

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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SUMMARY
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING

December 13, 2007
Sacramento, California

I. PUBLIC MEETING

CALL TO ORDER AND INTRODUCTIONS

Chair MacLeod called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 11:00 a.m., December 13, 2007, in the Hearing Room of the Occupational Safety and Health Appeals Board in Sacramento, California.

ATTENDANCE

Board Members Present

Chairman John MacLeod
Jonathan Frisch, Ph.D.
Bill Jackson
Jack Kastorff
Steve Rank
Willie Washington

Board Members Absent

Jose Moreno

Board Staff

Marley Hart, Executive Officer
Michael Manieri, Principal Safety Engineer
David Beales, Legal Counsel
Tom Mitchell, Senior Safety Engineer
Bernie Osburn, Staff Services Analyst
Chris Witte, Executive Secretary

Division of Occupational Safety and Health

Len Welsh, Chief
Steven Smith, Principal Safety Engineer

Others present

Tina Kulinovich, Federal OSHA
Kevin MacDonald, Townsend & Schmidt Masonry
Rick Smith, General Masonry, Inc.
Lynne Formigli, CTA
Patrick Bell, DOSH
Wade Woodward, Old Country Roofing

Marti Fisher, Cal Chamber
Buck Cameron, CPWR/BAC
Bruce Coleman, Multigroup, Inc.
Kevin Bland, CFCA/RCA
Julie Trost, CCMCA
Steve Johnson, ARC/BAC

Larry McCune, DOSH
Judi Freyman, ORC Worldwide
Joshua Henderson, Nixon Peabody, LLC
Joel Guth, Masonry Technology
Dave Danner, BAC Local #3
Morgan Nolde, Roofers & Waterproofers Union
Local 81
Mike Horowitz, DOSH
Jamie Khan, AGC
Bruce Wick, CALPASC
Dan Schuetz, Independent Construction
Elizabeth Treanor, Phylmar Round Table
Greg Peterson, Eagle Roofing Products

Dan Leacox, Greenberg Traurig
Walter Robinson, LIUNA

John Ford, DOSH
Phil Vermenlen, ECA

B. OPENING COMMENTS

Chair MacLeod 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.

Chair MacLeod opened the floor for public comment.

C. ADJORNMENT

With no comments, Chair MacLeod adjourned the Public Meeting at 11:04 a.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Chair MacLeod called the Public Hearing of the Occupational Safety and Health Standards Board (Board) to order at 11:04 a.m., December 13, 2007, in the Hearing Room of the Occupational Safety and Health Appeals Board in Sacramento, California.

Chair MacLeod opened the Public Hearing and introduced the first item on the agenda.

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Chapter 4, Subchapter 4, Article 4
New Section 1530.1
**Control of Employee Dust Exposure from Concrete and
Masonry Operations**

Mr. Smith summarized the history and purpose of the proposal and indicated that it is now ready for public comment and the Board's consideration.

The following commenters supported the proposal:

- Julie Trost, Executive Director, California Conference of Mason Contractor Associations, Inc. (CCMCA)
- Kevin MacDonald, President, Townsend & Schmidt Masonry
- Rick Smith, General Masonry, Inc.
- Mike Horowitz, Division of Occupational Safety and Health (Division)
- Morgan Nolde, Representative, Roofers and Waterproofers Local 81
- Dave Danner, Field Representative, Bricklayers, Tilelayers, and Allied Craftworkers Local No. 3, California

Wilfrid “Buck” Cameron, Program Director for The Center for Construction Research and Training (CPWR), asked that Section (c), Exception 1, regarding the usage of cutting tools where the PEL is not exceeded, be amended to clarify that the exception refers to the total generation of dust or the total exposure, meaning that if the work were divided among ten people, the permissible exposure would not be ten times the PEL. He also submitted written comments from WorkSafe!

Dr. Frisch asked whether any of the other exceptions gave Mr. Cameron’s organization any pause. Mr. Cameron responded that most of the other exceptions were discussed during the advisory committee meetings. He went on to state that the only exception that gave him (personally) pause was the exception regarding roofing work, but he understood that those representing the employers and employees in the roofing industry are working together with the Standards Board staff to resolve those problems.

Bruce Wick, Director of Risk Management for the California Professional Association of Specialty Contractors (CALPASC), asked that the proposal be amended regarding roofing work. Roof work is done on a slanted surface at an elevated height, which creates a different set of issues than working on level ground without a fall hazard. He stated that although the data is unclear regarding the exposure level, the contractors are willing to work with the Division to find a solution, which has not yet been reached. The two primary issues are the use of saws or other cutting instruments on an elevated, slanted work surface and the reduction in visibility created by respirator use. Until such a solution is reached, roofing contractors are required to train as if the proposed regulation were in place.

Dr. Frisch asked whether Exception (c)(2) applied solely to work on the roof or whether employees working on the ground and transporting materials up to the roof also would be considered roof work. Mr. Wick stated his understanding that the exception applied only to work on the roof. Dr. Frisch expressed concern that the exception would apply to any roofing operation, regardless of whether it takes place on the roof or on the ground. Mr. Welsh stated that the assumption behind the exception was that most of the work would take place on the roof, but the way it is currently written, it could include work on the ground, as well. He indicated that the language could be modified to be more specific.

Steve Johnson, Director of Safety and Compliance Services for the Associated Roofing Contractors of the Bay Area Counties, stated that employers want to be able to provide respiratory protection for their employees without fear of being cited by the Division because they provided an N95 respiratory protection for their employees without a written respiratory protection plan in place. He asked that the proposal be amended to clarify the type of dust mask or filtering face piece required, with the N95 being the minimum. Mr. Johnson also offered support of the CALPASC recommendations.

Dr. Frisch expressed “substantial” concern about modifying the requirements for respiratory protection, and he cautioned against a modification of the proposal to reduce the level of respiratory protection.

Wade Woodward, Estimating Manager for Old Country Roofing, expressed his company’s support for the CALPASC position.

Dan Schuetz, Safety Administrator for Independent Construction Company and incoming Chairman of the Association of General Contractors (AGC), spoke in support of the proposal as amended by the written comment submitted by Bo Bradley of the California AGC. He also indicated that the AGC was also in support of the amendments proposed by Kevin Bland and the coalition he represents.

Greg Peterson of Eagle Roofing Products expressed support for the CALPASC position.

Joel Guth, President of Masonry Technology Incorporated, expressed support for the CALPASC position.

Kevin Bland, representing the coalition of CCMCA, Masonry Institute of American (MIA), CALPASC, California Framing Contractors Association (CFCA), and Roofing Contractors Association (RCA), expressed support for the proposal, with amendments as noted in the written comments already submitted. He stated that the intent behind the respiratory protection requirements in the proposal was not to throw out all of the respirator rules, but to recognize that an employer can give a mask to an employee, but it is voluntary on the employee's part as whether he or she uses it. He stated that the coalition is in full support of the proposal, with the amendments suggested by the coalition members.

Dr. Frisch expressed concern that if an employer gives an employee a mask and says, "Use it," it is no longer voluntary. Mr. Bland stated that therein lies the problem. As it stands now, an employer cannot provide an added level of protection, even if the exposure is below the PEL, and make it voluntary.

Jim Bresnahan is a working bricklayer. He stated that particle masks are not as effective as respirators in filtering masonry dust. He also expressed confusion regarding the roofing exception. He stated that if roofing material needed to be cut, it could be done on a scaffold to eliminate the need for carrying materials up and down ladders. He also asked for a definition of the term "isolation."

Dr. Frisch asked how an employer would know to train employees and supervisors if the duties were not delineated before the training. Mr. Bland responded that the intent of the proposal is to train the people that would be dealing with this particular type of operation, and that there was a clear distinction between the supervisors who oversee this type of work and those who do not.

Mr. Rank asked for a definition of the term "voluntary" regarding the use of respiratory protection.

Mr. Kastorff asked whether Section (b)(1) was intended to include asphalt. Mr. Welsh responded that the intent of the section was to eliminate administrative waste when it comes to appeals of violations. He stated that the common sense approach to the proposal is that both employers and the Division know what they are dealing with and whether or not it contains silica. However, if the employer wants to claim that the material contains no silica, the information should be readily available to show that there is no silica.

Mr. Welsh thanked Mr. Bresnahan for being the "driving force" behind this proposal.

Chair MacLeod thanked everyone who had been involved with the development of the proposal and expressed the hope that it could be brought to a successful conclusion.

Mr. Jackson expressed concern as to whether the proposal meets the statutory requirement for necessity, stating that he was unable to find anything in the documentation that showed known exposures that exceed the PEL. He stated that, as drafted, the definition in Section (b)(1) unnecessarily assumes that all concrete products contain high enough levels of silica that there will always be an overexposure and forces the employer into a defensive posture whether or not there actually is a problem, a result that seems contrary to our basic concepts of fairness and correct procedure. He went on to state his concern about the exception for roofers, indicating that if the hazard exists for bricklayers, it exists for roofers, and if the proposal is intended to protect employees from exposure, then it should protect all employees. Mr. Jackson also expressed concern that the proposal unnecessarily duplicates requirements that exist elsewhere, stating that the same types of training requirements already exist in Sections 1509 and 3203 and employers performing this work currently are already obligated to do appropriate training for employees and supervisors, and therefore, the Division has all of the enforcement tools needed to prevent this hazard.

In response, Mr. Cameron stated that CPWR, the Bricklayers International Union, and other organizations had provided extensive documentation of monitoring studies for cutting cementaceous materials, all of which demonstrate that there is significant exposure.

Mr. Bresnahan stated that, as far as the generation of dust and other particulates, cutting cement was the same as cutting wood, and cutting even one cement block is enough to generate exposure above the PEL. He cited examples from employees who worked on the Hoover Dam, when the employer was losing one man a day to silicosis. He stated that there is little or no cost involved in adding a water attachment or a vacuum attachment to a saw to reduce the generation of dust, but the benefit to the employees that perform the work would be “astronomical,” and it would save lives.

2. TITLE 8: **MINE SAFETY ORDERS**
 Chapter 4, Subchapter 17, Article 17
 Section 7016(c)
 Brakes on Haulage Vehicles—Maintenance

Mr. Manieri summarized the history and purpose of the proposal and indicated that it is now ready for Board consideration and public comment.

There was no public comment on this item.

Dr. Frisch expressed concern that the phrase “where such recommendations are available” was ambiguous and probably unnecessary.

ADJOURNMENT

Chair MacLeod adjourned the Public Hearing at 12:15 p.m.

III. BUSINESS MEETING

Chair MacLeod called the Business Meeting of the Occupational Safety and Health Standards Board (Board) to order at 12:15 p.m., December 13, 2007, in the Hearing Room of the Occupational Safety and Health Appeals Board in Sacramento, California.

A. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Mr. Beales summarized the 44 variance applications on the consent calendar and asked that the Board adopt the proposed variance decisions as written.

MOTION

A motion was made by Mr. Jackson and seconded by Mr. Washington to adopt the consent calendar as proposed.

Dr. Frisch asked whether the Division's objection to the variance in OSHSB File No. 07-V-142 (Kenton Sessions, I Fly SF Bay) was resolved. Mr. Beales responded in the negative, stating that the Division has a policy of opposing the vertical movement of the type of lift specified in the variance application in excess of the maximum height provided in the current regulation, and the Board has a history of granting those variances. The technical data shows that the distance traveled is within the engineered capabilities of the machinery, and it is also consistent with a later national consensus standard.

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

B. VARIANCE RE-HEARING PETITIONS (OSHSB FILE NO. 05-V-024)

Mr. Beales stated that both Fleetwood Motor Homes of California (Applicant) and the Division had filed petitions seeking a re-hearing of the decision adopted in October, and he stated that neither petition met the legal requirements for granting a re-hearing. In these petitions, the Applicant wants to have one of the conditions modified, and the Division believes that the variance should be revoked. Both parties have rights under both a Labor Code provision and under the variance conditions to have those requests proceed through the Board's normal hearing process. The proposed decision, therefore, asks the Board to deny the re-hearing petitions, but let the hearings go forward under the correct legal provisions.

Mr. Jackson asked whether it was Mr. Beales' expectation that the two hearings would be consolidated or whether the Applicant and the Division would present their cases in separate hearings. Mr. Beales responded that the hearings would be consolidated.

MOTION

A motion was made by Dr. Frisch and seconded by Mr. Jackson to adopt the proposed decision.

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

C. OTHER

1. Permanent and Temporary Amusement Ride Update
Len Welsh, Chief
Division of Occupational Safety and Health

Mr. Welsh stated that this briefing was in response to a request by Dr. Frisch, who noted that there are several aspects of the work performed by the Division that may not be easily understood by the current Board. A bill, SB 783, authored by Senator Tom Torlakson, was signed into law recently, which made changes to the laws governing portable amusement rides. It will require some rulemaking activity by the Board, although most of the rulemaking work will be done by the Division, as it involves administrative changes.

Mr. Welsh explained that as part of its public safety functions, the Division regulates elevators, pressure vessels, both permanent and portable amusement rides, and aerial passenger tramways. Although these regulatory areas dovetail with occupational safety and health regulations, they are independent functions, protecting the users or patrons of these devices. The last major legislative action regarding rides was in 2000, when another Torlakson bill was signed into law. That statute brought the Division into the business of regulating permanent amusement rides for the first time. The Division has regulated portable amusement rides for several decades.

Under the 2000 law, the Division adopted two sets of regulations, one which consisted of administrative regulations implementing reporting requirements, certification of ride inspectors, and similar administrative functions. The second rulemaking package was created in partnership with the Standards Board implementing training and ride maintenance and operation requirements. Most of these requirements incorporated ASTM industry standards by reference. The Division will be adopting a third set of regulations to allow them to assess penalties for citations issued to permanent amusement ride parks. The new Torlakson bill contains a provision stating that the Division shall issue a citation whenever a violation of requirements contained in the statute or in regulations adopted pursuant to the statute is found. The Division has been issuing citations, but it has not yet assessed penalties, in part because it has been working with Senator Torlakson to create a slightly different approach as to how penalties are assessed.

The original intent was that the citation and penalty part of the work would be done in the normal Division style, in which the Division would perform an inspection, and if violations were found, write a ticket and assess a penalty. After the statute was signed into law, it came to light that that might not be an appropriate model for amusement rides, because the Division visits each permanent amusement ride park at least once per year, there is an existing relationship, the Division knows how the parks operate and keep records, and the Division knows their staffs, which is a marked contrast to the way most Cal-OSHA regulations are enforced. There is also the fact that when a person is injured on a ride, the ride operator is most likely going to be sued in private litigation, in which damages can be quite high. Because the Division has shut-down authority, it has been less important to issue citations and penalties as it has been to establish relationships that lead ride operators to understand what they are supposed to do, and if there is an issue, they can have a dialog about how to resolve it.

The plan is to go forward with a penalty structure for permanent rides, but it will be a modified penalty structure in which the Division discretionarily issues penalties only for certain violations, such as failures to report. The centerpiece of permanent ride regulations is the requirement that operators report to the Division injuries leading to treatment beyond first aid. That provides notice of the injury so that the Division can then perform an inspection. There will also be penalties for violations that get into the realm of negligence. There already are provisions “hardwired” into the statute that call for specified penalty amounts when there is a serious injury or death due to a willful act of the ride operator. The proposed regulations will be used to “fill in the blanks.”

With SB 783, the Senator was trying to put in place equivalent requirements for portable rides as those in place for permanent rides. The Division already was regulating portable rides under existing statutes, but the Senator was attempting to modernize those statutory requirements and make them more similar to the permanent amusement ride statutory requirements, although he went one better, which means that there may be one more round of rulemaking activity for permanent rides. The Senator proposed legislation that brought the minimum insurance requirement for portable ride operators to \$1 million from \$500,000. This \$1 million insurance minimum coverage is similar to the permanent ride requirement. The proposed legislation also implements a citation and penalty system, although the language was amended to avoid a knee-jerk reaction of issuing citations and assessing penalties, making it more discretionary on the part of the Division. There is also a requirement in the legislation to have training requirements consistent with the American Society for Testing and Materials (ASTM) requirements for portable rides. This is part of the statute that will have the Board and the Division working together on a rulemaking package in 2008. There is also a provision that mirrors an equivalent provision in the permanent ride statute that calls for a specified penalty if there is a willful or intentional act leading to serious injury or death. The penalty range is \$5,000 to \$25,000 for portable rides, in contrast to \$25,000 to \$75,000 for permanent rides.

The most controversial part of the new legislation is the reporting requirement for portable ride operators, making the requirement more expansive, such as a requirement that incidents involving loss of consciousness be reported. This provision also requires reporting of a major mechanical failure or of a patron falling from a moving ride or from a ride that has temporarily stopped in an elevated position. Therefore, the Board can expect to see four rulemaking packages in the next few months. The first would be to establish penalties for permanent rides, the second for penalties for portable rides, the third for administrative requirements from the new legislation, and the fourth for the training, a package that the Division will be working on with the Board staff.

Mr. Welsh stated that the subject matter expertise for doing rulemaking on specialized public safety issues lies with the Division staff doing the administrative and field work. The Board staff, like the Division’s Research and Standards staff, are generalists oriented toward occupational safety and health. What they know comes from their own on-the-job experience, which presents a challenge for them to write public safety rulemaking packages. He expressed appreciation for continuing to work with Ms. Hart to develop a closer working relationship between the Division staff and the Board staff.

Dr. Frisch thanked Mr. Welsh for his briefing and stated that one of the reasons he became interested in the issue of amusement rides was an incident involving a drowning that occurred this past summer. He had asked whether it was an amusement park ride as defined under the statute or whether it was a swimming pool; and it still appears to be an open question. This prompted Dr. Frisch to explore how the regulations are designed and to examine the authority of the Board and the authority of the

Division. He stated that he still was not completely satisfied that he understands where the lines are. He expressed his belief that it was going to continue to be an open question, and he stated that he looked forward to working with the Division on this issue to ensure that the regulations keep up with amusement ride technology.

Chair MacLeod asked whether Federal OSHA was involved in this sort of regulation in any way. Mr. Welsh responded in the negative. Chair MacLeod then asked whether there were any federal organizations or agencies that get involved when something goes wrong with an amusement ride. Mr. Welsh responded that the Consumer Products Safety Commission has been asked to get into the business of regulating amusement rides, and there is some talk of federal legislation. He stated that it was likely that there would be federal legislation regulating amusement rides within the next two or three years.

Mr. Washington stated that this legislation was a huge expansion of the Division's authority, and he expressed concern that these enforcement activities would stretch the Division's already taxed resources even further. Mr. Welsh responded that the regulation of public safety is funded through the fees charged to the regulated population. When the Division performs an inspection, a fee is charged, and by statute, those fees are intended to support the full cost of regulating the public safety areas. In theory, therefore, the Division has the ability to generate resources to perform these public safety functions, and they can build into the fees the charges for staff with the necessary specialized knowledge.

Mr. Rank expressed agreement with Dr. Frisch's concern about the regulations keeping up with amusement ride technology.

Chair MacLeod stated that the Industrial Welfare Commission was given the authority for many of these issues at the turn of the last century, that the legislature did not have a place to put elevators or mining and tunneling or amusement rides in terms of regulating and they thought that this was a good fit. When the occupational safety and health law came into being in 1973, the Division and the Board absorbed all of those responsibilities.

2. Executive Officer's Report

Ms. Hart congratulated Tom Mitchell, Board staff's Senior Industrial Hygienist, on his recent promotion to Senior Safety Engineer, and she stated that in his new position he will continue to review and provide expertise on health-related issues as well as provide assistance on safety matters. In addition, Ms. Hart congratulated Ms. Leslie Matsuoka of the Board staff for receiving recognition of 25 years of State services, 18-plus of which have been with the Board.

Ms. Hart further stated that Board staff had issued two 15-day notices of proposed modifications. One was for Section 3228(a), Number of Exits, in response to the State Fire Marshal's comments on the package. The other was for Section 1597, Jobsite Vehicles—Scope and Application, which was heard at the November 15, 2007, Public Hearing. The final date for comments on both packages is December 31, 2007, and they are posted on the Board's website. She went on to state that Board staff intended to issue a 15-day notice of proposed modification for the Revisions to the Elevator Safety Orders in the next week, and adoption of that package is anticipated for the February Board meeting.

Ms. Hart then briefly summarized the Calendar of Activities.

3. Future Agenda Items

No future agenda items were mentioned. Chair MacLeod closed by welcoming the newly-appointed Director of the Department of Industrial Relations, John Duncan, and thanked him for attending the meeting.

Mr. Rank congratulated Ms. Hart on her appointment as Executive Officer, and he thanked Chairman MacLeod, Dr. Frisch, and Mr. Jackson for the work they did on the recruitment committee. He also congratulated Mr. Welsh on his appointment as Chief of the Division.

ADJOURNMENT

Chair MacLeod adjourned the Business Meeting at 12:53 p.m.