

State of California
Department of Industrial Relations
M e m o r a n d u m

To: Chairman MacLeod and Members of the Standards Board

Date: June 29, 2010

From: Occupational Safety and Health Standards Board
Marley Hart, Executive Officer

Subject: **Petition Decision Process**

The Board requested to be briefed about the development of petition decisions. Concern was voiced that petition decisions tend to be general and vague, and the question was raised as to whether the Board would be better served if future petition decisions gave staff better direction regarding the Board's intent.

The petition process is governed as follows by the Labor Code:

- The Board is required to hold open public meetings at least monthly and to permit any person to propose new or revised regulations.
- Petitions for regulatory changes are to be evaluated by the Division of Occupational Safety and Health (Division), which is to submit the evaluation to the Board within 60 days after it (the Division) receives the petition.
- The Board must report its decision no later than six months following receipt of a petition.

As a matter of long-standing Board practice, once a petition is received, it is assigned to a Board staff engineer for research and evaluation. The Board staff ordinarily reviews the petition, the Division evaluation, relevant federal regulations (if any) and other information that is relevant to the evaluation of the petition—perhaps including a site visit, contact with subject matter experts, review of technical data and/or contact with stakeholders. The object of this review is to determine whether employee safety would be improved by adding provisions to Title 8 or by amending existing provisions.

A proposed petition decision is prepared based on the evaluations and other documentation in the file. That proposed decision is then presented to the Board for possible adoption. For many years, there have been three basic petition decision options that the Board has chosen among:

- Denying the petition;
- Granting the petition and directing Board staff to undertake a rulemaking;
- Granting the petition to the extent that an advisory committee is to be convened to develop a possible rulemaking proposal.

The Board historically has not, as part of proposed petition decisions, specified wording that must be included in regulatory proposals or specified, in any detail greater than the direction to convene

an advisory committee, the manner in which a regulatory proposal is to be developed. There are solid reasons for these long-standing practices:

- Even as set forth in a petition, proposed regulatory language requires much Board staff scrutiny before it is put in the form of a noticed rulemaking. The format must be consistent with what is required for Title 8. All the Title 8 provisions affected by a proposal must be located and considered to the maximum extent possible in order to make sure that the proposed wording does not have unintended negative consequences. It must be determined that any proposed wording is at least as effective as corresponding federal regulations. The optimum manner of inserting a new regulation into Title 8 may not be what the petitioner has proposed. And most significantly, whether there is an advisory committee or not, the process of developing a solid rulemaking proposal involves contact with, and input from, other persons in addition to the petitioner.
- Just as regulatory language proposed in a petition is not accepted without vetting, the Board allows Board staff to vet wording suggested by Board members. The Board has not made a practice of dictating regulatory text at Board meetings, as Board members have recognized that drafting regulatory proposals requires a great deal of staff work and cannot be done off-the-cuff.
- In formulating proposals to be noticed, Board staff must be free to consult with others in the manner that seems best as the process unfolds. It is impossible to tell at the beginning of a rulemaking—including those resulting from petitions—what issues will arise and who must be contacted in order to resolve those issues. The Board has an experienced technical staff that has developed hundreds of rulemaking proposals, and a great deal of their expertise has to do with knowing who to contact and when. The Board has never circumscribed the Board staff's discretion in this regard, and the overall quality of the Board's rulemaking is a testament to the wisdom of that course.
- Sometimes the staff work done after a petition is granted leads to the conclusion that the rulemaking should not go forward, either because there is no advisory committee consensus or because information ascertained by Board staff augers for such a result. The Board is always given the opportunity to say that a petition-based rulemaking effort should not be terminated, but the Board ordinarily agrees with Board staff in such matters, and a great deal of Board staff time has been saved from being wasted in unproductive pursuits. Limitations on the Board staff's discretion in working on rulemakings might well negate this benefit.

Everything discussed so far pertains to what happens before a rulemaking proposal is noticed. Once the formal, noticed rulemaking process begins, the matter is back in the hands of the Board. No regulation can be promulgated without the affirmative vote of at least four Board members, and if a proposal is not to the Board's liking, the Board may direct the Board staff as to how the proposal should be changed. The Board staff always strives to give the Board its best effort, and the Board always has the last word.

In view of these considerations, the Board staff believes that the petition process as it now exists works well and should continue.