

STATE OF CALIFORNIA

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DEPARTMENT OF INDUSTRIAL RELATIONS

**DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**

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December 30, 2009

Candice Traeger, Chair  
California Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
Sacramento, California 95833

**RECEIVED****DEC 31 2009****OSH Appeals Board**

Dear Candice:

The following is a series of recommendations by the Division of Occupational Safety and Health that the Occupational Safety and Health Appeals Board adopt several regulations to change the manner in which it adjudicates appeals. DOSH believes that these changes are needed if we are to have an appeals process that is truly efficient and fair given the purpose of the statutes that provide for the Cal/OSHA Program. Moreover, it is likely that if the changes recommended below are made, the number of employer appeals will be significantly reduced.

First, I want again to commend you on your decision to initiate and follow through with the process of stakeholder dialogue that has led to your solicitation of rulemaking proposals among other things. As I have pointed out publicly numerous times, this is the first time in the history of the Cal/OSHA Program that an Appeals Board Chair has made a sustained commitment to engage in a dialogue with the public for the purpose of improving the services it provides to its customers. Although the Appeals Board functions in many ways like a court of law in adjudicating appeals of citations issued by DOSH, the fact that it is a board and not actually a court allows for a process of dialogue that has great potential to shape the effectiveness of its customer service in ways not available to the courts.

In the spirit of using public dialogue to further the purposes of the California Occupational Safety and Health Act and the Cal/OSHA Program, I submit the following rulemaking recommendations:

**Rules of amendment before or at hearing and according to proof at hearing.**

The Cal/OSHA Program is in need of clarification of the manner in which multiple citations should be issued and upheld on appeal. Up to now, recently it appears the Board has shown more willingness to allow amendments to citations or employer appeals after issuance of citations and filing of appeals in response. However, it is still unclear what rules are being followed by the Board and what kind of variation in approach we can expect to see from different administrative law judges. I believe that both the purposes of the California Occupational Safety and Health Act and the requirements of due process can be better served by adopting more detailed rules of amendment and by making them congruent with the amendment rules set forth in the California Code of Civil Procedure.

**Substantiation of "serious" violations.**

Section 6432 of the Labor Code, at subsection (a), defines a serious violation to exist "if there is a substantial probability that death or serious physical harm will result from the violation..." At subsection (c), section 6432 goes on to state that

...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.

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The Board's current basic approach to upholding a serious violation is to require DOSH to prove that it is more likely than not that an accident, if one occurs as a result of a violation, will result in a serious injury as defined by the Labor Code. This derives in part from the Board's long-standing policy of interpreting "substantial probability" as meaning that there is a greater than 50% certainty that an accident resulting from the violation will result in a serious injury, which is usually established by a review of accidents that have actually occurred.

I believe that it would be beneficial to have an open discussion of this approach and to consider refining it by regulation to better take into account the different types of occupational safety and health standards that exist and the differing types of proof problems they present in terms of classifying violations arising under them.

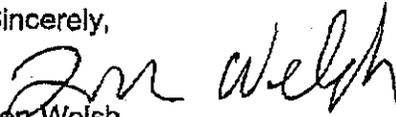
I also believe the public would be served by examining whether alternative approaches to exist to the repetitive process of adducing evidence of seriousness of violations which, once established by the evidence, are obviously serious and should not require further adjudication as their classification.

**Expert Testimony.**

Recent Board decisions have found DOSH inspectors not competent to testify as to likelihood of serious injury as well as other matters well within an inspector's training and knowledge. It would seem that the public interest might be better served if the highly paid and trained safety engineers and industrial hygienists who conduct investigations and issue citations are allowed to offer testimony as to why they have classified a citation as serious. An administrative law judge might find their testimony compelling or not so compelling, but it seems inconsistent with common sense to disallow them the opportunity to offer their opinion at hearing.

I look forward to a public meeting to discuss these and other issues, and this letter will be followed shortly by more detailed discussion and proposals addressing the issues identified here. My strong conviction is that if these issues are openly confronted and addressed, the appeals process will become more efficient, fair, and productive.

Sincerely,



Len Welsh  
Chief

Cc: John Duncan