacturing Co.*, Cal/OSHA App. 83-869, DAR (May 17, 1985).[10]

In *Liberty Vinyl Corporation*, Cal/OSHA App. 78-1276, DAR (Sept. 24, 1980), [reaffirmed in *Stockton Tri Industries, Inc.* Cal/OSHA App. 02-4946, DAR (March 27, 2006)] the Division, as in this case, challenged the Board's authority to reduce penalties. In *Liberty Vinyl*, the Board took into consideration a criminal fine imposed upon the appellant employer by a Court for a related violation. In its decision the Board stated at pages 4-5:

> With legislative intent plainly manifested that the Appeals Board is the final arbiter of penalties if the Division's proposals are contested, and because the Legislature has also entrusted the Appeals Board with a co-equal responsibility of selecting the means of achieving safe and healthful working conditions, selection of a particular remedy for a particular violation in relation to the stated purpose of the Act is peculiarly a matter for its discretion. There being no restriction upon how the Appeals Board may affirm, modify, vacate or direct other relief in considering penalties de novo, it is consistent and reasonable to conclude that the Appeals Board has full discretion in establishing the final monetary penalty necessary to encourage elimination of safety and health hazards provided that such discretion is consistent with the Act. Regulations and criteria are not warranted and are inappropriate for the exercise of such discretion. To hold as the Division wishes would deny rational practical analysis of the Act and would subvert the purpose and policy of the Act in providing an employer the right of independent review and, where appropriate, relief from the Division's proposal. [Emphasis added]

Applying the *Liberty Vinyl* rationale, we find that the Board's authority to determine the ultimate penalty in a case involving the failure to report a serious injury furthers both the letter and spirit of the Act.

II. APPLICATION OF THE BOARD'S AUTHORITY IN REPORTING CASES

Section 342(a), under which Employer was cited, provides:

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[10] *Capri, supra,* involved a mandatory minimum penalty regime under the Carcinogen Act (Health and Safety Code section 24200 et seq.) There the Legislature stated civil penalties "shall be not less than . . .[.]" (Health and Safety Code section 24260.)

> (a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

As noted above, the Division claims it has no choice but to propose a non-adjustable $5,000 penalty based on the Director of Industrial Relations' regulation, section 336(a)(6), which provides:

> For Failure to Report Serious Injury or Illness, or Death of an Employee — Any employer who fails to timely report an employee's injury or illness, or death, in violation of section 342(a) of Title 8 of the California Code of Regulations, shall be assessed a minimum penalty of $5,000. [Emphasis added.]

Even if it were consistent with Labor Code section 6409.1(b), the Director's regulation does not require the *Appeals Board* to assess a $5,000 minimum penalty for all section 342(a) violations regardless of the circumstances of any particular case. Such a conclusion would run afoul of the duties and responsibilities of the Board embodied in Labor Code section 6602.[11]

One of the Board's functions is to exercise independent discretionary authority to adopt, modify, or set aside the penalties proposed by the Division. Blanket adoption of penalties proposed by the Division is not compatible with that function. (*Associated Ready Mix*, Cal/OSHA App. 95-3794, DAR (Dec. 6, 2000).) In *Limberg Construction*, Cal/OSHA App. 78-433, DAR (Feb. 21, 1980) the Board stated at page 3:

> To hold that the Appeals Board is bound by regulations adopted by the Director and penalties proposed by the Division would ignore the language of the Labor Code, deny an employer the right of independent review of the Division's proposal, and frustrate the purpose of providing fair and equitable enforcement of the California Occupational Safety and Health Act of 1973.

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[11] The Division argues Labor Code section 6409.1(b) must be read to bind the Appeals Board as well as itself. Our reading, particularly in light of the text of that section and the need to harmonize it with the other Labor Code provisions unaltered by AB 2837, is that it is binding only on the Division.

Since at least 1984, Labor Code section 6602 has remained unchanged. Presumptively, the Legislature is regarded as having in mind existing laws when it passes a statute, and its failure to change the law in a particular respect manifests legislative intent to leave the law as it stands. In adopting legislation, the Legislature is presumed to also know the decisional history of how the statute has been applied in that body of decisional law. (*Estate of McDill* (1975) 14 Cal.3d 831, 837-839; and *Bailey* v. *Superior Court* (1977) 19 Cal.3d 970, fn. 10.)

The presumption applies with equal force to state administrative agency decisional law interpreting statutes and regulations. (See, e.g., *Moore* v. *California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017 [9 Cal. Rptr.2d 358] cert. denied 113 S.Ct. 1364; and *Robinson* v. *Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 233-235 [5 Cal.Rptr.2d 782]. ["Long standing, consistent administrative construction of a statute by those charged with its administration, particularly where interested parties have acquiesced in the interpretation, is entitled to great weight and should not be disturbed unless clearly erroneous." [*Rizzo* v. *Board of Trustees* (1994) 27 Cal. App 4th 853, 861]

Labor Code section 6600, which was last amended in 1976, creates an employer's right to appeal citations issued under Labor Code section 6317 or notices of proposed penalties issued under the Act. Since Labor Code section 6409.1(b) is part of the Act, employers have the right to appeal penalties proposed under Labor Code section 6409.1(b) unless the Legislature provides otherwise.

Because the Legislature left Labor Code sections 6600 and 6602 intact when it amended the Labor Code in AB 2837, we must infer that the Legislature manifested its intent to leave the unchanged portions of the law as they stand. Generally, statutory grants of authority are not considered superseded by subsequent legislation, "except to the extent that such legislation shall do so expressly." (*Armistead* v. *State Personnel Board* (1978) 22 Cal.3d 198, 202.)[12]

In 2003 the Legislature did not express limitations on an employer's right to appeal penalties or the Board's authority to assess them when it amended Labor Code section 6409.1. Therefore we can not *imply* a legislative restriction or qualification of the Board's authority over proposed penalties. "The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes. (*Stafford* v. *Realty Bond Service Corp.*, (1952) 39 Cal.2d 797, 805; *Lambert* v. *Conrad,* (1960) 185 Cal.App.2d 85, 93; 1 Sutherland, Statutory Construction (3d ed.), section 2012, pp. 461-466. [Internal quotations omitted.]) Thus there is a

[12] Also, compare Labor Code section 6712(d)(1) where the Legislature unambiguously set a minimum penalty. Its decision not to do so in Labor Code section 6409.1(b) is taken to mean it did not intend to bind the Appeals Board, but only the Division. (Compare *Emerald Produce Co., Inc.*, supra).

presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together." *Fillmore* v. *Irvine* (1983) 146 Cal.App.3d 649, 657. [Internal citations and quotations omitted.]

In light of the statutes and cases discussed above in Section II, the Board as a quasi-judicial body must examine the facts of each case to determine if there was a violation (here of the section 342(a) reporting requirement) and to establish what penalty, if any, should be assessed. (Labor Code §6602) Doing so promotes the fair administration of the Act by ensuring that a proposed penalty does not unfairly exceed what is justifiable under the circumstances of the violation once established.[13] For example, assessing an "unalterable penalty" may treat an employer who technically but unintentionally violated the requirement the same as those employers who have no safety programs at all, who do not enforce their safety programs, and who have a history of safety violations.

Assessing a fixed minimum $5,000 penalty would place this Employer in the same category as employers who *purposely* decline to report a serious work-related injury at all. Indeed, such result creates a *disincentive* for reporting serious work-related injuries. The employer is faced with the choice of reporting the injury late and facing a certain $5,000 fine, or not reporting it at all, hoping that the Division never finds out. Logically, many employers faced with a similar choice would opt not to report, defeating the purpose behind the reporting requirement, preventing the Division from quickly inspecting an accident location to determine if any hazards to other employees remain, and frustrating the objectives of the Cal/OSHA Act.

Removing any discretion to take certain factors into account when assessing a civil penalty would conflict with Labor Code section 6602, weaken the Board's ability to modify a proposed penalty or order "other appropriate relief," and would erode established incentives that encourage employers to comply with other provisions of the Act.

Civil penalties may have a punitive or deterrent aspect, but their primary purpose should be to secure obedience to statutes and regulations enacted to serve public policy objectives, the amounts should not exceed levels necessary to punish and deter, and the amount should bear some relationship to the gravity of the offense, not be disproportional to it. (*City and County of San Francisco* v. *Sainez* (2000) 77 Cal.App.4th 1302.)[14]

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[13] *Hale* v. *Morgan*, (1978) 22 Cal.3d 388.

[14] See also *Anresco, Inc.*, Cal/OSHA App. 90-855, DAR (Dec. 20, 1991).

III. APPROPRIATE RELIEF IN THE CURRENT CASE

As a general approach, we conclude that an employer that reports a serious injury to the Division, albeit belatedly, should not be in the same category as an employer that purposely fails to report at all. Although ignorance of the duty to independently report is no defense to a violation[15], the *penalty* for the violation should not be disproportionate to the infraction.

In determining a proper penalty under the current statutory scheme, the Board takes into account the Legislature's direction to the Division in amending Labor Code section 6409.1 as well as the Legislature's leaving undisturbed the Board's duties and authority under Labor Code section 6602.

The purpose of Labor Code section 6409.1(b) (and the Division's corresponding regulation § 342(a)) is to impel *employers* to report every serious injury quickly, so the Division can initiate an investigation. In the instant case, Employer's failure to report the injury appears not to have delayed this investigation. Taking into account the Legislature's intent, the objectives of the Act, and the circumstances, it is found that the $750 penalty assessed by the ALJ is reasonable. That amount, which is hereby affirmed, recognizes Employer's innocent mistake, its effective safety program, and its proactive stance on promoting safety. It also acknowledges the Legislature's aim to aggressively encourage compliance with reporting duties, while minimizing the disincentive to report created by applying the $5,000 minimum penalty across-the-board.

DECISION AFTER RECONSIDERATION

Employer contested the reasonableness of the Division's proposed penalty. The Board has, as it must, reviewed all relevant facts to determine the reasonableness of Employer's conduct under the then-existing circumstances which resulted in the failure to comply with section 342(a). Although the existence of the violation was not contested (and thus, is established by operation of law), the same facts as well as other relevant facts must be reviewed for purposes of determining whether the proposed penalty is reasonable.[16]

The Board agrees with the ALJ's analysis of the facts, including the assessment of Employer's conduct at the time following the employee's accident

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[15] *Steve P. Rados, Inc.*, Cal/OSHA App. 97-575, DAR (Nov. 22, 2000); and *Jaco Oil Company*, Cal/OSHA App. 97-943, DAR (Nov. 22, 2000).

[16] The Board has previously characterized its inquiry as to the reasonableness of a proposed penalty by acknowledging that while the existence of the violation is not in issue (through waiver or establishment of the violation), the evidence regarding the existence is relevant to determining the reasonableness of the penalty (*System 99, A Corporation*, Cal/OSHA App. 78-1259, DAR (Aug. 30, 1982).) We believe that adherence to such formulation is too restrictive since other facts which do not address the existence of the violation, e.g. the conduct of a third party or intervening events over which the employer has little or no control, may be relevant to the reasonableness of the proposed penalty. The particular facts of the case must be considered and any modification or other appropriate penalty relief is to be given on a case-by-case basis.

and that the delay in reporting had no impact on the Division's ability to investigate or to inspect the workplace to ensure worker safety.

Assessing the flat $5,000 penalty would impact this Employer, which had less than 10 employees, more severely than larger employers with larger cash flows. This factor and all the others mentioned persuade the Board that Employer requires less of a penalty to induce conformity to the letter of the reporting regulation than may larger employers with no reporting systems in place. For example, as explained above, Employer was diligent and knew of the reporting requirement but incorrectly assumed it could not immediately report the accident due to the incident occurring on a weekend. However, all California employers have an affirmative duty to stay current with the safety standards, orders, and regulations affecting their operations. (*McKee Electric Company*, Cal/OSHA App. 81-0001, DDAR (May 29, 1981). Therefore, some penalty amount is appropriate in this case.

As was also discussed above, assessing a $5,000 civil penalty may place an employer who technically violated the reporting requirement (reported albeit late) in the same category as employers who purposely decline to report and create a disincentive for reporting. Here, Employer knew of the reporting obligation, fully intended to report the injury, demonstrated an ability to report and did so on the first day (Monday) it believed was possible to report.

Accordingly, the Board finds that the proposed $5,000 penalty exceeds the level necessary to achieve the purpose of compelling *this* Employer to conform. The Board finds that a penalty of $750 is appropriate under all the circumstances.

ORDER

IT IS HEREBY ORDERED THAT the citation is established and the penalty is modified as indicated above and Employer is ordered to pay a $750 civil penalty.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: July 14, 2006

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July 31, 2009

Honorable Mark DeSaulnier
Room 2054, State Capitol

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD - #0914776

Dear Senator DeSaulnier:

You have asked whether the statutory minimum for a civil penalty assessed pursuant to Section 6409.1 of the Labor Code applies to decisions of the Occupational Safety and Health Appeals Board and therefore limits the board's discretion to lower penalties assessed by the Division of Occupational Safety and Health.

Your question necessitates a review of the California Occupational Safety and Health Act of 1973 (Pt. 1 (commencing with Sec. 6300), Div. 5, Lab. C.[1]; hereafter the act). The act was enacted for the general purpose of assuring safe and healthful working conditions for all California working men and women (Sec. 6300). The Department of Industrial Relations (hereafter the department) is the state agency responsible for administering the act (Sec. 50.7). Within the department is the Division of Occupational Safety and Health (hereafter the division), which is charged with enforcing occupational safety and health laws in California, along with standards and orders promulgated pursuant thereto (Sec. 6308). The Occupational Safety and Health Appeals Board (hereafter the board), another body within the department, adjudicates appeals from citations issued by the division (see Ch. 6.5 (commencing with Sec. 148), Div. 1, and Ch. 7 (commencing with Sec. 6600), Pt. 1, Div. 5).

At issue here is whether certain provisions in the act relating to statutorily prescribed penalties for violations of the act limit the discretion of the board while hearing appeals from the division. Specifically, Section 6409.1 requires an employer to file a report with the department for every occupational injury or illness that results in lost work time beyond the initial date of injury or illness, or that requires medical treatment beyond first aid, within five days after the employer obtains knowledge of the injury or illness (subd. (a), Sec. 6409.1). Additionally, subdivision (b) of that section requires an employer to immediately

[1] All further section references are to the Labor Code, unless otherwise indicated.

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report serious occupational injuries and illnesses to the division, or be subject to a discretionary penalty of not less than $5,000:

> "6409.1. * * *
>
> "(b) ... [I]n addition to the report required by subdivision (a), a report shall be made immediately by the employer to the Division of Occupational Safety and Health by telephone or telegraph. An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand dollars ($5,000). Nothing in this subdivision shall be construed to increase the maximum civil penalty, pursuant to Sections 6427 to 6430, inclusive, that may be imposed for a violation of this section." (Subd. (b), Sec. 6409.1; emphasis added.)

An employer served with notice of a civil penalty assessed by the division, such as the penalty set forth in subdivision (b) of Section 6409.1, above, may file a notice of appeal with the board within 15 days of receipt of the notice from the division (Sec. 6319). In assessing the action taken by the division, the board is required by the act to "issue a decision, based on findings of fact, affirming, modifying or vacating the division's citation, order, or proposed penalty, or directing other appropriate relief" (Sec. 6602).

Applying this statutory framework, the board has opined that the provisions of subdivision (b) of Section 6409.1 are binding on the division only and that the board may reduce a civil penalty below the $5,000 minimum required by that subdivision (*Bill Callaway & Greg Lay dba Williams Redi Mix*, 2006 CA OSHA App. Bd. LEXIS 64 (Cal. OSHA App. Bd. 03-2400, DAR (7/14/06); hereafter *Callaway*)). As discussed below, we believe this view is incorrect.

In *Callaway*, the board set forth several arguments for the proposition that the statutory minimum of subdivision (b) of Section 6409.1 is inapplicable to decisions of the board. First, the board pointed out that, since the inception of the act, the board itself has articulated the scope of its own authority to determine monetary penalties (*Callaway*, supra, at p. 4). Relying on the board's decision in *Liberty Vinyl Corporation*, 1980 CA OSHA App. Bd. LEXIS 43 (Cal. OSHA App. Bd. 78-1276, DAR (9/24/1980)), and the language of Section 6602 permitting the board to order "other appropriate relief" from action taken by the division, the board concluded that "the Board's authority to determine the ultimate penalty in a case involving the failure to report a serious injury [irrespective of the language of subdivision (b) of Section 6409.1] furthers both the letter and spirit of the Act" (Id., at p. 5).

Next, the board argued that because Assembly Bill No. 2837 of the 2001-02 Regular Session (hereafter A.B. 2837), which added subdivision (b) to Section 6409.1, did not alter the general appellate authority of the board found in Section 6600 or 6602, the board's authority in reviewing the actions of the division was not changed by the enactment of A.B. 2837 and, accordingly, the board is not bound by subdivision (b) of Section 6409.1 (*Callaway*, supra, at pp. 7-8). In reaching this conclusion, the board relied on *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198 (hereafter *Armistead*), for the proposition that statutory grants of authority, such as Section 6602, are not superseded by subsequent legislation,

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"except to the extent that such legislation shall do so expressly" (*Callaway*, supra at p. 7, quoting *Armistead*, supra, at p. 202).[2]

Finally, the board argued that limiting the board's discretion to modify a penalty assessed by the division pursuant to subdivision (b) of Section 6409.1 would make bad policy. Restricting the board from taking "certain factors into account" and modifying civil penalties accordingly "would erode established incentives that encourage employers to comply with other provisions of the act" (*Callaway*, supra, at p. 8).

While it is true that the contemporaneous administrative construction of an enactment by those charged with its enforcement is to be given great weight, clearly erroneous or unauthorized constructions need not be followed (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309). We think that the board's view articulated in *Callaway* is incorrect and that the board is restricted by the minimum penalty required under subdivision (b) of Section 6409.1.

Well-established principles of statutory construction warrant the conclusion that the board's decision in *Callaway* is an unauthorized construction of the act. In the interpretation of any statute, we first look to the plain text of the statute. "To ascertain the meaning of a statute, we begin with the language in which the statute is framed" (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438; *Visalia School Dist. v. Workers' Comp. Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220). Moreover, "[w]hen statutory language is clear and unambiguous, there is no need for interpretation, and the court must apply the statute as written" (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 547).

A reading of the plain language of the civil penalty framework of subdivision (b) of Section 6409.1 reveals that, while the imposition of a civil penalty is not in and of itself mandatory, if such a penalty is imposed, it must be no less than $5,000. Moreover, there is nothing in the statute to suggest that the mandatory minimum is to apply only to civil penalties imposed by the division.

Section 6602 is silent on the issue of whether the board is limited to the statutory minimum of Section 6409.1 and, in *Callaway*, the board used this absence of language to conclude that it is not limited by Section 6409.1. However, where the language of a statutory provision is susceptible of two constructions, one which would render it reasonable, fair, and in harmony with its manifest purpose, and the other which would lead to absurd consequences, the former construction must be adopted (*People ex rel. Lungren v. Superior Court*, supra, at p. 305). Put another way, statutes must be construed so as to give a reasonable and commonsense construction that is consistent with the apparent purpose and

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[2] This quotation from *Armistead* is actually a quote from former Section 11420 of the Government Code, which was repealed in 1980. The quote in full was "'The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly'" (Ibid.; emphasis added). Accordingly, we think that *Armistead* is inapposite to the issue of the scope of the board's authority.

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intention of the lawmakers, that is practical rather than technical, and that leads to wise policy rather than mischief or absurdity (*People v. Martinsen* (1987) 193 Cal.App.3d 843, 848).

We think that interpreting these two code sections so as to make a statutory minimum binding at the administrative hearing level, but not binding at the appellate level would unnecessarily create an "absurd consequence" within the act. The *Callaway* interpretation of Sections 6409.1 and 6602 renders the statutory minimum of Section 6409.1 meaningless, because the board is free under that interpretation to abandon the restriction when hearing an appeal from a decision by the division.[3] Thus, we think that the better view is that the statutory minimum set forth in subdivision (b) of Section 6409.1 binds both the division and the board.[4]

Therefore, it is our opinion that *Callaway* was incorrectly decided. The statutory minimum for a civil penalty assessed by the Division of Occupational Safety and Health for a violation of subdivision (b) of Section 6409.1 of the Labor Code applies to decisions of the Occupational Safety and Health Appeals Board as well.

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[3] The board's interpretation of Sections 6409.1 and 6602 compels the conclusion that a superior court would likewise be free to disregard the minimum penalty required by subdivision (b) of Section 6409.1. Section 6627 provides that a person affected by an order or decision of the board may seek a writ of mandate from the superior court of his or her county in order to determine the lawfulness of the board's decision or order. However, like Sections 6600 and 6602, Section 6627 was not amended by A.B. 2837. Thus, following the board's reasoning in *Callaway*, a superior court need not follow subdivision (b) of Section 6409.1. However, that same court would be required to act within the limitations set forth in other provisions of the Labor Code (see, e.g., Sec. 1858, C.C.P. ("In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms of substance contained therein, not to ... omit what has been inserted ... .")).

[4] In *Callaway*, the board recognized that it is bound by the statutory minimum penalty set forth in paragraph (2) of subdivision (d) of Section 6712. The board distinguished this minimum penalty from that imposed by Section 6409.1 by observing that Section 6409.1 permits discretion whether to impose a penalty at all. However, subdivision (b) of Section 6409.1 unambiguously requires that, if a civil penalty is to be imposed, it cannot be less than $5,000.00. Section 6409.1 provides no discretion to deviate below the statutory minimum if a penalty is assessed. In past decisions, the board has correctly recognized that it cannot affirm a decision that is in violation of an express statutory mandate (see, e.g., *Gaylord Container Corporation*, 2002 CA OSHA App. Bd. LEXIS 27 (Cal. OSHA App. Bd. 99-095, DAR 3/12/02)). As the board may not affirm a violation of a statutory mandate, it may not itself violate a statutory mandate when deciding an appeal.

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Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

[redacted]

Michael P. Beaver
Deputy Legislative Counsel

MPB:clr

SENATE OFFICE OF RESEARCH

Agnes Lee, Director

March 1, 2010

MEMORANDUM

TO: Senator Mark DeSaulnier, Chair
Senate Labor and Industrial Relations Committee
Attn: Gideon Baum and Alma Perez

FROM: Daniel Rounds [redacted]

SUBJECT: Employer Non-Reporting Penalty Reductions at OSHAB (the $5,000 Fine Issue)

Recently you asked the Senate Office of Research (SOR) to examine appeal outcomes at the Occupational Safety and Health Appeals Board (OSHAB) for those cases where employers were cited for allegedly failing to report serious workplace injuries or fatalities to the Division of Occupational Safety and Health (DOSH). Specifically, you requested SOR to provide information related to each of the following matters:

- The frequency with which appeals for $5,000 non-reporting penalties were granted and non-reporting penalties were overturned.[1]
- The frequency with which appeals for $5,000 non-reporting penalties were denied, but penalties were reduced below the $5,000 statutory minimum; what was the magnitude of associated penalty reductions?
- The frequency with which $5,000 non-reporting appeals were denied and penalties were upheld.

[1] The technical term the board uses is "vacated."

- The frequency with which $5,000 non-reporting penalties appeals were denied and penalties were increased; what was the magnitude of associated penalty increases?

- Relevant board Decisions After Reconsideration (DAR) pertaining to $5,000 non-reporting penalties; what has been the board's policy and practice concerning $5,000 non-reporting penalties, and what direction has it given to its Administrative Law Judges (ALJs) concerning non-reporting penalties?

The analysis that follows shows that penalty reductions of significant magnitude have been a common occurrence at the board, and a review of board DARs shows that the board has actively encouraged penalty reductions, though it may now be attempting to moderate the size of penalty reductions in those cases where the employer completely fails to report serious workplace injuries or fatalities.

Specifically, our analysis documents the following:

- In contested cases, board ALJs granted employer appeals for non-reporting penalties approximately 15 percent of the time and upheld the citation 85 percent of the time.

- In contested cases, where the citation was upheld, board ALJs reduced non-reporting penalties 87.5 percent of the time. Conversely, board ALJs upheld the $5,000 penalty in only 12.5 percent of the cases where the citation was affirmed.

- When board ALJs reduced penalties, they reduced penalties by at least 75 percent of the initial fine in over half of all relevant cases.

- The average size of the final fine levied by ALJs for non-reporting infractions has fallen over time, while the magnitude of penalty reductions has increased.

Board practice with respect to final penalties imposed was largely consistent with the practices of its ALJs.

- The board has routinely affirmed penalty reductions below the $5,000 statutory minimum. In six of the nine relevant cases, the board ordered or upheld an ALJ decision imposing a fine of less than $5,000. In two cases, the board upheld a $5,000 fine.

- In one instance, the board raised the fine above the statutory minimum, increasing the penalty from $5,000 to $7,000. This is the one known case where a fine was raised above the statutory minimum.

Background

Section 342(a), of Title 8, of the California Code of Regulations requires that employers report workplace serious injuries and fatalities to DOSH within an eight-hour period so DOSH can initiate its mandated investigations in a timely manner. Labor Code Section 6409.1 requires that employers report serious workplace injuries and fatalities to DOSH immediately and states that those who fail to do so "may be assessed a civil penalty of not less than five thousand dollars ($5,000)."

According to the *Cal-Osha Reporter*, employer non-reporting penalties are the most frequently appealed violation cited by DOSH.[2]

Recent Controversy Regarding Non-Reporting Penalties

In July 2006, OSHAB issued a DAR, hereafter referred to as the *Callaway* decision, in which it clarified its interpretation of board duties under Labor Code Section 6409.1. In its decision, the board ruled that the board and its agents have the power to reduce non-reporting penalties below the $5,000 statutory minimum, citing the board's powers and duties arising under Labor Code Sections 6600 and 6602.

According to the board, Labor Code Section 6600 gives employers the right to appeal penalty amounts imposed by DOSH in its citations and gives the board the responsibility of adjudicating these appeals. Moreover, Labor Code Section 6602 gives the board the power to "issue a decision, based on findings of fact, affirming, modifying or vacating the division's citation, order, or proposed penalty, or directing other appropriate relief."

In *Callaway* the board essentially argued that the requirements of Labor Code Section 6409.1 do not override the board's powers and duties specified in Labor Code Section 6602, which gives the board the power to modify DOSH's citations and provide for other forms of "appropriate relief." Similarly, the board argues in *Calloway* that Labor Code Section 6409.1 cannot impinge upon the board's duty to adjudicate appeals pertaining to *penalty amounts,* which is its statutory obligation under Labor Code Section 6600.

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[2] "Workplace Fatality Reporting Reg Is Most Appealed Cal-OSHA Standard," *Cal-OSHA Reporter,* August 21, 2009, Vol. 36, No. 31.

Legislative Counsel differs in its interpretation of the relevant statutes, and has argued in an opinion dated July 31, 2009, that "Well-established principles of statutory construction warrant the conclusion that the board's decision in *Callaway* is an unauthorized construction of the act."

According to Legislative Counsel, while there may be discretion in issuing a fine, there is no discretion with respect to the minimum fine imposed whenever a fine is imposed. According to Counsel, the statutory minimum of $5,000 is binding on the board and its agents, and the language in Labor Code Sections 6600 and 6602 does not release the board from its obligation to adhere to the statutory minimum.

Moreover, Counsel has argued that the board's interpretation of statute leads to "absurd consequences" because the statutory minimum effectively carries no force beyond the administrative level if the statute is interpreted in the manner the board has chosen to interpret the law.

Description of the Data Examined in This Memorandum

This memo examines appeals outcomes for 129 OSHAB ALJ decisions relevant to $5,000 non-reporting penalties issued by DOSH under Section 342(a) of Title 8 of the California Code of Regulations, between March 24, 2005, and January 6, 2009. These decisions were provided to Senate staff in response to an information request jointly sent to OSHAB by the Senate and Assembly Labor Committees.[3] These decisions reflect appeal outcomes and board practices pertaining to non-reporting penalties at the first level of appeal over the specified period of time.

The memo also examines appeals outcomes for nine OSHAB DARs relevant to $5,000 non-reporting penalties rendered between July 14, 2006, and October 8, 2009. These DARs reflect appeal outcomes and board practices pertaining to non-reporting penalties at the second level of appeal, where politically appointed board members adjudicate appeals. DARs issued by the board are precedent-setting decisions that set board policy and provide

[3] OSHAB provided 139 ALJ decisions in response to inquires about ALJ decisions related to 342(a) violations. According to a letter to the committee chairs from the board chair, the board provided "the best information that we have!" Only 129 of the 139 decisions provided were germane to the specific issues raised by the Labor Committee's research request to SOR. Three of the decisions provided to the Senate by OSHAB concerned cases in which the employer was not cited a non-reporting penalty. In an additional seven cases, the initial non-reporting penalty issued by DOSH was for an amount less than $5,000. Fines for those cases may have been levied before the $5,000 statutory minimum went into effect. The analysis of ALJ decisions in this memo only addresses the 129 germane cases provided by the board.

direction for decisions made at the first level appeal by the board's administrative law judges.

Analysis of Administrative Law Judge Decisions

Appeals outcomes for the relevant 129 ALJ decisions initially fall into three categories: (1) withdrawals (either DOSH dropped the charge or the employer dropped the appeal), (2) granted appeals (DOSH failed to prove its case), and (3) upheld citations (the employer was found to be in violation of 342(a)). Grouping decisions into these categories yields the following appeals outcomes for these 129 cases:

Table 1: OSHAB ALJ Appeals Outcomes March 2005 to January 2009

Outcome	Appeals	Share
Withdrawn Appeals	7	5.43%
Granted Appeals	18	13.95%
Upheld Citations	104	80.62%
Total	129	100%

In a little more than 5 percent of the cases, either DOSH or the employer withdrew. In about 14 percent of the cases, the appeal was granted, and in a little less than 81 percent of the cases, the citation was upheld.

Appeal Outcomes in Contested Cases

The numbers change somewhat when the analysis is restricted to contested cases, where neither DOSH nor the employer withdrew, and the ALJ issued a decision on the merits.

In 85 percent of the contested cases, the decision resulted in "conviction," wherein the citation was affirmed, while in roughly 15 percent of the cases, the citation was vacated and the appeal was granted.

Table 2: OSHAB ALJ Appeals Outcomes in Contested Cases March 2005 to January 2009

Outcome	Appeals	Share
Granted Appeals	18	14.75%
Upheld Citations	104	85.25%
Total	122	100%

Penalties in Cases Where the Citation Was Affirmed

Examining penalties in contested cases where the citation was upheld ("convictions") reveals that penalty reduction is the normal outcome.

Table 3 enumerates the number of times ALJs upheld $5,000 penalties, the number of times the penalty was reduced to some amount greater than zero, and the number of times the penalty was reduced to zero, effectively eliminating the fine.[4]

Table 3: OSHAB Final Assessed Penalties by ALJs When Citation Upheld, March 2005 to January 2009

Outcome	Appeals	Share
$5,000 Penalty Upheld	13	12.50%
Penalty Reduced	87	83.65%
Penalty Reduced to Zero	4	3.85%
Total	104	100%

Penalties were maintained at the $5,000 minimum in 12.5 percent of the cases, while penalties were reduced or eliminated altogether about 87.5 percent of the time. In about 4 percent of the cases, the penalty was eliminated altogether.

Table 4 provides summary information on the relative distribution of penalty reductions by the size of the reduction for the 91 cases where the penalty was reduced or eliminated.

Table 4: Magnitude of Penalty Reductions by OSHAB ALJs When Citation Upheld, March 2005 to January 2009

Outcome	Decisions	Share
Penalty Reduced up to 25%	7	7.69%
Penalty Reduced From 25 to 50%	18	19.78%
Penalty Reduced From 50 to 75%	18	19.78%
Penalty Reduced 75% or More[5]	48	52.75%
Total	91	100%

[4] In some of these cases the employer had gone out of business.
[5] Includes cases where the citation was upheld, but the penalty was reduced to zero.

When penalties were reduced, most of the time they were reduced by at least 75 percent. In more than 70 percent of the relevant decisions, the penalty was reduced by at least 50 percent.

Size of Average Penalty and Penalty Reductions in ALJ Decisions Over Time

A year-by-year review of the 104 contested cases in which the 342(a) citations were upheld, shows that the average employer non-reporting penalty levied by OSHAB ALJs has fallen over time. At the same time, in the 91 cases where the penalty was reduced, the average penalty reduction increased.[6]

- For the five relevant decisions issued in 2005, the average fine was $4,800. In four of these five cases, the $5,000 penalty was upheld. The penalty in the remaining case was $4,000.

- For the 50 relevant decisions issued in 2006, the average fine was $2,125. In five of the 50 cases, the $5,000 penalty was upheld. The average penalty reduction in the remaining 45 cases was $3,194.

- For the 33 relevant decisions issued in 2007, the average fine was $2,000. In three of the 33 cases, the $5,000 penalty was upheld. The average penalty reduction in the remaining 30 cases was $3,300.

- For the 15 relevant decisions issued in 2008, the average fine was $1,433. In one of these cases, the $5,000 penalty was upheld. In the 14 remaining cases, the average penalty reduction was $3,821.

- For the one relevant case for which we have data for 2009, the fine was $500. The penalty reduction was $4,500.

Analysis of Board Decisions After Reconsideration

The current board has issued nine DARs pertaining to $5,000 employer non-reporting penalties. These DARs reflect appeal outcomes at the second level of appeal, set board policy, and provide direction for decisions made at the first level appeal by ALJs.

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[6] Because the board provided data on ALJ decisions issued through January 6, 2009, it is unclear whether the size of the typical fine changed during the course of 2009.

Appeal Outcomes and Penalty Modifications at the Board Level

Our analysis finds that the board has consistently affirmed non-reporting infractions in its DARs but has, on balance, encouraged ALJs through its decisions to reduce penalties below the statutory minimum.

- In all nine cases where the board issued a DAR, the board upheld the infraction.
- In six of the nine DARs, the board ordered or upheld an ALJ decision imposing a fine of less than $5,000.
- In two of the cases, the board upheld $5,000 fines.
- In one case, the board raised the fine above the statutory minimum of $5,000, raising the penalty to $7,000.

Table 5 summarizes penalty outcomes for all nine of the relevant DARs.

Table 5: Non-Reporting Penalty Outcomes in Board Decisions After Reconsideration (DARs)

Board Decision (DAR)	Appeal Outcome	Treatment of Penalty	Initial Fine	ALJ Fine	Board Fine	Date
Trader Dan's	Affirmed citation	Remanded to ALJ for Increase	$5,000	$350	$4,000	10/8/2009
Central Valley Contracting	Affirmed citation	Raised ALJ fine	$5,000	$5,000	$7,000	6/1/2009
Long Beach City College	Affirmed citation	Maintained ALJ fine	$5,000	$5,000	$5,000	8/8/2008
Sun Valley Skylights	Affirmed citation	Maintained ALJ fine	$5,000	$500	$500	3/28/2008
Brydenscott Metal Products	Affirmed citation	Maintained ALJ fine	$5,000	$1,000	$1,000	11/2/2007
Silvercrest Western Homes	Affirmed citation	Lowered ALJ fine	$5,000	$5,000	$3,500	8/20/2007
Safeway #951	Affirmed citation	Lowered ALJ fine	$5,000	$5,000	$3,000	7/6/2007
McDonald's	Affirmed citation	Maintained ALJ fine	$5,000	$5,000	$5,000	5/31/2007
Callaway and Lay, Redi Mix	Affirmed citation	Maintained ALJ fine	$5,000	$750	$750	7/14/2006

In five of the nine cases, the board agreed with the fine levied by the ALJ, including two instances where the ALJ upheld the $5,000 fine, and three instances where the ALJ lowered the fine. In two cases, the board modified the ALJ fine upward, and in two of the cases, the board modified the ALJ fine downward.

Board Direction to Staff on Penalty Reductions

In your request to SOR, you asked about the board's policy and practices concerning $5,000 non-reporting penalties and the direction it has given to its ALJs by means of precedent-setting DAR.

Each of the nine cases discussed above is summarized below. Our analysis found that the decisions in these cases collectively contain the following operative guidelines for ALJs when they impose employer non-reporting penalties:[7]

- Fine amounts should distinguish between good actors and bad actors.
- There are different degrees of good faith and bad faith action by employers.
- Fines can be increased above the $5,000 statutory minimum when employers engage in malfeasance; for example, when employers attempt to deceive the board or its agents.[8]
- The statutory minimum fine of $5,000 is effectively reserved for employers who *purposely* fail to report a serious workplace injury or fatality.[9]
- Employers who completely fail to report a serious workplace injury or fatality may have their fines reduced below $5,000, and ALJs may consider the following factors when imposing penalties: an innocent mistake; notification of accident to first responders; employer size; employer safety record; timely and effective abatement measures; and a lack of impact on Division's ability to investigate the accident.[10]
- Penalties for employers who completely fail to report serious workplace injuries or fatalities should be higher than penalties for those who fail to

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[7] These "guidelines" are not explicitly enumerated or articulated in the relevant decisions in the exact format given here. This is a summary of the principles provided by the board in these nine cases.

[8] See the *Central Valley Contracting* decision.

[9] See the text of the *Callaway*, *Safeway*, *Silvercrest*, *Sun Valley*, and *Brydenscott* decisions.

[10] See the *Trader Dan's* decision.

report timely. Penalty reductions below the statutory minimum should be larger for those who report late than for those who fail to report at all.[11]

Collectively these "guidelines" effectively render the statutory minimum penalty a *de facto* maximum penalty, except in cases of provable employer malfeasance.

Summary of Relevant Board Decisions After Reconsideration

1. **Callaway and Lay, Redi Mix.** The board upheld the ALJ ruling reducing the $5,000 non-reporting penalty to $750. The board further ruled that it has the authority to reduce non-reporting penalties under Section 6602 of the Labor Code, ruling that if the Legislature wanted to limit the board's authority to reduce fines and penalties, it would have rewritten Sections 6600 and 6602 of the Labor Code. The board infers legislative intent on policy grounds arguing that its approach to penalty reduction provides the right incentives to encourage employer compliance with statutory reporting requirements and so more effectively promotes worker safety than would an inflexible application of $5,000 fines.

2. **Safeway #951.** The board overturned the ALJ ruling upholding the $5,000 non-reporting penalty ruling that ALJ failed to properly consider reasons the fine should be reduced. Based on its decision in the *Callaway* case, the board reduced the fine from $5,000 to $3,000 and further ruled that ALJs not only have the authority to reduce non-reporting penalties, *but the obligation to do so when the facts warrant it.*

3. **Trader Dan's.** The board overturned an ALJ ruling reducing the $5,000 non-reporting penalty to $350 and suggested a fine reduction from $5,000 to $4,000. The board argued that penalties for employers who completely fail to report serious workplace injuries or fatalities should be higher than penalties for those who fail to report in a timely manner. Likewise, the board ruled that penalty reductions below the statutory minimum should be of a greater magnitude for those who report late than for those who fail to report at all.

4. **Central Valley Contracting.** The board increased the non-reporting penalty from $5,000 to $7,000 based on evidence that the employer intentionally provided false information during the course of the appeal.

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[11] See *Trader Dan's.*

5. **Silvercrest Western Homes.** The board overturned the ALJ decision and reduced the $5,000 non-reporting 342(a) fine to $3,500 on the grounds that the failure to report the employee injury *was not intentional.* The decision reaffirms the board's authority to reduce the non-reporting penalty below the $5,000 statutory minimum, citing the *Calloway* case.

6. **Sun Valley Skylights, Inc.** The board upheld the ALJ decision to reduce the 342(a) non-reporting penalty from $5,000 to $500 on grounds that failure to report was not intentional. The decision reaffirms the board's authority to reduce the non-reporting penalty below the $5,000 statutory minimum, citing the *Calloway* case.

7. **Brydenscott Metal Products.** The board upheld the ALJ decision reducing the 342(a) non-reporting penalty from $5,000 to $1,000 on grounds that failure to report was not intentional and the employer was unaware of its duty to report. Decision reaffirms the board's authority to reduce the non-reporting penalty below the $5,000 statutory minimum, citing the *Calloway* case.

8. **Long Beach City College.** The board upheld the ALJ $5,000 non-reporting penalty for procedural reasons, but directed the employer to seek a refund of the fine through alternative procedural means.

9. **McDonald's.** The board upheld the ALJ ruling and affirmed penalties in the total of $20,100, including a $5,000 non-reporting penalty.

Other Relevant Matters

At least 35 of the 109 cases taken up for reconsideration on the board's own motion during the current board's tenure are cases related to employer non-reporting penalties. At the time that this memo was prepared, Senate staff possessed no specific information pertaining to outcomes for 27 of these 35 cases. Consequently, information on the final penalties issued in these cases could not be incorporated into the analysis.

Summary of Findings

Penalty reductions of significant magnitude have been a common occurrence at the board, and a review of board DARs shows that the board has actively encouraged penalty reductions, though it may now be attempting to moderate the size of penalty reductions in cases where the employer completely fails to report serious workplace injuries or fatalities.

- In contested cases, where the non-reporting infraction was upheld, board ALJs reduced penalties 87.5 percent of the time. Conversely, board ALJs upheld the $5,000 penalty in 12.5 percent of cases where the citation was affirmed.

- When board ALJs reduced penalties, they reduced penalties by at least 75 percent of the initial fine in over half of all relevant cases.

- The average size of the final fine levied by ALJs for non-reporting infractions has fallen over time, and the magnitude of penalty reductions has increased.

- In DARs, the board has routinely affirmed penalty reductions below the $5,000 statutory minimum. In six of the nine relevant cases, the board ordered or upheld an ALJ decision imposing a fine of less than $5,000. In two cases, the board upheld a $5,000 fine.

- In one instance, the board raised the fine above the statutory minimum, increasing the penalty from $5,000 to $7,000. This is the one known case for all ALJ and board decisions where a fine was raised above the statutory minimum.

Under current board practice, the board and its ALJs have effectively rendered the statutory minimum $5,000 penalty a *de facto* maximum penalty, except for those cases where there is demonstrated and egregious malfeasance on the part of the employer.

DR:tr