

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**SUMMARY
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING
March 15, 2018
Rancho Cordova, California**

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman Dave Thomas called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:03 a.m., March 15, 2018, in the Council Chambers of the Rancho Cordova City Hall, Rancho Cordova, California.

ATTENDANCE

Board Members Present

Dave Thomas
David Harrison
Chris Laszcz-Davis
Barbara Smisko
Laura Stock

Board Member Absent

Board Staff

Marley Hart, Executive Officer
Mike Manieri, Principal Safety Engineer
Peter Healy, Legal Counsel
David Kernazitskas, Senior Safety Engineer
Sarah Money, Executive Assistant

Division of Occupational Safety and Health

Eric Berg, Deputy Chief of Health

Others Present

Chris Kirkham, DOSH
Richard Thompson, NCCCCO
Marti Fisher, CalChamber
Larry Wong, Univ. of CA Office of the
President
David Jones, AGC
Michael Strunk, IUOE Local Union No. 3
Justin Hess, Sacramento County Dept. of
Transportation
Amber Novey, LiUNA

Michael Musser, CA Teachers Association
Jamie Carlile, Southern CA Edison
Dan Leacox, Leacox & Associates
Gail Blanchard-Saiger, CA Hospital
Association
Kathy Oceguela, PG&E
Ron Kilburg, El Dorado Irr. District
Pamela Murcell, CA Industrial Hygiene
Council
Jay Weir, AT&T

B. OPENING COMMENTS

Mr. Thomas indicated that this portion of the Board's meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2.

Michael Musser, CA Teachers Association, thanked the Board staff for its work on the proposal to address workplace violence prevention in general industry. He said that he is glad that the proposal for workplace violence prevention in healthcare has been adopted and become law because it can now serve as a template to follow while the proposal for workplace violence prevention in general industry is being created. He stated that it is important that incidents of workplace violence are logged on some kind of a form that the employer keeps for a certain length of time, and that the employee and his or her representative have access to those forms so that they can be reviewed if necessary. He also said that workers should be allowed to participate in the development of an employer's workplace violence prevention plan, and the workplace violence prevention plan should contain language on how to address an active shooter situation.

Dan Leacox, Leacox & Associates, commented on the permissible exposure limit (PEL) process presentation that Mr. Berg will be doing during the business meeting portion of the meeting today. He focused on feasibility and what level of data is meaningful when a determination of feasibility or infeasibility is made. He said that it is a difficult area in which to gather data, and very high evidentiary burden cannot be set and achieved either way. He stated that the first demonstration of feasibility has to come from the Board or the Division in order to meet the criteria of the statute that permits setting PEL's. He said that one way that feasibility is determined is by surveying or talking to employers to find out if the PEL is feasible for them. He stated that if only a handful of employers speak up in opposition, that is not enough to determine that a PEL is infeasible, and it creates a double standard in terms of evidence required. He said that if the Division could not use an example or two to demonstrate feasibility, it would make things very difficult for them. He also stated that the substance of the documentation that the Board receives from the Division should be a matter of great concern to the Board. He said that there are a number of things that the Division should make evident to the Board in the documents that it gives to the Board as a rationale for the PEL, and many decisions that are made along the way that are policy-type decisions. He said that the areas where policy judgements are made should be made very evident in the document because it is a policy judgement that is inherent in the rationale for the proposed PEL. He stated that this Board generates policies, so it is important that these policy-type decisions are made evident so that the Board can see them and review them.

C. ADJOURNMENT

Mr. Thomas adjourned the public meeting at 10:18 a.m.

II. **PUBLIC HEARING**

Mr. Thomas called the Public Hearing of the Board to order at 10:18 a.m., March 15, 2018, in the Council Chambers of the Rancho Cordova City Hall, Rancho Cordova, California.

Mr. Thomas opened the Public Hearing and introduced the first item noticed for public hearing.

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Section 1618.1 Operator Qualification and Certification
Operator Qualification and Certification - Effective Dates
(HORCHER)

Mr. Manieri summarized the history and purpose of the proposal, as set out in the Informative Digest Notice, and indicated that the proposal is ready for the Board's consideration and the public's comment.

There were no public or Board Member comments.

A. ADJOURNMENT

Mr. Thomas adjourned the Public Hearing at 10:27 a.m.

III. BUSINESS MEETING

Mr. Thomas called the Business Meeting of the Board to order at 10:27 a.m., March 15, 2018, in the Council Chambers of the Rancho Cordova City Hall, Rancho Cordova, California.

A. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Mr. Healy stated that he is aware of no unresolved legal issues regarding items A-H on the consent calendar, and he believes that those items are ready for the Board's decision on the question of adoption.

MOTION

A motion was made by Ms. Laszcz-Davis and seconded by Mr. Harrison to adopt the consent calendar.

A roll call was taken, and all members present voted "aye." The motion passed.

B. OTHER

1. Legislative Update

Mr. Healy provided updates on the following bills:

- SB 772 would exempt from the standardized regulatory impact analysis (SRIA) requirement of the Administrative Procedures Act any occupational safety and health standard and order that has the \$50 million threshold for extensive economic analysis. This bill has been placed in the suspension file. It could be reactivated later in the legislative session.

- AB 1576 pertains to modeling agency licensee requirements. He stated that this bill would require modeling agencies that are licensed by the Labor Commissioner to train their supervisors in sexual harassment as part of the licensing process. He said that under this bill, the Board would be required to adopt standards that address models' rights to healthcare privacy and workplace safety issues, such as eating disorders. This bill is dead.
 - AB 1761 pertains to hotel worker safety and workplace violence prevention. This bill includes proposed means of addressing these issues, including providing panic buttons for employees to use who are working alone, as well as a method for tracking violent or threatening guests.
 - AB 1789 would require the Standards Board to adopt safety and health standards that address valley fever. This bill has been referred to the Senate Labor and Employment Committee.
 - AB 3031 pertains to power tool safety. This bill may require the Board to take some kind of action at some point, but presently only proposes statutory standards.
2. Presentation on Health Experts Advisory Committee – Feasibility Advisory Committee (HEAC-FAC) – Eric Berg, Division

Mr. Berg showed a PowerPoint slide show during his presentation. Please see the file copy of the Board packet to view a printed copy of the slide show.

Mr. Berg stated that he was going to speak about feasibility, the permissible exposure limit (PEL) setting process, and how feasibility is determined. He said that since the federal and California laws regarding feasibility of PEL's are very similar to each other, decisions made by the U.S. federal courts are very useful for the Division when it comes to drafting PEL rulemakings for California. He stated that the U.S. Supreme Court defines feasibility as "capable of being done", but the Supreme Court feels that it is important to not compare benefits and costs because the benefit is worker health protection, and for the cost, the only thing that must be considered is whether or not it is possible to be done.

Mr. Berg stated that there are two types of feasibility:

- Technological feasibility. To establish technological feasibility, the D.C. Circuit Court requires OSHA to prove a reasonable possibility that a typical firm will be able to develop and install engineering and work practice controls that can meet the PEL listed in the standard in most of its operations. Mr. Berg said that just because examples of infeasibility exist does not mean that the PEL is infeasible. He also stated that even if a PEL is not currently feasible, OSHA can require regulations that will require the development of new technologies to meet the PEL, and in those cases, OSHA is required to provide additional time for implementation of the PEL so that these technologies can be discovered and implemented.

- Economic feasibility. The D.C. Circuit Court ruled that the PEL in a rule is economically feasible in a particular industry so long as it does not threaten massive dislocation to, or imperil the existence of, the industry. The court also ruled that a PEL in a standard is not infeasible simply because it is financially burdensome, or even because it threatens the survival of some companies within an industry. The court requires OSHA to establish a reasonable estimate of cost, and to demonstrate that these costs will not threaten the competitive structure of an industry, even if it does portend disaster for some marginal firms. The court also said that although OSHA does not have to provide hard and precise estimates of cost, it must use the best available evidence that it has.

Ms. Stock stated that Supreme Court and the Circuit Court seem to contradict each other in this case. She said that it appears the Supreme Court feels that the health benefits of a regulation can only be mitigated if it is capable of being done. **Mr. Berg** stated that the Supreme Court decided that a cost benefit analysis is not required, and the benefits do not have to exceed the costs. He said that the court determined that the benefit is worker health, and the cost only has to consider whether or not it is possible to be done. He stated that the court decided that if a rule disrupts an entire industry, it is not capable of being done, and therefore, is infeasible. He said that the D.C. Circuit Court ruled that it can't disrupt an entire industry, but it can bankrupt some marginal firms, and in that case, it is still capable of being done.

Mr. Berg stated that the D.C. Circuit Court ruled that respiratory protection cannot be used in place of engineering and work practice controls. The court feels that respiratory protection cannot be required in a majority of processes, and it should be possible to use engineering and work practice controls for the majority of procedures. Mr. Berg stated that respirators are allowed to be used, but they cannot be used most of the time.

Mr. Berg stated that when it comes to the burden of proof for a rule, the organization proposing the rule has the burden of proving why the rule is needed, as well as making a reasonable estimate of costs based on the best available evidence. He said that the Division does calculate the costs and benefits, but the proven benefits do not have to exceed the costs. He said that the D.C. Circuit Court requires OSHA to substantiate or support its findings with evidence, and explain why it relied on this evidence as opposed to other evidence. The court defines "substantial evidence" as relevant, factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument. The court also says that OSHA cannot wait for scientific certainty, and that it must make reasonable predictions on the basis of credible sources of information.

Mr. Berg stated that there is one thing that federal OSHA does that the Division does not do at this time, which is calculating the revenues and profits for each industry that would be affected by a proposed regulation. He said that federal OSHA has a table containing the revenues and profits of each industry on an annual basis, and then they calculate the cost of the proposal. He stated that if the cost of the proposal is less than 10% of the profits, or less than 1% of the total revenue, federal OSHA considers it to be feasible. If the cost is greater than 10% of the profits, or greater than 1% of the revenues, it is not necessarily considered infeasible by federal OSHA, but it would require further in-depth study. He stated that the

Division has not been able to get this kind of data, but it is something that the Division could strive for in the future to try and compare costs and revenues.

Mr. Berg stated that at the HEAC meetings, the Division tries to gather a lot of monitoring data to find out if employers are already meeting the proposed PEL or not. He said that this has a big impact on feasibility because if a majority of employers are already meeting the PEL, this means that it might be feasible, and if a majority are higher than the proposed PEL, it might not be feasible. He stated that the Division also researches exposure limits in other jurisdictions, such as other states or countries. He said that the Division also gathers existing monitoring data from its own inspections, as well as from NIOSH and federal OSHA, and gathers monitoring, use, and cost data from stakeholders. He said that all of this data is used to determine what substances are commonly used in California and whether it is technically feasible to measure exposures to see if they are at the proposed level or not. He stated that if it cannot be measured, a PEL cannot be established because there is no way to tell if an employer is meeting it or not. He said that this information is also used to determine what engineering and work practice controls employers use to control exposure to the substance so that they meet the PEL, and the Division also uses it to determine if delaying the effective date for a PEL will help employers to comply and make it more feasible.

Mr. Berg stated that with the information that is gathered, the Division must consider the following:

- If some employers are already meeting the proposed PEL, what controls are they using, and how much do they cost?
- What must other employers do to meet the proposed PEL? The Division must consider the gap between the existing PEL and the proposed PEL, and the cost of the engineering and administrative controls that employers will need to have in order to meet the proposed PEL.
- Will respirators be needed for certain operations?

From there, Mr. Berg said that the Division will put together a rulemaking package and make a calculation on the total cost of the regulation based on the information that the Division has, as well as the benefits from stakeholder input in their research. He said that the recent federal rulemakings for silica and beryllium can help the Division by providing estimates on costs of controls. He stated that some of these costs may be overestimated due to the inclusion of other components not in a PEL update, such as housekeeping, medical monitoring, and record keeping.

Ms. Laszcz-Davis stated that she received an email from an association following the last HEAC meeting. She said that this association did not attend the meeting, but heard about the deliberations that took place during that meeting. She stated that on December 12, 2017, the HEAC made a preliminary recommendation to set the PEL for aluminum in all its forms at 1 mg/m³. She said that the association had the following questions:

- What are the next steps involved in the process?
- Is there a defined timetable to complete these steps?

- What are the California regulatory requirements and citations that address these steps?

Chris Kirkham, Principal Safety Engineer for the Division's Research and Standards Unit, stated that although he did not attend the meeting, he knew that there was discussion about putting all of the forms of aluminum under one PEL, but the committee felt that that would not be a good idea. He said that as a result, the Division is looking into splitting up the different forms of aluminum into different PEL's. He said that after the Division completes its process, it will present its findings to the committee and get input from the committee members and stakeholders.

Ms. Stock thanked Mr. Berg for his presentation. She said that it was very helpful and provided some much-needed clarification about how the process works. **Ms. Smisko** also thanked Mr. Berg for his presentation. She said that she has heard a concern from some folks regarding how short the advisory committee meetings are, considering the amount of discussion that is needed for particular PEL's. She asked Mr. Berg how people could more effectively supply input for the process. **Mr. Berg** stated that the Division makes it clear on the meeting agenda how many times that a particular substance has been discussed, and the Division tries to hold several meetings to discuss a substance so that people have an opportunity to provide input. He said that if people need more time, or are unable to make it to the meeting, the Division is open to discussing that and giving people more time, if necessary. He stated that an advisory committee meeting was recently held to discuss manganese, and a few stakeholders who have some information on technical feasibility have notified the Division that they are not able to attend a meeting until September. He said that as a result of this, the Division has agreed to hold an advisory committee in September so that they can provide input.

Ms. Smisko stated that it must be difficult sometimes for the Division to make sure that advisory committee attendees stick to discussing only the matters listed on the agenda for that meeting, yet be able to devote enough time to each aspect of feasibility. She asked Mr. Berg if there is flexibility in the agenda when attendees make the effort to attend the meetings and want to discuss particular things. **Mr. Berg** stated that if someone wants to talk about something in particular, the Division will let them talk about it, and the Division is working on being more precise in its advisory committee meeting agendas so that people will know what topics the Division plans to discuss at the meeting. He said that if an attendee is only able to make it to a certain meeting, and the attendee wants to talk about something that is not on the agenda, the Division is flexible and will give them time for that.

Ms. Smisko stated that people who are knowledgeable about technical feasibility are not always knowledgeable about economic feasibility from an economic standpoint in the real world, or how things really go on for employers in an industry, so it is important for the Division to be aware that a different group of people may need to provide input on the economic feasibility versus the technical feasibility. **Mr. Berg** stated that the Division tries to invite stakeholders to come and discuss both technical and economic feasibility.

Mr. Thomas thanked Mr. Berg for the presentation and for the Division's efforts to make sure that all voices are heard. He said that he appreciates how difficult it is for the Division to balance discussing what is on the agenda and discussing other topics that attendees want to discuss.

3. Executive Officer's Report

Ms. Hart stated that Patty Quinlan, Public Member, resigned from the Board in late February. She said that Patty will be greatly missed, and the Board hopes to honor her at a future Board meeting in Oakland. She stated that with Patty's resignation, there are now 2 vacant positions on the Board: the Occupational Health position and the Public Member position. She said that she hopes that DIR, the Labor Agency, and the Governor will get both positions filled as soon as possible.

Ms. Hart stated that the proposal for hotel housekeeping was approved by the Office of Administrative Law (OAL) and filed with the Secretary of State on March 9, 2018. This standard will become effective on July 1, 2018.

Ms. Hart stated that she and Mr. Manieri do several public outreach presentations throughout the year to various interested groups. She said that these presentations tell the public about the Board, what the Board does, and how the public can become involved with the Board. She stated that many of these presentations are done for management groups, but she and Mr. Manieri would be happy to do these presentations for labor groups as well.

Ms. Hart stated that she is going to retire in the near future. She said that the exact date is unknown at this time, but because she is retiring, she decided to re-class a vacant Associate Safety Engineer position to make it a Staff Services Manager position, which is a civil service position, so that there will be a manager available to assist the new Executive Officer. She stated that she had previously worked as a Staff Services Manager on the Board staff, but when she left for a short while, the position remained vacant until 2008, when it was eliminated due to budget cuts. She said that the Staff Services Manager will be responsible for supervising the Board staff's analysts and administrative staff, and Mr. Manieri will continue supervising the technical staff.

Ms. Stock asked for an update on the advisory committee processes that are going on for indoor heat illness and workplace violence prevention in general industry. **Mr. Berg** stated that the Division is receiving comments following the last advisory committee meeting for workplace violence prevention in general industry through the end of March, and it is unknown at this time whether or not another advisory committee will be held. He said that the Division is on a tight schedule for indoor heat illness prevention because there is legislation requiring the Division to develop a proposal by January 1, 2019. He stated that the advisory committee is pretty close to reaching language for the regulation that is acceptable to everyone, and he doesn't know if another advisory committee meeting will be held. **Ms. Hart** stated that after the last advisory committee meeting, the Division suggested revised language and gave it to the committee, and that language is posted online for people to review.

Mr. Harrison asked for an update on the consolidation of the cranes and derricks standards back into the General Industry Safety Orders. **Ms. Hart** stated that the language is done, but now the Board staff must figure out how to take the construction orders and move them into the General Industry Safety Orders for people who are not currently regulated for that. She said that the Board staff needs to figure out what's different, what impact this will have on those employers, how many employers will be impacted, and what the costs will be. She stated that there weren't a lot of changes made to the language, and the changes that were made were requested by the advisory committee, and the Board staff must indicate what

changes were made, why those changes were made, and how those changes will impact employers who were not impacted originally. She said that many cranes are used in both construction and general industry anyway, and there are very few industries where there is not a crossover, and it is important for the Board staff to identify the industries where there is no crossover that may have the true impact, and those where cranes are used and the employers already comply with the construction rules regardless of where the cranes are located.

Mr. Harrison stated that he did not speak about the public hearing item today during the public hearing because he had not heard any opposition to it and it is a Horcher. He said that he supports the proposal because there are a lot of machinations happening on the federal level regarding this rule, and he feels that the rule will change a lot between now and the end of the year, so it is a good idea to delay implementation of the rule. **Ms. Hart** stated that it is important that the dates in Title 8 coincide with the dates that federal OSHA has, and in this case, if the Board decided to wait and see what happens with the rule, it could create a problem if the rule changes on the federal level.

C. CLOSED SESSION – NONE HELD

Ms. Hart stated that there is no need to hold a closed session today. She said that once a plan has begun to develop for recruiting a new Executive Officer, the Board will begin holding closed sessions to discuss the process.

D. OTHER

4. Future Agenda Items

No future agenda items were mentioned by the Board.

E. ADJOURNMENT

Mr. Thomas adjourned the Business Meeting at 11:15 a.m.